

# NON-AMENABLE MEAT CONSUMPTION, SALE, AND REGULATION: BISON, BEEF AND BAMBI, OH MY! ALL MEATS ARE NOT CREATED EQUAL

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## I. INTRODUCTION

Deer, wild turkey, elk, rabbit, and squirrel are just a few of the species commonly hunted and consumed for food in the United States.<sup>1</sup> Furthermore,

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1. See U.S. FISH & WILDLIFE SERVICE ET AL., 2011 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION (rev. 2014), <https://www.census.gov/prod/2012pubs/fhw11-nat.pdf> [hereinafter 2011 NATIONAL SURVEY].

deer, bison, and elk are now farmed for food and fee hunting in addition to being recreationally hunted in the wild for personal consumption and sport.<sup>2</sup> The meat from these species can be inspected and is available in some stores and online retailers,<sup>3</sup> alongside traditional meats like beef, pork, and chicken. In fact, cervid farming is a rapidly growing industry in the United States with a total economic impact of \$2.3 billion, employing 29,199 people.<sup>4</sup> Deer farming is a rapidly growing industry in many states. In Ohio, 59 percent of deer farms were started in the ten year period from 1999 through 2009.<sup>5</sup> Furthermore, deer farming contributes a total of \$59.2 million dollars to the Ohio economy.<sup>6</sup> Deer and elk farming is also rapidly growing in the state of Indiana with the number of licensed breeders increasing 19 percent since 2006.<sup>7</sup> Deer and elk farming in Indiana have a total economic impact of \$49.3 million.<sup>8</sup> The number of Pennsylvania deer farms rapidly expanded during the 1990's and 2000's, and accounted for \$103 million of economic impact to the state in 2007.<sup>9</sup>

According to the 2007 Census of Agriculture, there were 198,234 bison, 269,537 deer, and 68,251 elk on game farms and/or ranches across the country.<sup>10</sup> Likewise, there were 4,499 farms with bison, 5,654 farms with deer and 1,917 farms with elk.<sup>11</sup> However, disclosure provisions require data that would identify

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2. Matthew J. Butler et al., *Commentary: Wildlife Ranching in North America — Arguments, Issues, and Perspectives*, 33(1) WILDLIFE SOC'Y BULL. 381 (2005).

3. *Cabela's Wild Game Steaks Variety Pack*, CABELA'S, <http://www.cabelas.com/product/Cabelas-Wild-Game-Steaks-Variety-Pack/746243.uts> (last visited Feb. 7, 2016); *Golden Plains Bison*, OMAHA STEAKS, <http://www.omahasteaks.com/products/Golden-Plains/Golden-Plains-Bison> (last visited Feb. 7, 2016).

4. DAVID P. ANDERSON ET AL., AGRIC. & FOOD POLICY CTR., TEX. A & M UNIV., ECONOMIC IMPACT OF THE UNITED STATES CERVID FARMING INDUSTRY 4, 14 (2007), <https://www.afpc.tamu.edu/pubs/2/480/rr-2007-04.pdf>.

5. WHITETAIL DEER FARMERS OF OHIO, INC., ECONOMIC IMPACT OF THE OHIO DEER FARMING INDUSTRY 1 (2010), <http://www.shepstone.net/OhioDeer/OhioDeer.pdf>.

6. *Id.* at 2.

7. JOHN LEE & ALICIA ENGLISH, IND. DEER & FARMING ASS'N, ECONOMIC IMPACT OF THE DEER & ELK FARMING INDUSTRY IN INDIANA 3 (2011), [http://indianadeer.com/wp-content/uploads/2014/02/eis\\_-\\_short\\_version.pdf](http://indianadeer.com/wp-content/uploads/2014/02/eis_-_short_version.pdf).

8. *Id.*

9. SHEPSTONE MGMT. CO., THE ECONOMIC IMPACT OF PENNSYLVANIA'S DEER FARMS 2 (2007), <http://www.shepstone.net/padeer.pdf>.

10. TOM VILSACK & CYNTHIA Z.F. CLARK, USDA, 2007 CENSUS OF AGRICULTURE 25 (2009), [http://www.agcensus.usda.gov/Publications/2007/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/usv1.pdf](http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf).

11. *Id.*

a respondent in the Agricultural Census to be suppressed;<sup>12</sup> thus, the reported numbers may be lower than those actually reported by respondents. In 2013, there were 57,200 head of bison slaughtered in the US; yet, only 46,600 were slaughtered in federally inspected facilities.<sup>13</sup> In addition, feral pigs have been increasingly trapped and/or captured live for transportation to commercial or federally inspected slaughterhouses.<sup>14</sup> With alternative species entering the commercial food chain, in addition to being hunted for recreation and personal consumption, it is important to understand the laws and regulations governing their harvest, slaughter, inspection, and consumption.

First, this Article examines the fragmented system of meat inspection as it relates to wild game meats and how the current situation could create difficulties for producers and consumers. Then, attention turns to the unique situation of the feral pig related to the inspection of its meat, and efforts to stop the spread of this invasive species. Alternatives to the current regulatory system are presented and discussed with regard to processing, inspection, and sale of wild game meats.

## II. A BRIEF HISTORY OF WILDLIFE LAW

In the United States, wildlife has been considered a public resource that belongs to the people.<sup>15</sup> Early in the colonization of North America, the British class system determined wildlife ownership.<sup>16</sup> Under that system, wildlife were owned by nobility. However, in North America, hunting was a critically important way of securing food and material for clothing.<sup>17</sup> Furthermore, wild game were scattered over the vast, wild lands.<sup>18</sup> The alternative to the British class system was the Roman civil code which gave title of the wild animal to the person who captured or killed it, even if that animal was on someone else's land.<sup>19</sup> Under this free taking doctrine, hunters had substantial rights to follow

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12. *Id.* at IX.

13. NAT'L AGRIC. STATISTICAL SERV., USDA, LIVESTOCK SLAUGHTER 2013 SUMMARY 15 (2014).

14. *Approved Feral Swine Holding Facilities*, TEX. ANIMAL HEALTH COMM'N, [http://www.tahc.state.tx.us/animal\\_health/feral\\_swine.html](http://www.tahc.state.tx.us/animal_health/feral_swine.html) (last visited Feb. 7, 2016).

15. *See* *Geer v. Connecticut*, 161 U.S. 519, 529-30 (1896), *overruled by* *Hughes v. Oklahoma*, 411 U.S. 322 (1974).

16. J.M. Kelley, Legislative Note, *Implications of a Montana Voter Initiative that Reduces Chronic Wasting Disease Risk, Bans Canned Shooting, and Protects a Public Trust*, 6 GREAT PLAINS NAT. RES. J. 89, 91 (2001).

17. Darren K. Cottriel, Comment, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PAC. L.J. 1235, 1244 (1996).

18. THOMAS A. LUND, AMERICAN WILDLIFE LAW 20 (1980).

19. Kelley, *supra* note 16, at 92.

game, regardless of its location.<sup>20</sup> This custom recognized any member of the community's right to hunt animals.<sup>21</sup> This doctrine of free taking of game by anyone was recognized by most people of the time, and courts encouraged the doctrine by holding that hunters could pursue game on another person's unenclosed and undeveloped land.<sup>22</sup>

Due to improvements in agriculture and industrialization of the country, by 1900 hunting was no longer necessary for survival.<sup>23</sup> Likewise, the amount of open land diminished and private property rights gained more recognition.<sup>24</sup> Due in part to dwindling game animal populations, lawmakers restricted and regulated hunting, effectively ending the free taking doctrine.<sup>25</sup> As a result of these changes, the current U.S. system emerged, establishing that the owner of private land is vested with certain rights incident to ownership, which includes the exclusive right to hunt upon that land.<sup>26</sup> This also means that landowners have the right to lease their land for recreational purposes. In fact, 21 percent of all hunting related expenditures, for a total of \$7.1 billion, were on land ownership and leasing.<sup>27</sup> Leasing land for recreational purposes such as hunting can be a source of income for landowners. According to the 2012 Census of Agriculture, 33,161 farms offered tourism and/or recreational services and averaged \$21,230 of income from these activities.<sup>28</sup> At times, increased demand for recreational activity has helped fuel increases in land values.<sup>29</sup>

On the legal and regulatory front, during the 1700's and 1800's, the federal government passed very few wildlife laws.<sup>30</sup> In the absence of federal legislation, the states acted by passing wildlife laws that withstood legal challenges.<sup>31</sup> According to the public trust doctrine, the public has ownership over certain nat-

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20. Cottriel, *supra* note 17, at 1245.

21. *Id.* at 1244.

22. *Id.*; LUND, *supra* note 18.

23. *Id.* at 1245.

24. *Id.*

25. *Id.*

26. *Id.*

27. 2011 NATIONAL SURVEY, *supra* note 1, at 23.

28. NAT'L ARGIC. STATISTICAL SERV., USDA, 2012 CENSUS OF AGRICULTURE - STATE DATA, 292 tbl. 6 (2014), [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_2\\_US\\_State\\_Level/st99\\_2\\_006\\_006.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_US_State_Level/st99_2_006_006.pdf) (noting income from farm-related sources in 2012 and 2007).

29. Jason Henderson & Sean Moore, *The Capitalization of Wildlife Recreation Income into Farmland Values*, 38(3) J. OF AGRIC. & APPLIED ECON. 597, 597 (2006).

30. Olen Paul Matthews, *Who Owns Wildlife?*, 14 WILDLIFE SOC'Y BULL. 459, 459 (1986).

31. *Id.*

ural resources<sup>32</sup> and a duty to protect them as well.<sup>33</sup> Historically, the doctrine has been primarily applied to navigable waterways.<sup>34</sup> However, it has expanded to include resources such as wildlife.<sup>35</sup> Thus, the public has an interest in the wildlife resource and the state has a duty to manage wildlife to meet the public's common needs.<sup>36</sup> This is in contrast to the laws associated with food source or companion animals such as livestock or pets (i.e. dogs) which are considered personal property.<sup>37</sup> Issues of public versus private ownership are complicated by the increase in captive deer farming in many states.<sup>38</sup> Some states allow for private individuals to own wildlife.<sup>39</sup>

In fact, in *Geer v. Connecticut*, the United States Supreme Court recognized the states' sovereign trusteeship over the public wildlife resource, a case decided in 1896.<sup>40</sup> Despite the fact wildlife laws were primarily passed by states, the federal government passed the Lacey Act in 1900,<sup>41</sup> which made it illegal to transport across state lines any fish, wildlife or plants taken in violation of any state, tribal, or federal law.<sup>42</sup> The trend continued and numerous cases persisted to chip away at state sovereignty over wildlife.<sup>43</sup> The end came with the 1979 Supreme Court decision in *Hughes v. Oklahoma*.<sup>44</sup> In that case the Supreme Court declared wildlife to be an article of commerce subject to federal regulation under the powers of the commerce clause.<sup>45</sup> Nevertheless, states continue to regulate wildlife by establishing hunting seasons and bag limits, issuing licenses,

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32. Michael C. Blumm, *The Public Trust Doctrine—A Twenty-First Century Concept*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 105, 105 (2010).

33. Cottriel, *supra* note 18, at 1268.

34. *Id.* at 1262.

35. *Id.* at 1264.

36. *Id.* at 1269.

37. David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1026 (2010).

38. See *Captive Bred White-Tailed Deer License*, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/permits/25011.html> (last visited Feb. 7, 2016); *Captive Cervid Industry in California*, CAL. DEP'T OF FISH & WILDLIFE, <http://www.dfg.ca.gov/wildlife/hunting/deer/captivecervind.html> (last visited Feb. 7, 2016).

39. *Captive Bred White-Tailed Deer License*, *supra* note 38; *Captive Cervid Industry in California*, *supra* note 38.

40. *Geer v. Connecticut*, 161 U.S. 519, 529-35 (1896), *overruled by* *Hughes v. Oklahoma*, 411 U.S. 322 (1974); *see also* Kelley, *supra* note 16, at 93.

41. Matthews, *supra* note 30, at 460.

42. 16 U.S.C. § 3372 (2012).

43. Matthews, *supra* note 30, at 460.

44. See generally *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

45. See *id.* at 335.

and by defining the legal means of taking wild game.<sup>46</sup> Thus, there remains a tension between states and the federal government with the states being able to regulate wildlife via police power, and the federal government regulating wildlife as an article of commerce.<sup>47</sup>

### III. A BRIEF HISTORY OF THE FOOD SAFETY SYSTEM FOR WILD AND FARMED ANIMALS

President Abraham Lincoln established the Department of Agriculture in 1862<sup>48</sup> with the mission of promoting United States agriculture.<sup>49</sup> Although the legislation creating the United States Department of Agriculture (USDA) did not mention food safety, it was the logical place for the authority.<sup>50</sup> Originally, the USDA, had sole responsibility for food safety.<sup>51</sup> However, the primary mission of the USDA, promoting United States agriculture, was fundamentally at odds with a food safety mission.<sup>52</sup> Early on, food safety functions were administratively separated because control over meat and non-meat products were tasked to different units.<sup>53</sup> Congress enacted the Meat Inspection Act (MIA)<sup>54</sup> administered by the Bureau of Animal Industry, and the Pure Food and Drugs Act (PFDA) administered by the Bureau of Chemistry.<sup>55</sup> In fact, Congress passed, the PFDA and the MIA on the same day in 1906.<sup>56</sup> The MIA established continuous inspections by in-house federal inspections in meat processing facilities, a practice that remains in place today.<sup>57</sup> The MIA was later amended through the Wholesome Meat Act (WMA) of 1967.<sup>58</sup>

The PFDA prohibited adulterated food in interstate commerce.<sup>59</sup> The Bureau of Chemistry eventually became known as the Food and Drug Administra-

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46. See, e.g., COLO. CODE REGS. §§ W-2 (201), (203), (205) (2015).

47. LUND, *supra* note 18, at 36, 49-50.

48. *FSIS History*, USDA (May 3, 2012), <http://www.fsis.usda.gov/wps/portal/informational/aboutfsis/history/history>.

49. 7 U.S.C. § 2201 (2012).

50. Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 78 (2000).

51. *Id.*

52. *Id.*

53. *Id.*

54. Meat Inspection Act of 1907, Pub. L. No. 59-242, 34 Stat. 1256, 1260-65.

55. Merrill & Francer, *supra* note 50, at 79.

56. *Id.*

57. 21 U.S.C. § 603 (2012).

58. Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967).

59. Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906); Merrill & Francer, *supra* note 50, at 79.

tion in 1930.<sup>60</sup> The federal government began formally dispersing food safety duties in 1940 by removing the FDA from the USDA.<sup>61</sup> The FDA was eventually moved to the Department of Health and Human Services.<sup>62</sup>

#### A. The FDA

Under the Federal Food, Drug, and Cosmetics Act (FDCA), the FDA regulates all food products *except* those specifically covered by the Federal Meat Inspection Act (FMIA)<sup>63</sup> and the Poultry Products Inspection Act (PPIA).<sup>64</sup> The exemptions are detailed in the FMIA and as such, the FDA provides inspection for all meat and animal food products not covered under the FMIA and PPIA.<sup>65</sup> These products include seafood, dairy products, and wild game.<sup>66</sup> Also, included with the FDA's responsibilities are non-specified red meats such as bison, rabbits, game animals, members of deer family, elk, and moose, and all non-specified birds such as wild turkey, wild ducks, and wild geese.<sup>67</sup>

The Wholesome Meat Act “generally requires the inspection of certain animal species.”<sup>68</sup> As regulated by the FDA, the fish industry does not do the same. Mandatory inspections are not feasible for the fish-processing industry, primarily because of the sheer number of species.<sup>69</sup> Unlike the USDA, FDA inspections are not continuous.<sup>70</sup> However, the new Food Safety Modernization Act (FSMA) increases “the FDA’s authority to monitor, inspect, and enforce food safety standards.”<sup>71</sup>

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60. Note, *Reforming the Food Safety System: What if Consolidation isn't Enough?*, 120 Harv. L. Rev. 1345, 1348 (2007) [hereinafter *Consolidation*].

61. Merrill & Francer, *supra* note 50, at 82.

62. *Consolidation*, *supra* note 60, at 1348.

63. 21 U.S.C. § 392 (2012).

64. 21 U.S.C. § 467(f).

65. *See id.*

66. *See FDA, USDA, NOAA Statements on Food Safety*, FDA, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm248257.htm> (last updated Mar. 23, 2011).

67. FDA, U.S. DEP'T OF HEALTH & HUMAN SERVS., INVESTIGATIONS OPERATIONS MANUAL 104 (2015) [hereinafter OPERATIONS MANUAL].

68. Brandt T. Bowman, Comment, *Roll Sushi, Roll: Defining “Sushi Grade” for the Consumer and the Sushi Bar*, 116 Penn St. L. Rev. 495, 512 (2011); *see* 21 U.S.C. § 603(a).

69. Bowman, *supra* note 68, at 519.

70. Richard Raymond, Opinion, *Farm Bill 2014: FSIS Inspection Must Satisfy FDA Requirements?*, FOOD SAFETY NEWS (Feb. 3, 2014), <http://www.foodsafetynews.com/2014/02/farm-bill-2014-fsis-inspection-must-satisfy-the-requirements-of-the-fda/#.VFkaRfMo7cs>.

71. Pamela A. Vesilind, *Continental Drift: Agricultural Trade and the Widening Gap Between European Union and United States Animal Welfare Laws*, 12 VT. J. ENVTL. L. 223,

When it comes to wild game meats, the FDA provides general guidelines.<sup>72</sup> According to guidelines, game animals commercially sold for food must be farmed or ranched, not hunted, and either inspected under voluntary inspection by an agency with animal health jurisdiction or inspected by an agency other than one with the animal health jurisdiction.<sup>73</sup> If game animals are live-caught in the wild, they must undergo an inspection such as one conducted by an agency with animal health jurisdiction.<sup>74</sup> Live-caught wild animals must be slaughtered and processed following the same regulations for other meat or poultry that are determined by the agency possessing animal health jurisdiction and the agency actually conducting the inspection.<sup>75</sup> The agency actually conducting the inspection determines whether ante-mortem and/or postmortem examinations by an approved veterinarian are necessary.<sup>76</sup> For wild game that has been dressed in the field, a post-mortem inspection must be conducted by an approved veterinarian and the carcass must be transported following the regulations of the agency with animal health jurisdiction and the agency conducting the investigation.<sup>77</sup>

### B. The USDA

The FMIA outlines standards for meats such as “cattle, sheep, swine, goats, horses, mules, other equines,” and additional species of livestock deemed appropriate by the USDA.<sup>78</sup> The Poultry Products Inspection Act (PPIA) of 1957 covers poultry inspection.<sup>79</sup> Amenable poultry for the purposes of the PPIA include domestically raised chickens, turkeys, ducks, geese, and guineas, ratites, and squabs.<sup>80</sup> Further, meats and poultry shall be exempt from the FDA jurisdiction to the extent they are covered by the FMIA.<sup>81</sup>

Most wild game is a non-amenable species and are therefore not “meat” or “poultry” under the FMIA or PPIA.<sup>82</sup> Domestically raised game birds or water-

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229 (2011).

72. See PUB. HEALTH SERV., FDA, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOOD CODE § 3-201.17 (2013), <http://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM374510.pdf> [hereinafter FOOD CODE].

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* § 3-201.17(A)(1)(c)(ii).

77. *Id.* § 3-201.17(A)(4).

78. 21 U.S.C. § 603 (a) (2012).

79. 21 U.S.C. §§ 451-72.

80. See 21 U.S.C. § 453(e).

81. 21 U.S.C. § 392(a).

82. OPERATIONS MANUAL, *supra* note 67.



fowl like pheasant, quail, partridge, or swans, are not amenable species.<sup>83</sup> Game birds can also include wild turkeys, geese, ducks, grouse, quail, and other non-domesticated fowl.<sup>84</sup> Some United States game animal species include deer, elk, antelope, bison, bear, moose, and caribou.<sup>85</sup> Wild game also includes those being domestically raised.<sup>86</sup>

Traditional meat and poultry producers get cost-free USDA inspections funded by United States tax dollars.<sup>87</sup> The Agricultural Marketing Act of 1946 gives the Food Safety and Inspection Service (FSIS) authority to provide voluntary inspection for non-amenable species.<sup>88</sup> Producers of alternative livestock pay for the FSIS inspection necessary to sell and ship the product in interstate commerce.<sup>89</sup> Producers of non-amenable species must pay for this inspection because federal tax dollars cannot be used to provide voluntary FSIS inspection.<sup>90</sup> The 2010 rate for the voluntary inspection was \$51.35 per hour with an additional requirement of a minimum visit of two hours.<sup>91</sup>

Before inspecting game or exotic animals, the federally inspected slaughterhouse must obtain approval to process these additional species.<sup>92</sup> Wild game carcasses must fit on a plant's existing equipment and the FSIS inspector must be knowledgeable about that particular species.<sup>93</sup> Each species of animal must be processed separately, which increases the cost to processors.<sup>94</sup>

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83. Denise Amann, *Harvesting Wild Game*, FSIS, USDA, <http://www.fsis.usda.gov/wps/wcm/connect/fsis-content/internet/main/newsroom/meetings/newsletters/small-plant-news/small-plant-news-archive/spn-vol5-no4> (last modified Mar. 24, 2015).

84. *Id.*

85. *Id.*

86. See FOOD CODE, *supra* note 72, at § 3-201.17.

87. See Robert Luedeman & Darla Mondou, Article, *Meet the New Meat: Legal Aspects of Ratite Bird Production*, 8 SAN JOAQUIN AGRIC. L. REV. 1, 3 (1998).

88. Amann, *supra* note 83.

89. Luedeman & Mondou, *supra* note 87.

90. *Inspection & Grading of Meat and Poultry: What are the differences?*, FSIS, USDA, [http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/inspection-and-grading-of-meat-and-poultry-what-are-the-differences/\\_inspection-and-grading-differences](http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/inspection-and-grading-of-meat-and-poultry-what-are-the-differences/_inspection-and-grading-differences) (last modified June 3, 2014) [hereinafter *Inspection & Grading*].

91. *Slaughtering, Cutting, and Processing*, CORNELL SMALL FARMS PROGRAM, CORNELL UNIV., <http://smallfarms.cornell.edu/2012/07/07/slaughtering-cutting-and-processing/> (last visited Feb. 7, 2016).

92. *Id.*

93. *Inspection & Grading*, *supra* note 90.

94. *Non-Amenable Species*, AGRIC. OMBUDSMAN, UNIV. OF CAL. COOP. EXTENSION, [http://ucanr.edu/sites/CESonomaAgOmbuds/Selling\\_Meat/Non-Amenable/](http://ucanr.edu/sites/CESonomaAgOmbuds/Selling_Meat/Non-Amenable/) (last visited Feb. 7, 2016).

State-inspected meats that are non-amenable under the FMIA or PPIA may be transported in interstate commerce if the meats comply with FDA and applicable state laws.<sup>95</sup> Furthermore, individual states can require non-amenable meats obtain state inspection.<sup>96</sup> Thus, interstate movement of state-inspected or voluntary FSIS-inspected non-amenable product is dictated by FDA and state laws and requirements.<sup>97</sup>

Further differentiating mandatory and voluntary inspection is the fact the inspection mark for amenable livestock is circular; the mark is triangular for game animals.<sup>98</sup> Processed products that include more than three percent of raw or two percent of cooked wild game meat (and the remainder amenable meat or poultry) are subject to FSIS inspection.<sup>99</sup> These products, once they have passed inspection will be given the round USDA inspection mark.<sup>100</sup> Mislabeling of product attributes could potentially cause confusion and diminish consumer confidence in both products and verification agencies.<sup>101</sup> The same dangers exist when mixing meats. Even with proper labeling, mixing meats might cause consumer confusion and lower consumer confidence in wild game products. Additionally, the potential for mislabeling wild game products, particularly those that are mixed, exists and could have ramifications for consumers such as no longer wanting to purchase wild game products.<sup>102</sup>

Pundits have pointed out that selling wildlife, such as deer, could help reduce population numbers in many areas.<sup>103</sup> However, current regulations do not allow for this.<sup>104</sup> Assurance that the meat of an animal harvested by a hunter is transported to a processing facility that is clean, wholesome, and properly identified is generally not possible.<sup>105</sup> Thus, there is no assurance that the meat from a

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95. *State Inspected Non-Amenable Species Crossing State Lines*, FSIS, USDA, [http://askfsis.custhelp.com/app/answers/detail/a\\_id/1446/~state-inspected-non-amenable-species-crossing-state-lines](http://askfsis.custhelp.com/app/answers/detail/a_id/1446/~state-inspected-non-amenable-species-crossing-state-lines) (last updated July 1, 2015 11:54 AM) [hereinafter *Crossing State Lines*].

96. *Id.*

97. *Id.*

98. *Id.*

99. Amann, *supra* note 83.

100. *Id.*

101. See Nicole J. Olynk et al., *Labeling of Credence Attributes in Livestock Production: Verifying Attributes Which are More than "Meet the Eye,"* 5 J. FOOD L. & POL'Y 181, 184 (2009).

102. See generally *id.*

103. Jim Sterba, *If Only Hunters Could Sell Venison*, WALL ST. J. (Oct. 18, 2013 8:49 PM ET), <http://online.wsj.com/articles/SB10001424052702304410204579139424081224050>.

104. See Amann, *supra* note 83.

105. *Id.*

hunted animal is unadulterated.<sup>106</sup> In most states, hunted animals may be harvested for personal consumption, but not commercially sold.<sup>107</sup> But, wild game animals raised on farms, and following applicable regulations, may be sold if the jurisdiction allows.<sup>108</sup> The inspection requirements for alternative species like deer, elk, and bison are confusing and can be complicated.<sup>109</sup>

### 1. State Meat Inspection Systems

States that have a “USDA equivalent” system of meat inspections can require inspection of non-amenable game and stamp those meats with a state mandatory inspection mark.<sup>110</sup> However, those non-amenable meats may be sold in intrastate commerce only.<sup>111</sup> Currently, just over half of the states have their own inspection program.<sup>112</sup> The Talmadge-Aiken Act of 1962 allows trained state inspectors with federal inspection privileges to complete inspections.<sup>113</sup> Likewise, Talmadge-Aiken plants are considered federally inspected, and products from them have the federal inspection mark.<sup>114</sup>

If meat is sold live, or “on the hoof,” a custom-exempt slaughterhouse can slaughter and process, wrap, and label the animal “not for sale,” and the meat is delivered in bulk to the owner/buyer.<sup>115</sup> The FMIA includes an exemption that allows animals to be slaughtered for personal consumption without the carcass being inspected by officials before slaughter or during processing.<sup>116</sup> Specifically, this exemption is often used by farmers to sell meat “on the hoof” whole, in halves, or in quarters.<sup>117</sup> This exemption is available because the live animal is

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106. *Id.*

107. *Id.*

108. *Id.*

109. See AGRIC. UTILIZATION RESEARCH INST., ALTERNATIVE LIVESTOCK SPECIES IN THE STATE OF MINNESOTA 48 (2002), <http://www.auri.org/wp-content/assets/legacy/research/multi.pdf>.

110. *Slaughtering, Cutting, and Processing*, *supra* note 91.

111. *Id.*

112. ROB HOLLAND & MEGAN BRUCH, CTR. FOR PROFITABLE AGRIC., GENERAL OVERVIEW OF THE HISTORY, REGULATIONS AND INSPECTION INFORMATION FOR DIRECT MEAT MARKETING IN TENNESSEE 4 (2013), <https://extension.tennessee.edu/publications/Documents/PB1819.pdf>.

113. *Id.* (noting nine states allow this including: Alabama, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, Texas, Utah, and Virginia).

114. See *id.* at 5.

115. 9 C.F.R. § 303.1(a)(2) (2015); Lauren Gwin & Arion Thiboumery, *Conference on Agriculture and Food Systems: September 28, 2012: Local Meat Processing: Business Strategies and Policy Angles*, 37 VT. L. REV. 987, 988 (2013).

116. 21 U.S.C. § 623 (2012).

117. RACHEL J. JOHNSON, DANIEL L. MARTI & LAUREN GWIN, ECON. RESEARCH SERV.,

being sold, rather than its meat.<sup>118</sup> The USDA inspects custom slaughter plants, but only two to four times each year for sanitation and facilities compliance purposes.<sup>119</sup> Because of this, these plants only process meat for the owner of the animal—be it farmers, owners of livestock, or hunters.<sup>120</sup> The meat processed by a custom-exempt slaughterhouse can be served to family, guests, and employees of the animal's owner,<sup>121</sup> but the meat cannot enter commerce, be sold, traded, or gifted to a food bank or charity.<sup>122</sup>

#### IV. EVIDENCE OF VARIATION AND INEQUALITY IN THE CURRENT SYSTEM

Producers must have access to a slaughterhouse that is approved to slaughter the animals they raise and provide the kind of inspection needed for the producers' intended market.<sup>123</sup> Producers could potentially be prohibited from shipping their game animals across state lines,<sup>124</sup> and must comply with additional health restrictions to gain access to a slaughterhouse with the approval to slaughter and inspect their alternative livestock or poultry.<sup>125</sup>

Access to processing facilities is a bottleneck in the meat supply chain, especially for local supply chains.<sup>126</sup> Producers need access to processing facilities that have the appropriate inspection status for their target market.<sup>127</sup> In addition, access to processors that provide value-added services such as patty-making, sausage, or jerky may be further limited.<sup>128</sup> Further exacerbating the lack of production facilities available for exotic meats, "processing deserts" have crept up for cattle, pigs, and chickens as the number of plants has declined.<sup>129</sup> Additionally, current slaughterhouses must take steps to become approved to slaughter non-

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USDA, SLAUGHTER AND PROCESSING OPTIONS AND ISSUES FOR LOCALLY SOURCED MEAT 7 (2012), <http://www.ers.usda.gov/media/820188/ldpm216-01.pdf>.

118. LAUREN GWIN & JIM POSTLEWAIT, OR. STATE UNIV. EXTENSION SERV., FREQUENTLY ASKED QUESTIONS ABOUT USING CUSTOM-EXEMPT SLAUGHTER AND PROCESSING FACILITIES IN OREGON FOR BEEF, PORK, LAMB, AND GOAT 3-4 (2009), <http://smallfarms.oregonstate.edu/sites/default/files/small-farms-tech-report/techreport-custommeatfaqs.pdf>.

119. HOLLAND & BRUCH, *supra* note 112, at 6.

120. *Id.* at 5.

121. *Id.* at 5-6.

122. GWIN & POSTLEWAIT, *supra* note 118, at 3.

123. 21 U.S.C. § 619 (2012).

124. *Id.*

125. *Slaughtering, Cutting, and Processing*, *supra* note 91.

126. Gwin & Thiboumery, *supra* note 115, at 987.

127. *Id.* at 988.

128. *See id.*

129. *Id.* at 990.

amenable species and must slaughter all species separately which adds to processing cost.<sup>130</sup> Another factor that could exacerbate the lack of processing facilities for wild game is that some states have banned the importation of animals such as captive deer.<sup>131</sup> For example Kentucky has banned deer imports from Indiana, Pennsylvania, and Ohio.<sup>132</sup> In conclusion, the number of slaughterhouses available to slaughter wild game animals is significantly fewer than for traditional amenable species.

*A. Mix Your Way to a Federally-Inspected Product*

While it is possible for state-inspected non-amenable meats to be sold across state lines if they comply with FDA and state laws,<sup>133</sup> these products cannot move as easily as products that are federally inspected by the USDA.<sup>134</sup> Even if wild game meat is federally inspected, it will still only carry the voluntary federal inspection mark as opposed to the circular inspection mark amenable species receive upon inspection.<sup>135</sup>

The USDA has jurisdiction over products with more than three percent raw meat.<sup>136</sup> Therefore, the inclusion of amenable meat, albeit a very small percentage, makes it an amenable product subject to mandatory USDA inspection.<sup>137</sup> In other words, non-amenable elk or deer meat can be used as an ingredient, along with beef or another amenable meat, when mixed together in a meat product.<sup>138</sup> Wild game is considered a non-meat ingredient and must originate from an approved source, meaning that it has been inspected by a federal, state, or foreign service.<sup>139</sup> The final meat product, three percent beef and 97 percent elk, is then

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130. 21 U.S.C. § 619 (2012); *Slaughtering, Cutting, and Processing*, *supra* note 91.

131. See, e.g., Alan Clemons, *Deer Wars Intensify as State Agency Bans Captive Imports*, DEER & DEER HUNTING (Feb. 17, 2015), <http://www.deeranddeerhunting.com/articles/deer-wars-intensify-state-agency-bans-captive-imports>.

132. *Id.*

133. *Crossing State Lines*, *supra* note 95.

134. See generally KNOW YOUR FARMER KNOW YOUR FOOD COMPASS, USDA 45, <http://www.usda.gov/documents/KYFCompass.pdf> (last visited Feb. 7, 2016).

135. Amann, *supra* note 83.

136. OPERATIONS MANUAL, *supra* note 67.

137. *How Low Can the Level of Meat/Poultry be Before the Product is no Longer Amenable to U.S. Department of Agriculture (USDA) Jurisdiction (i.e., to the Federal Meat Inspection Act (FMIA) or Poultry Products Inspection Act (PPIA)?*, FSIS, USDA, [http://askfsis.custhelp.com/app/answers/detail/a\\_id/412/kw/not%20subject%20to%20mandatory%20inspection/related/1](http://askfsis.custhelp.com/app/answers/detail/a_id/412/kw/not%20subject%20to%20mandatory%20inspection/related/1) (last updated June 28, 2007).

138. Mike Mamminga, *Venison Inspection Requirements*, DEERFARMER.COM, <http://www.deerfarmer.org/index.php/component/content/article?id=188:venison-inspection-requirements> (last visited Feb. 7, 2016).

139. *Id.*

subject to mandatory USDA inspection and will carry the mandatory, round inspection mark.<sup>140</sup> Because it has been federally inspected, it can be sold and shipped across the United States, even though it could contain 97 percent of state-inspected meat.<sup>141</sup> While this may seem like a far-fetched example, products such as these are already available in stores and from online retailers.<sup>142</sup> For example, one brand of venison jerky is advertised as containing three percent beef (to adhere to USDA regulations for nationwide distribution).<sup>143</sup>

### B. A “Wild” Amenable Species: The Feral Hog

The population of feral pigs in the United States is estimated at over 5 million and they have been found in over 35 states.<sup>144</sup> Feral pigs are widespread in the Southern United States.<sup>145</sup> However, populations exist as far north as upstate New York, Oregon, and Michigan.<sup>146</sup> Feral hogs are an invasive species that cause damage to agriculture crops, lawns, and levee systems.<sup>147</sup> Furthermore, feral pigs damage the habitat of other wildlife, including feeding on small wildlife and ground nesting birds.<sup>148</sup> Feral pigs also present a disease risk; according to the 2012 Feral Swine Management Report from New York State, they “are highly mobile disease reservoirs and can carry at least 30 viral and bacterial diseases in addition to 37 parasites that affect people, pets, livestock, or wildlife.”<sup>149</sup> Feral swine cause \$800 million in damage annually directly to agricultural crops and \$1.5 billion in total damages.<sup>150</sup> The capture, hunting, sale, and consumption of

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140. *Id.*; *Slaughtering, Cutting, and Processing*, *supra* note 91.

141. *Mamminga*, *supra* note 138; see U.S.C. § 619 (2012).

142. See *Venison Jerky*, BUFFALO BILLS, <http://www.bbjerky.com/venison-jerky/> (last visited Feb. 7, 2016).

143. *Id.*

144. Gail Keirn, *We Can't Barbecue Our Way Out: Why Feral Swine Management Requires a National Approach*, USDA (April 4, 2014, 10:00 AM), <http://blogs.usda.gov/tag/feral-swine/>.

145. See *id.*

146. See *id.*

147. *Damage by Pigs*, MISS. STATE UNIV. EXTENSION, <http://wildpiginfo.msstate.edu/damage-caused-by-pigs.html> (last updated May 19, 2014).

148. *Feral Swine: Damage and Disease Threats*, APHIS, USDA, [http://www.aphis.usda.gov/publications/wildlife\\_damage/content/printable\\_version/feral\\_swine.pdf](http://www.aphis.usda.gov/publications/wildlife_damage/content/printable_version/feral_swine.pdf) (last updated June 2013).

149. *USDA Releases New York 2012 Feral Swine Management Report*, N.Y. INVASIVE SPECIES INFO. (Mar. 8, 2013), [http://www.nyis.info/?action=news&type=news&prism\\_type=&startat=99](http://www.nyis.info/?action=news&type=news&prism_type=&startat=99).

150. Gail Keirn, *Feral Swine: Ripping and Rooting Their Way Across America*, USDA (Apr. 30, 2013 1:00PM), <http://blogs.usda.gov/2013/04/30/feral-swine-ripping-and-rooting-their-way-across-america/>.

feral pigs is regulated according to each individual state.<sup>151</sup> Although both feral and domestic pigs are the same species and are treated the same according to the FMIA,<sup>152</sup> they are regarded differently in other aspects by both legal and economic literature. In fact, wild pigs are either trapped<sup>153</sup> or captured live<sup>154</sup> so that they may satisfy the pre mortem inspection required by the FMIA so that the meat can be sold in interstate commerce.<sup>155</sup> This presents an opportunity for animal welfare concerns associated with the capture and eventual slaughter of feral pigs, in addition to the previously discussed unequal treatment of other wild species with regard to meat inspection, sales, and labeling.<sup>156</sup>

Consumers' animal welfare concerns for food animals have already had the effect of changing production practices. For example, consumer groups used market pressure to change milk producers' use of recombinant bovine somatotropin (rbST).<sup>157</sup> Additionally, changes in production processes and the banning of gestation crates have been brought about by ballot initiatives, state legislation, and market pressures.<sup>158</sup> Thus, it is important to consider similar outcomes for the welfare of wild animals. The policy implications for production and harvest of wild game animals in general could include changes in the way game animals are hunted in wild settings, produced in farmed settings, and consumed for food. Annually, 13.7 million people over the age of 16 take part in recreational hunting and spend \$32.5 billion.<sup>159</sup> Specific to feral pig population control, policy changes could result in changes to the ways feral pigs are hunted and captured and hamper the ability to control the population growth of this invasive species.

According to the FSIS of the USDA, swine of the family Suidae, and spe-

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151. See THE WILDLIFE SOC'Y, 2012 ANNUAL STATE SUMMARY REPORT WILD HOG WORKING GROUP (2012), <http://www.dgif.virginia.gov/wildlife/feral-hogs/seaFwa-2012-annual-state-report.pdf>.

152. *Amenable Swine*, FSIS, USDA, [http://askfsis.custhelp.com/app/answers/detail/a\\_id/1441/~/amenable-swine](http://askfsis.custhelp.com/app/answers/detail/a_id/1441/~/amenable-swine) (last updated July 17, 2015).

153. *Types of Traps*, MISS. ST. UNIV. EXTENSION, <http://wildpiginfo.msstate.edu/types-traps-feral-pigs.html> (last updated June 27, 2013).

154. *Using Dogs*, MISS. ST. UNIV. EXTENSION, <http://wildpiginfo.msstate.edu/hunting-wild-pigs-with-dogs.html> (last updated June 27, 2013).

155. See U.S.C. § 604 (2012).

156. See generally *id.*

157. Nicole Olynk et al., *Production Technology Option Value: The Case of rbST in Michigan*, AGRIC. ECON., 2012, at 1.

158. Melissa G.S. McKendree et al., *Consumer Preferences for Verified Pork-Rearing Practices in the Production of Ham Products*, 38 J. AGRIC. & RESOURCE ECON. 397, 398 (2013).

159. 2011 NATIONAL SURVEY, *supra* note 1, at 62.

cies *Sus scrofa* are amenable to the FMIA.<sup>160</sup> This includes domestic pigs and those that are now feral, *Sus scrofa domestica*, and the Common Wild Boar, *Sus scrofa fera*.<sup>161</sup> While other species of wild game animals are non-amenable species and not subject to mandatory USDA meat inspection for sale in interstate commerce, feral hog meat is subject to the same regulations as farmed pork.<sup>162</sup> If feral pigs are captured live, they may be sold for meat if state laws permit live capture and transportation to a slaughterhouse.<sup>163</sup> This brings up an important point, namely that feral hogs must be inspected live before slaughter, which means they must be captured live and transported to a slaughterhouse.<sup>164</sup> Wild pigs are frequently trapped<sup>165</sup> or hunted with dogs<sup>166</sup> to achieve a live capture. Hunting with the goal of capture typically uses trained hunting dogs to locate and keep the hog in place, often by holding the pig by the ear, until hunters arrive to secure the hog for live transport or euthanize it.<sup>167</sup> Some people consider hunting feral pigs by plane or helicopter to be cruel,<sup>168</sup> including the People for the Ethical Treatment of Animals (PETA).<sup>169</sup> Furthermore, the use of dogs for bear hunting is upsetting to some<sup>170</sup> and recently a measure to ban bear hunting via hounding (use of dogs) failed in Maine.<sup>171</sup> Likewise, other wildlife management techniques have caused concern; the USDA came under fire for allowing dogs to attack coyotes trapped in leg snares<sup>172</sup> and for the use of steel traps and cyanide

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160. *Amenable Swine*, *supra* note 152.

161. *Id.*

162. *See id.*

163. *See Slaughter Inspection 101*, FOOD SAFETY & INSPECTION SERV., USDA, <http://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/slaughter-inspection-101/slaughter-inspection-101> (last modified Aug. 9, 2013).

164. *Id.*

165. *Types of Traps*, *supra* note 153.

166. *Using Dogs*, *supra* note 154.

167. *Id.*

168. Mark Essig, *High Above the Hog*, N.Y. TIMES (Aug. 31, 2011), [http://www.nytimes.com/2011/08/31/opinion/high-above-the-hog.html?\\_r=0](http://www.nytimes.com/2011/08/31/opinion/high-above-the-hog.html?_r=0).

169. *'Refuges' No Sanctuary for Feral Pigs*, PETA (July 12, 2011), <http://www.peta.org/blog/refuges-sanctuary-feral-pigs/>.

170. *Bear Trophy Hunting*, THE HUMANE SOC'Y OF THE U.S., [http://www.humanesociety.org/issues/bear\\_hunting/](http://www.humanesociety.org/issues/bear_hunting/) (last visited Feb. 7, 2016).

171. Aislinn Sarnacki & Ben McCanna, *Maine Voters Reject Ban on Bear Hunting Practices for Second Time*, BANGOR DAILY NEWS (Nov. 4, 2014, 11:34PM), <http://bangordailynews.com/2014/11/04/politics/maine-voters-reject-ban-on-bear-hunting-practices-for-second-time/>.

172. *See* Cristina Corbin, *Animal Torture, Abuse Called a 'Regular Practice' Within Federal Wildlife Agency*, FOX NEWS (Mar. 12, 2013),



cartridges.<sup>173</sup> Likewise, consumers are generally concerned that practices used in the production of domestic pigs, such as ear notching, tail docking, or teeth clipping, reduce the welfare of farmed pigs.<sup>174</sup> Thus, there is potential for consumer and public outcry regarding the treatment of feral pigs.

At the state level, feral hogs are either regulated by the state department of agriculture or the state fish and wildlife agency.<sup>175</sup> Where this control is situated determines how feral pigs are classified: livestock, wild game or wildlife, nuisance species, non-game animals, exotic species, or invasive species.<sup>176</sup> This classification determines whether feral pigs are regulated as wild game animals or as nuisances to agriculture.<sup>177</sup> States have the authority to determine the legal methods and seasons to capture or hunt feral pigs, whether live animals and/or meat can be sold, and restrictions on selling this meat.<sup>178</sup> There are a variety of state laws and policies in place across the country regarding the hunting and capture of feral hogs.<sup>179</sup> The Southeastern Association of Fish and Wildlife Agencies (SEAFWA) has formed a Wild Hog Working Group from its member state fish and game agencies to address the problem of wild pigs across fifteen states in the Southern United States<sup>180</sup> Even within their group, substantial differences in the regulation of wild pigs exist.<sup>181</sup> For example, in Louisiana, feral pigs are considered “outlaw quadrupeds” and may be hunted year round during daylight hours, and at night with some restrictions.<sup>182</sup> In Mississippi, feral pigs are considered nuisance animals and may be captured and transported to a slaughterhouse with a transportation permit.<sup>183</sup>

Just as feral pigs are classified differently in each state, they are also regu-

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<http://www.foxnews.com/us/2013/03/12/animal-torture-abuse-called-regular-practice-within-federal-wildlife-agency/>.

173. Editorial, *Agriculture's Misnamed Agency*, N.Y. TIMES (July 17, 2013), [http://www.nytimes.com/2013/07/18/opinion/agricultures-misnamed-agency.html?\\_r=1&](http://www.nytimes.com/2013/07/18/opinion/agricultures-misnamed-agency.html?_r=1&).

174. *Welfare Implications of Teeth Clipping, Tail Docking, and Permanent Identification of Piglets*, AM. VETERINARY MED. ASS'N (July 15, 2014), <https://www.avma.org/KB/Resources/LiteratureReviews/Pages/Welfare-implications-of-practices-performed-on-piglets.aspx>.

175. THE WILDLIFE SOCIETY, *supra* note 151, at 6-8.

176. *See id.* at 5-6.

177. *See id.* at 5.

178. *See id.* at 5-14.

179. *See id.* at 15-22.

180. *Id.* at 46.

181. *See generally id.* at 5-47.

182. *Outlaw Quadrupeds (Armadillo, Coyotes, Feral Hogs)*, LA. DEP'T OF WILDLIFE & FISHERIES, <http://www.wlf.louisiana.gov/hunting/outlaw-quadrupeds> (last visited Feb. 7, 2016).

183. MISS. CODE ANN. § 49-7-1 (2015).

lated by different state agencies.<sup>184</sup> For example, Oklahoma's Department of Agriculture regulates all aspects of feral hogs except trapping and hunting, which are left to the state's Department of Wildlife Conservation.<sup>185</sup> In Louisiana and Mississippi, each state's department of wildlife has authority.<sup>186</sup> In Texas, the Animal Health Commission regulates wild pig buyers, slaughter, and hunting preserves for wild pigs, but wild pig hunting and permit authority is controlled by the state's wildlife department.<sup>187</sup>

States also have differing rules when it comes to selling and transporting wild hogs.<sup>188</sup> In Mississippi and North Carolina, live wild pigs may not be transported or relocated.<sup>189</sup> In Georgia, feral swine may be relocated if they have passed disease testing,<sup>190</sup> but in Florida wild pigs may only be transported by a licensed dealer.<sup>191</sup> In Arkansas and Louisiana, feral hogs can be sold at public animal auction barns;<sup>192</sup> but, other states impose stricter regulations on feral hogs sold in public sale barns.<sup>193</sup> In Alabama, Florida, Kentucky, North Carolina, Oklahoma, and Tennessee feral pigs may not be sold in a public sale barn.<sup>194</sup> Feral hogs may be sold for slaughter in Arkansas, Florida, Georgia, Louisiana, Mississippi, Missouri, Oklahoma, and Texas, but not in Alabama, Kentucky, North Carolina, South Carolina, Tennessee or West Virginia.<sup>195</sup>

The disparities continue when the legal methods of hunting and capture are examined.<sup>196</sup> In Arkansas, any method of harvest on private land is allowed, including hunting with dogs, trapping or snaring, but restrictions apply on public land.<sup>197</sup> However, in Georgia, any snaring of feral hogs is not permitted.<sup>198</sup> On private land in Florida, archery, firearms, dogs, and trapping are legal methods to hunt feral pigs.<sup>199</sup> In Oklahoma, feral pigs may be hunted using firearms and ar-

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184. THE WILDLIFE SOC'Y, *supra* note 152, at 6-8.

185. *Feral Swine*, OKLA. AGRIC. FOOD & FORESTRY, <http://www.ag.ok.gov/ais/feralswine.htm> (last visited Feb. 7, 2016).

186. THE WILDLIFE SOC'Y, *supra* note 152, at 6.

187. *Id.* at 8-10.

188. *Id.* at 8-10, 13-14.

189. *Id.* at 8-12.

190. *Id.*

191. *Id.* at 10.

192. *See id.* at 13-14.

193. *See id.*

194. *Id.* at 13-14.

195. *Id.* at 14.

196. *See id.* at 15-22.

197. *See id.*

198. *Id.* at 16.

199. *Id.*

chery during the day, but a permit must be obtained to hunt at night.<sup>200</sup> In Louisiana, feral pigs may be hunted or trapped after obtaining a hunting license and snared if the hunter possesses a trapping license.<sup>201</sup> In Virginia, baiting, night hunting, trapping, and hunting with dogs are permitted.<sup>202</sup>

This patchwork of state regulations on the hunting and sale of wild pigs presents a problem for effective interstate pig population control in part because there is no single federal law for managing invasive species.<sup>203</sup> Furthermore, these disparities also present an opportunity for state-by-state animal welfare legislation regarding the legal hunting and capture methods for wild pigs.<sup>204</sup> In addition, there is potential for consumer confusion or disapproval regarding the welfare of the pigs during the process.<sup>205</sup> For example, an animal rights group could lobby in a given state for a law making it illegal to sell feral pigs for slaughter thereby hampering the ability of state game agencies to effectively control the population of feral hogs by removing market incentives.

#### V. PRODUCER INCENTIVE TO INSPECT: FEDERAL VS. STATE

In general, if the producer's state has a state inspection system the non-amenable species will likely be allowed to be processed through state meat inspection.<sup>206</sup> However, this option is dependent on whether the producer's state has maintained its own meat inspection system separate from the federal system.<sup>207</sup> In order for producers to ship wild game products to another state, FDA meat inspection is another potential avenue.<sup>208</sup> In New York, producers would need to locate a processing plant that is approved by the USDA to slaughter that particular species and then pay an additional fee for the voluntary inspection.<sup>209</sup> Non-amenable meat could obtain FDA inspection because its movement in interstate commerce is governed by the FDA and applicable state laws where the meat

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200. *Id.*

201. *Id.*

202. *Id.*

203. Cassandra Burdyshaw, *Detailed Discussion of the Laws Concerning Invasive Species*, ANIMAL LEGAL & HISTORICAL CTR., MICH. STATE UNIV. (2011), <https://www.animallaw.info/article/detailed-discussion-laws-concerning-invasive-species>.

204. *See id.*

205. *See* M.G.S. McKendree et al., *Bioethics Symposium II: Current Factors Influencing Perceptions of Animals and Their Welfare*, 92 J. ANIMAL SCI. 1821, 1829 (2014).

206. RON MCKAY, STATE MEAT INSPECTION PROGRAM, USDA RURAL DEV. & OR. STATE UNIV. 5 (2008), [http://fic.oregonstate.edu/sites/default/files/mcKay\\_finalcdcleanA.pdf](http://fic.oregonstate.edu/sites/default/files/mcKay_finalcdcleanA.pdf).

207. *See* JOHNSON, MARTI & GWIN, *supra* note 117, at 5-6.

208. *Crossing State Lines*, *supra* note 96.

209. *See Slaughtering, Cutting, and Processing*, *supra* note 91.

is shipped to and/or sold.<sup>210</sup> However, some states prohibit the sale of any uninspected meat, thus FDA inspection alone may not be adequate.<sup>211</sup> To ship non-amenable meats freely in interstate commerce, producers should either obtain state inspection where available, or voluntary USDA federal inspection if the producer can locate a plant that will slaughter non-amenable species.<sup>212</sup>

## VI. POSSIBLE MARKET OR LEGISLATIVE SOLUTIONS FOR WILD GAME MEATS

The current system of meat inspection in the United States is fragmented. That divide is further highlighted when wild game meats are considered. There are a variety of avenues that could be pursued to correct the problem.

### A. Make No Changes

#### 1. Wild Game Producers

Under the current system, producers could pay for federal voluntary inspection to ship interstate to any state; they could also obtain state inspection and ship to states that recognize other state's inspections.<sup>213</sup> Likewise, obtaining a state inspection would allow producers to sell meat within their own states.<sup>214</sup> However, these options may not be available to all producers. For example, the producer's state may not have a separate state inspection system or the nearest slaughterhouse could be hundreds of miles away, making these types of inspections impossible or cost prohibitive.<sup>215</sup>

Producers could build their own processing facility. However, this requires a large volume of animals to slaughter and an established market for that type of meat product.<sup>216</sup> The on-farm slaughterhouse is subject to the same regulations as any other slaughterhouse.<sup>217</sup> A newly built slaughterhouse could opt to be federally or state inspected, or a custom-exempt processor approved by a local or state department of health.<sup>218</sup> However, meat processed at a custom exempt slaughterhouse could not be sold commercially.<sup>219</sup>

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210. *Crossing State Lines*, *supra* note 96.

211. *See id.*

212. *Id.*

213. REBECCA THISTLETHWAITE & JIM DUNLOP, *THE NEW LIVESTOCK FARMER: THE BUSINESS OF RAISING AND SELLING ETHICAL MEAT* 155 (2015).

214. *Id.* at 153.

215. *Id.* at 11.

216. *Id.* at 229.

217. *Id.*

218. *Id.*

219. 9 C.F.R. § 303.1 (2015).

Another option for producers is to utilize mobile slaughterhouses or processing units.<sup>220</sup> This allows for the slaughter of animals on their own farm so that they do not need to be transported and is often a good option for producers of “wild” animals that may not be easy to load or transport.<sup>221</sup> For example, Texas allows wild game animals to be processed partly in a mobile unit and partially in an approved slaughterhouse to complete the processing, if it is observed in the field by a USDA inspector.<sup>222</sup> While this would increase production costs, it is a viable option already used by some wild game producers.<sup>223</sup>

Finally, rather than slaughtering animals and selling the meat, producers may opt to sell live animals which buyers can then have slaughtered for their personal consumption.<sup>224</sup> This is already commonly used for amenable species, but is rare for non-amenable species.<sup>225</sup>

## 2. Slaughterhouses

Slaughterhouses have different options to choose from depending on what state they operate in and what classification of slaughterhouse they currently fall under (e.g. USDA-inspected, state inspected, custom-exempt).<sup>226</sup> First of all, the options are dependent on whether the state has chosen to maintain a separate state inspection system alongside the federal system, or if the state has turned its inspection duties over to the USDA.<sup>227</sup> If the slaughterhouse is currently a USDA inspected slaughterhouse, it could make an application to the USDA to process additional species.<sup>228</sup> If the slaughterhouse is a state inspected slaughterhouse, it would need to explore the laws and regulations in the state where it operates to determine if a state inspected slaughterhouse can, or must, provide inspection services for wild game species.<sup>229</sup>

## 3. States

States could choose to alter their relationship with the USDA in terms of

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220. See THISTLETHWAITE & DUNLOP, *supra* note 214, at 238.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 155.

225. *See id.*

226. *How Regulations are Classified*, CORNELL SMALL FARMS PROGRAM, CORNELL UNIV. (July 3, 2012, 12:55PM), <http://smallfarms.cornell.edu/2012/07/03/how-regulations-are-classified/#>.

227. *Slaughtering, Cutting, and Processing*, *supra* note 91.

228. *See id.*

229. *See id.*

whether the state operates a completely separate system of state inspections, offers a federally equivalent system of state inspections, or has already turned its inspection duties over to the federal government.<sup>230</sup> If the state has already turned over its inspection system to the federal government or maintains a federally equivalent inspection service, it could consider restarting a state inspection service for small plants to facilitate local and alternative meats. This option would likely result in increased expense to the adopting state government.

If the state maintains a separate state system, it could consider mandating all slaughterhouses be federally equivalent to encourage all slaughterhouses to be able to provide federal meat inspection that would allow products to move in interstate commerce.<sup>231</sup> This would likely be an unpopular move in states with several small processors. For these small state-inspected slaughterhouses, such a mandate would likely force many plants to shut down because the cost of becoming compliant would be too high.

Furthermore, a state with an independent state inspection system could make wild game species amenable species for the purposes of state inspection, which is already the case in some states.<sup>232</sup> This would allow wild game producers to obtain cost-free state inspections.<sup>233</sup> However, it could increase the costs to the state as the number and type of inspections increased. States could also opt to do nothing. For states with a state inspection system, they could turn their system over to the federal government.

## B. Legislative Action

### 1. Consolidate

Many have recommended that the United States consolidate all food safety functions under a single agency.<sup>234</sup> These recommendations began as soon as the FDA and USDA were split.<sup>235</sup> Experts point to the current system's arbitrary jurisdictional lines as evidence of the shortcomings of the current system.<sup>236</sup> As stated earlier in this Article, products containing over three percent amenable meat are under the jurisdiction of the USDA, despite the fact the remaining 97 percent could be non-amenable meats.<sup>237</sup> Another major difference in the two

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230. See *How Regulations are Classified*, *supra* note 226.

231. *Id.*

232. THISTLETHWAITE & DUNLOP, *supra* note 213, at 155.

233. See Luedeman & Mondou, *supra* note 87.

234. *Consolidation*, *supra* note 60, at 1346.

235. *Id.*

236. *Id.* at 1354.

237. Amann, *supra* note 83.

systems is that the USDA has continuous inspection, but the FDA does not.<sup>238</sup> Such an arbitrary distinctions could erode consumer confidence.

### *2. Make Wild Game Animals “Amenable Species” under the FMIA*

To simplify the system of wild game meat inspection in the United States, one solution is to make wild game species amenable so that USDA inspection is mandatory. This would reduce producers’ costs because mandatory inspection is provided without charge for amenable species.<sup>239</sup> However, it would increase government inspection costs, and could indirectly increase taxpayers’ costs, because of the additional species and overall increase in animal numbers and the reimbursement under the current system. Presumably, slaughterhouses would still have to apply for approval to slaughter additional species and current regulations require a complete cleaning of equipment between slaughtering different species.<sup>240</sup> There will likely be an increased likelihood of cross-contamination for slaughterhouses that slaughter multiple species.

### *3. Allow State Inspected Meats to Ship Interstate*

State inspected slaughterhouses are already required to be equivalent to federal plants.<sup>241</sup> This transition is somewhat underway for small plants. For example, Indiana, Ohio, North Dakota, and Wisconsin have joined the USDA Cooperative Interstate Shipment Program which allows some small state-inspected plants to ship their products in interstate commerce with the USDA federal inspection mark.<sup>242</sup> However, this program is only available for small and very small plants.<sup>243</sup>

### *4. Alter USDA Pre-mortem Inspection Requirements for Wild Game Animals*

The pre-mortem inspection requirement prevents hunted game from entering into the commercial food system.<sup>244</sup> When meat is wild-hunted and transported to the slaughterhouse, there could be fewer guarantees as to the safety or

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238. Raymond, *supra* note 70.

239. Luedeman & Mondou, *supra* note 87.

240. *Slaughtering, Cutting, and Processing*, *supra* note 91.

241. *How Regulations are Classified*, *supra* note 226.

242. *Indiana Creating New Opportunity for Small Meat Processors*, FSIS, USDA (Apr. 8, 2014), <http://www.fsis.usda.gov/wps/portal/fsis/newsroom/news-releases-statements-and-transcripts/news-release-archives-by-year/archive/2014/nr-040814-01>.

243. *Id.*

244. *See Slaughtering, Cutting, and Processing*, *supra* note 91.

origin of the product.<sup>245</sup>

## VII. CONCLUSION

The system of laws dealing with wildlife food processing and sales in the United States is complicated and disjointed. This begins with the notion that states may regulate wildlife through their police power and the federal government may regulate wildlife via the commerce clause. Throughout legal history, this separation of power and oversight have often been at odds. The divide widens when the current, fragmented food safety system in the United States is studied; this is especially evident when wild game meats are considered.

The status of most game meats as non-amenable species presents special legal challenges about the food safety system as a whole. To summarize, the meat of feral and domestic hogs is subject to mandatory inspection by the USDA. However, most wild game meat is under the regulation of the FDA, but may obtain voluntary inspection from the USDA for a fee. Ranchers and farmers of wild species such as deer, elk, and bison face a complicated, disjointed system for getting their products to market. They may face difficulties locating a suitable federally inspected slaughterhouse or be forced to deal with a mishmash of state laws regarding their meat products. Feral pigs, are classified as an amenable species for federal meat inspection purposes, but they are subject to various state laws as to their capture and hunting. Thus, controlling the spread of this invasive species becomes difficult at the national scale. The system of laws, both federal and state, in the United States is complex and varies tremendously for wild animal management, farming, ranching, and processing.

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245. *See id.*