

STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

DIVISIONS OF FISH AND WILDLIFE AND ENFORCEMENT

IN THE MATTER OF THE PROPOSED ADOPTION OF
RULES PRESCRIBING RESTITUTION VALUES FOR FISH AND
WILDLIFE ILLEGALLY KILLED, INJURED OR POSSESSED

STATEMENT OF NEED AND REASONABLENESS

January 22, 1991

Statement of Need and Reasonableness

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INTRODUCTION

Restitution can be defined as providing compensation for something that has been lost or taken away. In a legal sense, restitution is a payment to an injured party to restore lost values, as opposed to a criminal penalty designed to punish a violator. Appendix A¹ provides a more comprehensive discussion of the concept of restitution and specifically how it is applied to fish and wildlife.

Minnesota's fish and wildlife resource is owned by the state for the benefit of its citizens². Heretofore, these statutes and several others³, as well as a Department of Natural Resources (DNR) Policy Directive⁴ have served as the legal basis for attempts to collect compensation for fish and wildlife lost as the result of illegal acts. The state has successfully sought compensation for fish and wildlife damages dating back to the 1930's. In 1989, the

¹Talhelm, D.R., 1990. Recommended values for computing fair restitution to the citizens of Minnesota for fish and wildlife illegally killed, injured or possessed. Report to Minnesota Dept. of Natural Resources. Incorporated herein by reference.

² Minn. Stat. §§ 97A.025 and 97A.501

³ Minn. Stat. § 115.071, subd. 3(b) authorizes the state to collect compensation for any loss or destruction of wildlife, fish or other aquatic life caused by the discharge of pollutants regulated by the Minnesota Pollution Control Agency.

Minn. Stat. § 18B.23, subd. 4 (1988) (repealed, 1989 c 326 art 5 s 53, and replaced by Minn. Stat. § 18D.111, subd. 1)) is a similar provision concerning the illegal use, storage, handling, or disposal of pesticides.

⁴ Department of Natural Resources Policy Directive No. 6, Claims and Penalties for Damage to Wildlife by Pollution (Appendix B).

legislature passed new law, Minn. Stat. §§ 97A.341 and 97A.345, specifically authorizing the state to collect restitution for wild animals killed, injured or possessed in violation of the game and fish laws.

Minn. Stat. § 97A.345(a) states that the commissioner of natural resources may, by rules adopted under the administrative procedures act⁵, prescribe the dollar value to the state of species of wild animals. Factors to be considered include the value to other persons to legally take a wild animal (hunting, trapping and fishing values), replacement costs, and the intrinsic value of the animal to the state. Minn. Stat. § 97A.345(b) states that the values so prescribed constitute *prima facie* evidence of the value of an animal to be collected as restitution from violators. Money collected as restitution is to be placed in the game and fish fund⁶ and used by the state for the replacement, propagation or protection of wild animals.

Assigning a dollar value to a species of wild animal is a difficult task. For most species, no direct markets exist to provide guidance. For certain managed species, estimates of replacement costs are available. However, other aspects to be considered such as the values to users of wild animals and intrinsic values are complex and difficult to measure. Some people are philosophically opposed to the concept of placing a dollar value on a wild animal. Nonetheless, state law now requires the payment of restitution⁷. State courts are already

⁵ Minn. Stat. Ch. 14

⁶ Minn. Stat. § 97A.341, subd. 5.

⁷ Minn. Stat. § 97A.341.

seeking restitution and frequently request guidance from the DNR on the dollar values that should be collected. In order to achieve a fair and consistent application of the restitution provisions of the game and fish laws, a schedule of restitution values for the species covered by the law is needed.

Recognizing the difficulty in developing a list of restitution values, the DNR solicited outside assistance. In August 1989, the DNR published a notice for request for proposals for contract services. In response to this notice, seven proposals were received. The DNR subsequently selected Daniel R. Talhelm, Ph.D., a natural resources economist, to develop a list of recommended restitution values. The contract also called for a complete review of the literature pertaining to fish and wildlife values and a survey of the values used for restitution by other state, federal and provincial agencies and the methods used to develop those values. Using a variety of valuation methods and input from three public meetings, Dr. Talhelm provided the DNR with a schedule of recommended values. This schedule and an accompanying report that fully explains the concept of restitution and the methods used to develop the recommended values is presented in Appendix A. The DNR also published a notice of intent to solicit outside opinion on developing the restitution values in September, 1990⁸. No responses were received.

The DNR is confident that the values recommended by Dr. Talhelm reflect the state of the art in the economic evaluation of fish and wildlife. His study drew upon a variety of sources

⁸ 15 S.R. 700

of information, and he attempted to tailor the recommended values to Minnesota. However, there is a vast store of knowledge and information within the DNR to which Dr. Talhelm did not have ready access. Biologists in the Division of Fish and Wildlife have extensive research and management experience with the species under review. Division of Enforcement staff have a thorough knowledge of legal and procedural issues and how the values are likely to be perceived in the courts. Therefore, Dr. Talhelm's report was reviewed extensively by DNR staff to ensure that the prescribed dollar amounts adequately and reasonably value the state's fish and wildlife. The result of this review is the schedule of values that the DNR proposes to adopt by rule. Many of the values recommended by Dr. Talhelm are proposed to be adopted unchanged; some values were modified slightly to achieve consistency within groups of similar species. For these species, Appendix A provides a thorough discussion of how the values were derived and no further explanation is needed. Some of Dr. Talhelm's values were changed significantly following DNR review. These changes and the justification for the proposed values will be discussed on the following pages.

GENERAL PROVISIONS

6133.0010 to 6133.0020 STATUTORY AUTHORITY AND DEFINITIONS

General Minn. Stat. § 97A.341 specifies the groups of species for which restitution may be collected. The proposed restitution values rule prescribes values for those species only and they are defined in the "Definitions" part of the rule. Sec. 97A.341 states that additional species may be added by order of the commissioner following public hearings and notification of the chairs of the environment and natural resources committees in the senate and house of representatives. Upon adding new species, restitution values for those species would be prescribed by amending the rules now under consideration. Stated succinctly, new species may eventually be added by commissioner's order; values for those species would then be prescribed by further rulemaking.

Subp. 11 Trophy animal Refer to page 9 of Appendix A for a discussion of trophy animals and the rationale for placing higher values on these specimens. The DNR concurs with the need to increase the values of trophy specimens; however, we used somewhat different procedures than those recommended by Dr. Talhelm to specify trophies and assign values.

For deer, elk, caribou and moose, Dr. Talhelm recommended that \$50 for each antler point be added to the base restitution value. The DNR does not believe this is an accurate way to value trophy animals because deer often have small antlers with several points. Also, animals with non-typical antlers may be significantly over-valued using this method. As an

alternative, we elected to specify trophy animals using the well known, widely accepted methods established by the Boone and Crockett Club and Pope and Young Club for scoring big game trophies⁹. These clubs are sportsmen's organizations that score and maintain records of trophy game. The Boone and Crockett Club is for game taken by firearm; the Pope and Young Club is for game taken by archery and has lower minimum qualifying scores. The scoring methods used by both of these organizations are essentially the same and involve measurements of the size, mass and symmetry of an animal's antlers. Scoring is done by trained scorers. The DNR has elected to use the Pope and Young minimum qualifying scores as the baseline for designating trophy animals¹⁰. Under the official scoring system, the antlers are not measured until after a 60-day drying period to allow for shrinkage. Because this delay could hamper legal proceedings following game law violations, the proposed rule states that antlers may be scored at any time, even while "green" or undried. To adjust for this, the trophy qualifying scores in the rule are somewhat higher than the Pope and Young minimums.

Since there are presently no caribou populations in the state and no hunting season, the proposed rule does not specify a trophy status for caribou.

⁹ Records of North American Big Game, Ninth Edition, Nesbitt, W.H. and J. Reneau, eds., The Boone and Crockett Club, Dumfries, VA, 1988, 498 pp.

¹⁰ Minimum Pope and Young qualifying scores are as follows: typical deer - 125, nontypical deer - 150, moose - 135, elk - 240 (Bowhunting Big Game Records of North America, Third Edition, Kline, L., ed., Pope and Young Club, 1987, 392pp.)

Dr. Talhelm's report does not have any provisions for collecting greater restitution for trophy-sized black bear. However, the DNR believes it is appropriate to do so because larger bears are more highly valued by hunters. The designation of a trophy bear in the proposed rule is based on the Pope and Young minimum qualifying score for skull measurements, adjusted for the fact that skulls may be measured before drying¹¹.

RESTITUTION VALUES

6133.0030 GAME BIRDS

Most of the values recommended by Dr. Talhelm for game birds are proposed to be adopted unchanged or with minor adjustments to achieve consistency within groups of similar species. The DNR proposes significantly different values for a few of the species. Dr. Talhelm's research indicated a value of \$200 for wild turkey. For a dedicated and growing population of turkey hunters, the experience of turkey hunting can be equated with that of deer or other big game, which have recommended restitution values of \$300 - \$1000. On the basis of the DNR's known management costs (including replacement costs) for this species and an assessment of the values associated with turkey hunting in Minnesota, we propose a restitution value of \$400.

Dr. Talhelm recommended a value of \$100 for canvasback and redhead ducks. Due to the fact that there is a closed hunting season on canvasback and because of recent indications of

¹¹ Pope and Young minimum qualifying score for black bear is 18 (*Id.*).

deteriorating habitat conditions along the Mississippi River, which supports high concentrations of canvasback during migration, we propose a value of \$200. Conversely, redheads may be taken during the waterfowl hunting season and are not so susceptible to catastrophic losses at selected concentration points during migration. Therefore, the proposed rule includes redheads along with other ducks at a value of \$50.

The DNR proposes a restitution value of \$3000 for trumpeter swans rather than the value of \$2000 recommended by Dr. Talhelm's study. Trumpeter swans are presently considered extirpated in the state and the DNR has an ongoing effort to restore a breeding population. The proposed increase in value reflects our known costs for raising and re-introducing birds to the wild.

The Talhelm report recommends a value of \$25 for mute swans. This is a non-native species, artificially introduced into the state. It aggressively drives native waterfowl away from nesting areas. Unlike native swans, the mute swan is not federally protected¹². For these reasons, the DNR has elected not to assign a restitution value to mute swans and this species is therefore omitted from the proposed rule.

6133.0040 BIG GAME

The proposed restitution value for deer represents a \$100 increase over the amount recommended by Dr. Talhelm's study. This adjustment reflects consideration of the DNR's

¹² 50 CFR, Chap. 1, § 10.13

management costs for this species, extensive DNR experience with the public's perceptions of the values associated with deer hunting and observation, and statistics on the economic contribution of deer hunting to the state's economy.

The proposed values for elk and caribou were raised from Dr. Talhelm's recommended value of \$700 to \$1000. Minnesota has an extremely limited elk population and the DNR believes that Dr. Talhelm's assumptions on the existence and option values are too low and that these animals warrant a higher value. There is presently no caribou population in the state and there have been discussions concerning caribou reintroduction efforts. If reintroduction of caribou is attempted, management costs will be very high and the proposed restitution value reflects this.

The DNR believes that Dr. Talhelm's recommended value for moose undervalues this species somewhat. The proposed restitution value for moose reflects DNR experience with habitat management for moose and the values associated with moose hunting and observation.

The value for pronghorn antelope was increased to reflect the fact that they very rarely occur in Minnesota and the values associated with this species were judged to be similar to those of deer.

For black bear and many of the small game (furbearers), Dr. Talhelm recommended that in addition to the base restitution value, the state should collect the market value of the pelt of

the animal that was illegally taken. Under current practice, the state routinely sells any marketable pelts that are confiscated and thus receives restitution for the value of the pelt. Therefore, the proposed rule omits reference to the "fur market value."

6133.0050 SMALL GAME

The wolverine presently has a very low population in Minnesota and is listed by the state as a species of special concern¹³. The DNR is also of the opinion that very high aesthetic values are attached to the wolverine by the public. The DNR believes that the \$500 value recommended by Dr. Talhelm for this species does not adequately represent these values, hence we propose a value of \$1000.

The proposed values for badger, otter, pine marten and fisher were increased over the amount recommended in the consultant's report. These increases reflect the DNR's perception that these species have higher intrinsic values in Minnesota than assumed by Dr. Talhelm. The proposed value for lynx was also raised for this reason, plus the fact that the population of this species in Minnesota is low and may be declining.

6133.0060 to 6133.0070 ENDANGERED AND THREATENED SPECIES

For threatened and endangered (T&E) species, the DNR's proposed values diverge significantly from those recommended by Dr. Talhelm. The values for T&E species recommended by Dr. Talhelm range from \$500 to \$100,000, with the majority of the listed

¹³ Minn. Stat. § 84.0895; see Minn. Rules part 6134.0200

species valued at \$10,000 or more. The DNR does not necessarily disagree with these findings; a peregrine falcon may very well be worth \$100,000 to the citizens of Minnesota. However, we question whether such high values would be perceived as reasonable and we suspect that in most cases, the courts would not be likely to assess such penalties. Also, the DNR has active management and reintroduction efforts underway for some of the T&E species and the replacement costs for these species are known. In light of these factors, the DNR recommends restitution values for T&E species of \$500 to \$4000. While these values may not represent full restitution according to Dr. Talhelm's study, it is our belief that they are reasonable, will ensure a fair and consistent application of the restitution provisions in the courts, and are sufficient to deter illegal taking.

The proposed rule also departs from Dr. Talhelm's recommendations in that it specifies values for general groups of T&E species rather than for each listed species. This was done to avoid having to amend the restitution rule each time the T&E list is updated. (The list is evaluated and may be changed every three years).¹⁴

6133.0080 GAME FISH

The values for most game fish in the proposed rule do not depart significantly from the base values recommended by Dr. Talhelm. Some minor changes were made to achieve consistency; most of the popular gamefish (walleye, bass, northern pike, trout) are valued at \$30. The proposed rule differs somewhat in its treatment of "trophy" fish from the

¹⁴ Minn. Stat. § 84.0895, subd. 3.

recommendations in Dr. Talhelm's report. Dr. Talhelm suggested that trophy sized fish could be designated for each species which would be approximately the 99th percentile in length for a typical year's catch. He suggested that fish exceeding this trophy size should be valued at ten times the base value for the species. The DNR feels that this method is too extreme and fails to properly value larger fish that fail to meet the 99th percentile cut-off. Therefore, the proposed rule utilizes a more graduated method that specifies a "quality" size for each species and adds \$10 to the base value for every inch over the quality size. The designated quality sizes are based on a system developed to assess the quality of fish stocks for angling¹⁵. Some minor adjustments were made to this system, based on the judgment of DNR fisheries specialists, to make it more applicable to Minnesota fish populations.

The proposed rule also modifies Dr. Talhelm's recommendations for the valuation of muskellunge. In the interest of simplification, the number of size categories is reduced and single values are assigned to each size category rather than dollars/inch. Large muskellunge warrant high restitution values because of their rarity and the difficulty in catching them.

The proposed rule specifies a value of \$500 for paddlefish rather than the \$200 recommended by Dr. Talhelm. This increase is justified due to the low population status of this species and it's the DNR's opinion that paddlefish have values similar to sturgeon, which are valued at \$500.

¹⁵Gablehouse, D.W. 1984. A length-categorization system to assess fish stocks. North American Journal of Fisheries Management 4:273-285.

OTHER CONSIDERATIONS

FISCAL NOTE

If the adoption of a rule will require the expenditure of public money by local public bodies, the adopting agency may be required to prepare a fiscal note giving an estimate of the total cost to all local public bodies¹⁶. The rule governing fish and wildlife restitution values will not require the expenditure of public money by local public bodies, thus no fiscal statement is required.

AGRICULTURAL LAND IMPACTS

If the adoption of a rule will adversely affect agricultural land, the adopting agency is required to comply with state policy on the preservation of agricultural land and is subject to certain review and notification procedures¹⁷. The rule governing fish and wildlife restitution values will not affect agricultural land.

SMALL BUSINESS CONSIDERATIONS

When an agency proposes a new rule which may affect small businesses, the agency is required to consider several methods for reducing the potential impact¹⁸. The rule governing restitution values for fish and wildlife will have no effect on small businesses.

¹⁶ Minn. Stat. § 3.982 and § 14.11, subd. 1.

¹⁷ Minn. Stat. §§ 14.11, subd. 2 and 17.80-84.

¹⁸ Minn. Stat. § 14.115.

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