

Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
Filed 6/3/2026 10:21 AM

2 Opinion Number: _____

3 Filing Date: June 3, 2026



Mark Reynolds

4 **NOS. A-1-CA-42309, A-1-CA-42310**

5 **KALVIN KIEHNE; GREG NASH;**
6 **DAVID E. JONES and PATRICIA**
7 **CAROL JONES, TRUSTEES of the**
8 **DAVID E. JONES AND PATRICIA**
9 **CAROL JONES REVOCABLE TRUST**
10 **and ROBERTA ROMERO CHIAPPONE**
11 **and FRANK A. CHIAPPONE; JENNIFER**
12 **SWENSON; CLIFFORD STUDDARD;**
13 **OAK RIDGE FARMS, LLC; and HUGH B.**
14 **MCKEEN RANCH, LLC,**

15 Plaintiffs-Appellees,

16 v.

17 **NEW MEXICO DEPARTMENT**
18 **OF GAME AND FISH and NEW MEXICO**
19 **STATE GAME COMMISSION,**

20 Defendants-Appellants.

21 **APPEAL FROM THE DISTRICT COURT OF CATRON COUNTY**
22 **Mercedes C. Murphy, District Court Judge**

23 Domenici Law Firm, P.C.
24 Pete V. Domenici, Jr.
25 Albuquerque, NM

26 for Appellees

1 Freedman Boyd Hollander & Goldberg, P.A.
2 Joseph Goldberg
3 Albuquerque, NM

4 Fayerberg Dodd, LLC
5 Christopher A. Dodd
6 Amber Fayerberg
7 Albuquerque, NM

8 for Appellant New Mexico Department of Game and Fish

9 Cuddy & McCarthy, P.C.
10 Aaron Wolf
11 Santa Fe, NM

12 for Appellant New Mexico State Game Commission

1 **OPINION**

2 **WRAY, Judge.**

3 {1} This case involves two interlocutory appeals arising from a single motion for
4 summary judgment. Plaintiffs, seven property owners, filed a complaint against
5 Defendants, the New Mexico Game Commission (the Commission) and the New
6 Mexico Department of Game and Fish (the Department), and alleged that
7 Defendants’ mismanagement of the elk population in Catron County had damaged
8 Plaintiffs’ properties. Plaintiffs asserted that Defendants’ mismanagement effected
9 an unconstitutional taking of their properties and resulted in both a public and a
10 private nuisance. The district court granted Defendants’ motion for summary
11 judgment as to Plaintiffs’ claim for an unconstitutional taking but denied summary
12 judgment as to Plaintiffs’ nuisance claim. Both parties appealed. We conclude that
13 (1) Defendants’ conduct does not support a takings claim because any occupation of
14 Plaintiffs’ properties by elk is not attributable to Defendants and no private property
15 right has been appropriated by Defendants’ management of the elk; and (2)
16 Defendants are not liable for nuisance based on harm caused by the elk, because
17 Defendants’ only challenged acts involve the discretionary implementation of the
18 elk management system, which are acts that are duly authorized by law. We therefore
19 hold that summary judgment was appropriate on all of Plaintiffs’ claims and affirm
20 in part and reverse in part.

1 **BACKGROUND**

2 {2} Plaintiffs are various property owners and ranchers in Catron County who
3 assert that property damage has resulted from conservation decisions initially made
4 by the state in the early 1900s and 1950s. After New Mexico’s native Merriam’s elk
5 were hunted to extinction, the state introduced the Rocky Mountain elk (the elk) into
6 this region and built up the population through conservation efforts. At the time the
7 litigation began, the relevant population of the elk, known as the Greater Gila Herd,
8 was estimated to be up to 27,000 animals. Although the parties dispute the specific
9 damage caused by the elk, Defendants concede that the elk have a “transient
10 presence” within Catron County, including on the private properties of Plaintiffs.

11 {3} Defendants each have responsibilities in the management of the elk. The
12 Legislature has authorized the Commission to manage protected wildlife through
13 regulation, and the Commission manages the elk through the Elk Rule, the EPLUS
14 program, and the depredation rules. *See* NMSA 1978, § 17-1-26 (1931, amended
15 2025) (delegating regulatory authority to the Commission); NMSA 1978, § 17-2-1
16 (2019) (same); 19.30.5.7(M) NMAC (defining “EPLUS” as “elk private lands use
17 system”). The Elk Rule designates the number of available hunting licenses, based
18 on population management objectives. *See* 19.31.14.8 NMAC; 19.31.14.14(E)
19 NMAC (providing for hunting licenses in particular game management units). The
20 EPLUS program is designed “[t]o acknowledge landowners who provide

1 meaningful benefit to elk and accept elk on their properties and to provide hunting
2 opportunities on private and public land to all elk hunters who wish to recreate within
3 New Mexico’s exterior boundaries.” 19.30.5.2 NMAC; *see* 19.30.5.8(A)(4) NMAC
4 (providing EPLUS hunting licenses for voluntary participants depending on “harvest
5 objectives” found in the Elk Rule). The regulations also include a depredation
6 assistance program to mitigate damage to private property caused by game animals.
7 *See* 19.30.2.8 NMAC (providing depredation rules). For its part, the Department has
8 statutory authority to issue landowner elk hunting permits, *see* NMSA 1978, § 17-
9 3-14.1 (1989), as well as delegated authority to enforce the Commission’s
10 regulations, *see* NMSA 1978, § 17-1-5 (1973) (delegating enforcement authority to
11 the Department); NMSA 1978, § 17-1-9 (1985) (same).

12 {4} Plaintiffs filed a complaint and alleged that these regulations (the regulatory
13 program) have resulted in an increase in elk population on private property that
14 amounts to an unconstitutional taking and that the implementation of the regulatory
15 program is a nuisance. Defendants moved for summary judgment and primarily
16 argued that the state cannot be liable for the actions of wild animals. In relevant part,
17 the district court granted summary judgment on the claim for an unconstitutional
18 taking but allowed the nuisance claim to proceed to trial after determining there were
19 “questions of fact as to whether elk constitute a nuisance.” Both parties applied for
20 interlocutory review, which this Court granted.

1 **DISCUSSION**

2 {5} “We review a district court’s grant of summary judgment de novo.” *City of*
3 *Albuquerque v. SMP Props., LLC*, 2021-NMSC-011, ¶ 14, 483 P.3d 566 (internal
4 quotation marks and citation omitted). Summary judgment is appropriate where
5 there is “no genuine issue as to any material fact” and the movant “is entitled to a
6 judgment as a matter of law.” Rule 1-056(C) NMRA. If “reasonable minds will not
7 differ as to an issue of material fact, a court may properly grant summary judgment.”
8 *SMP Props., LLC*, 2021-NMSC-011, ¶ 14 (alteration, internal quotation marks, and
9 citation omitted). We view “the facts in the light most favorable to the party opposing
10 summary judgment and will draw all reasonable inferences in support of a trial on
11 the merits,” and generally, view summary judgment with disfavor. *Id.* (internal
12 quotation marks and citations omitted). We begin with Plaintiffs’ constitutional
13 claim and then evaluate the claim for nuisance.

14 **I. The Constitutional Claim**

15 {6} The New Mexico Constitution guarantees that “[p]rivate property shall not be
16 taken or damaged for public use without just compensation.” N.M. Const. art. II,
17 § 20. A “taking” may be instituted through a condemnation proceeding, but “if the
18 condemning authority has taken or damaged property for public use without making
19 just compensation therefor or without initiating proceedings to do so, the property
20 owner has recourse through inverse condemnation proceedings.” *Primetime Hosp.,*

1 *Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 14, 146 N.M. 1, 206 P.3d 112
2 (alteration, internal quotation marks, and citation omitted); *see* NMSA 1978, § 42A-
3 1-29 (authorizing inverse condemnation claims); NMSA 1978, § 17-4-2 (1939)
4 (providing the Commission with eminent domain authority).¹

5 {7} “Takings jurisprudence distinguishes between physical takings and regulatory
6 takings.” *State v. Wilson*, 2021-NMSC-022, ¶ 26, 489 P.3d 925. In the present case,
7 Plaintiffs do not raise a regulatory takings claim. *See id.* ¶¶ 26, 29 (explaining that a
8 regulatory taking can occur when a regulation prohibits a property owner from
9 certain uses of their property). We therefore focus on physical takings, which “are
10 categorically compensable and occur whenever the government acquires private
11 property for a public purpose.” *Id.* (internal quotation marks and citation omitted).
12 The government effects a physical taking of a property in numerous ways, including
13 “formally” taking title to the property, taking physical possession “without acquiring
14 title,” occupying the property through indirect means, or physically interfering with
15 a property owner’s ability to use their property. *See Cedar Point Nursery v. Hassid*,
16 594 U.S. 139, 147-48 (2021); *Wilson*, 2021-NMSC-022, ¶ 25 (noting that “we turn
17 to both state and federal cases for guidance” (alteration, internal quotation marks,
18 and citation omitted)). Plaintiffs invoke the third and fourth principles and argue that

¹The district court dismissed the constitutional claim against the Department early in the proceedings after determining that the “Department does not have the power of eminent domain.” This ruling is not at issue on appeal.

1 Defendants occupied their properties through indirect means (the elk) and through a
2 physical interference with the right to use their properties (the regulatory program
3 and its implementation). We address these arguments in turn, followed by Plaintiffs’
4 suggestion that under the New Mexico Constitution, the fact that their properties
5 were damaged for public use is sufficient to warrant compensation without
6 establishing one of the forms of a physical taking.

7 **A. Taking By Indirect Means**

8 {8} Plaintiffs argue that the physical invasion of the elk, caused by Defendants’
9 implementation of the regulatory program, is a taking through indirect means.
10 Plaintiffs specifically argue that their “properties have been physically appropriated
11 as part of the [s]tate’s elk program” and the regulations “caused a physical invasion”
12 resulting in “[e]ntire herds of non[-]native elk—sometimes 500 animals at once—
13 occupy[ing Plaintiffs’] properties for months at a time.” Taking by indirect means
14 results from “the government . . . effect[ing] a physical taking when it occupies
15 property—say, by recurring flooding as a result of building a dam.” *Cedar Point*
16 *Nursery*, 594 U.S. at 148. Plaintiffs’ view is that Defendants’ management of the elk
17 caused an occupation of Plaintiffs’ property by the elk. The difficulty with this
18 argument is the well-established principle that an occupation by wildlife is not
19 attributable to the state.

1 {9} Long ago, our Supreme Court explained the state’s relationship with wild
2 animals:

3 All the authorities are to the effect that the state holds title to the wild
4 animals in trust for the people. No individual has any title to any such
5 animal until he reduces it to lawful possession. As trustee for the
6 people, the state through its Legislature may enact laws designed to
7 conserve wild life, and regulate or prohibit its taking in any reasonable
8 way it may deem necessary for the public welfare, so long as it does not
9 violate any organic law of the land.

10 *State ex rel. Sofeico v. Heffernan*, 1936-NMSC-069, ¶ 16, 41 N.M. 219, 67 P.2d 240.

11 The *Sofeico* Court explained that the Legislature created the Commission to regulate
12 game and fish and entrusted the Commission with “the duty of safeguarding this
13 property in the interest of the public.” *Id.* ¶ 26. Because the state is viewed as a
14 trustee for—and not an owner of—wildlife, other jurisdictions have determined that
15 the governments that regulate the well-being of wildlife do not have corresponding
16 liability for the actions of that wildlife. *See, e.g., Corron v. State*, 10 N.Y.S.2d 960,
17 961 (Ct. Cl. 1939) (holding that the state could not be liable for the damage caused
18 to property owners by cottontail rabbits); *Utah Native Plant Soc’y v. United States*
19 *Forest Serv.*, 923 F.3d 860, 870-71 (10th Cir. 2019) (noting “mountain goats are
20 *ferae naturae*” and no trespass by the state occurred because the state did not own
21 the animals “once it released the goats back into the wild”). At least one jurisdiction
22 has stated explicitly that an occupation by wildlife is not a physical taking by the
23 state. *See Moerman v. State*, 21 Cal. Rptr. 2d 329, 331 (Ct. App. 1993) (noting that

1 “tule elk are not instrumentalities of the state nor controlled by the state, and
2 therefore, there has been no physical taking” of private property by the state); *cf.*
3 *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1428 (10th Cir. 1986)
4 (rejecting an argument in a regulatory takings case that the protection of wild animals
5 by statute transformed the wild animals into instrumentalities of the government and
6 caused “a permanent governmental occupation”). We similarly conclude that
7 trusteeship over wild animals does not by itself result in an occupation by the state
8 if wild animals occupy private property.

9 {10} Plaintiffs focus not on Defendants’ stewardship or control over wild animals
10 but on the foreseeability of the harm to private property caused by Defendants’
11 implementation of the regulatory program. Plaintiffs contend that “the State
12 intentionally introduced a non-native elk herd, managed its population to grow
13 dramatically, and knowingly relied on private lands to sustain the herd for public
14 benefit.”² Because the private lands have features that will attract the elk, Plaintiffs
15 argue that Defendants’ management of the elk caused “deliberate” and “foreseeable”

²Plaintiffs also highlight that the elk belong to a “non-native [elk] herd.” The Legislature, however, has designated this species of elk as protected game, and the elk are regulated by the Commission. *See* NMSA 1978, § 17-2-3(A)(4) (2015) (describing as protected “all of the family Cervidae (elk and deer)”). The “non-native” distinction is therefore not relevant. *Cf. Moerman*, 21 Cal. Rptr. 2d at 459 (“Clearly it is unreasonable to argue that because the animals were once eliminated from [the region] and driven to the brink of extinction, that they are now nothing more than a public improvement or pet, under the control of the state.”).

1 damage to private property, based on our Supreme Court’s analysis in *Electro-Jet*
2 *Tool Mfg. Co. v. City of Albuquerque (Electro-Jet)*, 1992-NMSC-060, 114 N.M.
3 676, 845 P.2d 770.

4 {11} In *Electro-Jet*, the plaintiffs brought a takings claim against the city, which
5 had performed work on ditches that caused water to accumulate and damage private
6 property. *Id.* ¶¶ 2-4. The issue was whether a takings claim required a showing that
7 the government intended to cause damage while performing a public purpose. *Id.*
8 ¶¶ 12, 18. The Court determined that a plaintiff must show at least that the
9 government took “a calculated risk that damage to private property may occur,”
10 which the Court defined as “knowledge of a substantial probability” of harm to
11 property. *Id.* ¶ 23 (internal quotation marks and citation omitted). In the present case,
12 Plaintiffs apply the *Electro-Jet* test and frame the necessary “calculated risk” as
13 Defendants’ introduction of the elk and encouragement of the increase in herd size
14 in an area that abutted private lands that elk might find attractive. *See id.* ¶ 23.

15 {12} In our view, the *Electro-Jet* test was developed to resolve a different question
16 than is posed by this appeal. The *Electro-Jet* Court considered how culpable a
17 governmental actor must be in order for a property owner to establish a claim for an
18 unconstitutional taking. *Id.* ¶ 22. The issue was not whether the city’s work on the
19 ditches caused a physical taking by water occupying private property. The harm in
20 *Electro-Jet* was directly caused by the city—an “occupation” by the water caused

1 by the work on the ditches. *Id.* ¶¶ 2-3; *see also United States v. Cress*, 243 U.S. 316,
2 327 (1917) (holding that the occupation of land by permanent backwater overflow
3 due to the government’s damming of a river was an unconstitutional taking). In the
4 present case, the elk occupied the properties.

5 {13} As we have explained, the occupation of the elk—even though the state
6 reintroduced the elk and Defendants manage the elk population—is not generally
7 attributable to Defendants because wildlife and the natural condition of the land is
8 generally out of the government’s control. *See Moerman*, 21 Cal. Rptr.2d at 333
9 (“The majority of courts that have considered the question of whether the
10 government owes compensation for damage to property caused by protected wildlife
11 have held that the government does not.”). Thus, Plaintiffs have not established a
12 cause of harm, or an occupation, that is attributable to Defendants. We therefore do
13 not reach the consideration resolved by *Electro-Jet*—whether the government had
14 knowledge of a substantial probability of harm. 1992-NMSC-060, ¶ 22. For these
15 reasons, we conclude that Plaintiff did not establish a taking by indirect means.

16 **B. Physical Interference with Property Rights**

17 {14} Alternatively, a conservation regulation may result in a taking that demands
18 compensation if government action infringes on a fundamental property right. *See*
19 *Allen v. McClellan*, 1965-NMSC-094, ¶ 10, 75 N.M. 400, 405 P.2d 405 (holding that
20 the designation of the plaintiff’s private property as a game refuge was a taking that

1 required compensation because the plaintiff was deprived of the right to hunt game
2 on his own property). In *Cedar Point Nursery*, the Supreme Court of the United
3 States considered a regulation that required employers to allow union organizers
4 onto their property for up to three hours per day, 120 days per year. 594 U.S. at 143.
5 The Court held that the regulation infringed on employers’ rights to exclude persons
6 from their properties and constituted a physical taking, *id.* at 149-50, and explained
7 “that government-authorized invasions of property—whether by plane, boat, cable,
8 or beachcomber—are physical takings requiring just compensation,” *id.* at 152.
9 Thus, an appropriation of property rights is not always about who or what invades
10 private property—including wild animals such as elk—but may instead be about
11 how the private property owner is impacted by the appropriation.

12 {15} Along these lines, Plaintiffs argue that Defendants’ regulatory management
13 and control of the elk herd has deprived them “of the essential right to control access
14 to their land.” We disagree that Defendants have appropriated Plaintiffs’ property
15 rights to the extent required to establish a physical taking. *Cf. id.* at 162 (determining
16 that a regulation that “grants a formal entitlement to physically invade the growers’
17 land” constituted a “per se physical taking”); *State ex rel. State Highway Comm’n v.*
18 *Mauney*, 1966-NMSC-035, ¶¶ 1, 7-9, 18-19, 24, 76 N.M. 36, 411 P.2d 1009
19 (rejecting a takings claim that was based on diminished traffic passing a landowner’s

1 business and changed the access route to the property, because the road project did
2 not cause total deprivation of access).

3 {16} In the present case the regulations do not require elk to be on private property
4 or deny a property owner the right to exclude them—the regulations only limit how
5 a property owner can hunt, harm, or remove them. The Elk Rule regulates how and
6 when certain people can obtain hunting licenses, which the Department generally
7 uses to manage the population of the elk. *See* 19.31.14.14 NMAC (dictating the elk
8 management goals and number of public licenses permitted by region); 19.30.5.8
9 NMAC (permitting additional hunting licenses for qualified property owners);
10 19.31.14.13 NMAC (reserving for the Department the authority to authorize
11 population management hunts). EPLUS participation is completely voluntary, and a
12 property owner must enroll, apply, and be accepted in order to obtain the benefits.
13 *See* 19.30.5.8 NMAC. In addition to other requirements, for a landowner to obtain
14 and maintain a landowner hunting license under the EPLUS program (the “elk
15 private lands use system”), they must (1) agree “to accept elk on their property”; (2)
16 “demonstrate” that the private lands have regular elk use and “provide meaningful
17 benefits to elk”; and (3) subject to some exceptions, not benefit or make requests
18 from the Department’s depredation assistance program. *See* 19.30.5.8(A), (C)(9)
19 NMAC. Alternatively, to receive depredation assistance, landowners are required to
20 contact the Department when depredation occurs and to use intervention methods

1 authorized by the Department that are “fiscally responsible, reasonable, effective,
2 and, if practical, long-term solutions to depredation on private lands” with
3 specifically annotated exceptions. *See* 19.30.2.8 NMAC.

4 {17} None of these regulations generally require or authorize elk on private
5 properties or prevent property owners from building fences to keep them out. *See*
6 NMSA 1978, § 77-16-1 (1909) (requiring that “[e]very gardener, farmer, planter or
7 other person having lands or crops that would be injured by trespassing animals,
8 shall make a sufficient fence” to prevent the trespass).³ Though Plaintiffs’ right to
9 control access has been impacted by the elk, the regulatory program creates no
10 entitlement for any physical invasion of private property and therefore, does not
11 deprive Plaintiffs of any property right. *See Cedar Point Nursery*, 594 U.S. at 162;
12 *see also SMP Props., LLC*, 2021-NMSC-011, ¶¶ 15-16 (explaining that a court “may
13 decide as a matter of law that there has been no taking or that as a matter of law the

³Plaintiffs contend that they have built “sufficient” fences to satisfy their obligations under Section 77-16-1, but the elk have destroyed the fences. The parties dispute whether Plaintiffs’ fences, built to the specifications of NMSA 1978, § 77-16-4 (1909), are “sufficient” fences for the purpose of Section 77-16-1, but we need not resolve this dispute. Regardless of whether Plaintiffs’ fences could be considered “sufficient” to keep out elk, *see Wild Horse Observers Ass’n, Inc. v. N.M. Livestock Bd.*, 2022-NMCA-061, ¶ 19, 519 P.3d 74 (“[I]t is a landowner’s duty to build a fence sufficient to prevent wild [animals] from entry onto [their] private property.”), the analysis must focus on whether the regulatory program prohibits Plaintiffs from fencing out the elk, which it does not.

1 evidence does not establish substantial interference” with a property right when no
2 factual questions need to be resolved).

3 **C. The New Mexico Constitution**

4 {18} As we have set forth, the New Mexico Constitution mandates that “(p)ivate
5 property shall not be taken or damaged for public use without just compensation.”
6 N.M. Const. art. II, § 20. To the extent that Plaintiffs argue that they need not show
7 a particular taking simply because their property was “damaged for public use,” we
8 disagree. To establish a physical taking in the present case, Plaintiffs had to show
9 that (1) the government caused harm that “affect[s] some right or interest which the
10 landowner enjoys and which is not shared or enjoyed by the public generally,” *Pub.*
11 *Serv. Co. of N.M. v. Catron*, 1982-NMSC-050, ¶ 7, 98 N.M. 134, 646 P.2d 561; (2)
12 the government took at least a calculated risk that harm would result, *Electro-Jet*,
13 1992-NMSC-060, ¶ 22; and (3) the taking or harm “invade[d] some substantive or
14 intrinsic aspect of a landowner’s right to the use and enjoyment of [their] property,”
15 *Santa Fe Pac. Tr., Inc. v. City of Albuquerque*, 2014-NMCA-093, ¶ 30, 335 P.3d
16 232. As we have explained, Defendants’ implementation of the regulatory program
17 does not meet these criteria.

18 {19} For these reasons, we affirm the district court’s grant of summary judgment
19 on Plaintiffs’ constitutional takings claim.

1 **II. The Nuisance Claim**

2 {20} Defendants separately appeal the district court’s denial of summary judgment
3 on Plaintiffs’ nuisance claim. Whether alleged as public or private, nuisance claims
4 generally involve unreasonable or negligent nontrespassory invasions of property
5 rights. *See City of Sunland Park v. Harris News, Inc.*, 2005-NMCA-128, ¶ 40, 138
6 N.M. 588, 124 P.3d 566 (describing a public nuisance as “an unreasonable
7 interference with a right common to the general public” (internal quotation marks
8 and citation omitted)); *id.* ¶ 41 (“In contrast, a private nuisance is distinguished by
9 the interest invaded; it is an unreasonable interference with the private use and
10 enjoyment of land.”). NMSA 1978, Section 30-8-1 (1963) describes a public
11 nuisance as “knowingly creating, performing or maintaining anything affecting any
12 number of citizens without lawful authority which is either . . . injurious to public
13 health, safety, morals or welfare; or . . . interferes with the exercise and enjoyment
14 of public rights, including the right to use public property.” *See also Titus v. City of*
15 *Albuquerque*, 2011-NMCA-038, ¶ 18, 149 N.M. 556, 252 P.3d 780 (noting that
16 Section 30-8-1 “encompass[es] the common law prohibitions” that bar public
17 nuisances). Liability for a private nuisance, on the other hand, arises from an actor’s
18 conduct that “is a legal cause of an invasion of another’s interest in the private use
19 and enjoyment of the land, and the invasion is either (a) intentional and
20 unreasonable, or (b) unintentional and otherwise actionable under the rules

1 controlling liability for negligent or reckless conduct, or for abnormally dangerous
2 conditions or activities.” *Scott v. Jordan*, 1983-NMCA-022, ¶ 12, 99 N.M. 567, 661
3 P.2d 59.

4 {21} Public and private nuisances can be nuisances per se or nuisances in fact, and
5 Plaintiffs restrict their claims to the latter. “A nuisance in fact is described as an
6 activity or structure which is not a nuisance by nature, but which becomes so because
7 of such factors as surroundings, locality, and the manner in which it is conducted or
8 managed.” *City of Sunland Park*, 2005-NMCA-128, ¶ 40 (internal quotation marks
9 and citation omitted). The district court denied summary judgment after determining
10 that “there are questions of fact as to whether elk constitute a nuisance.” Plaintiffs
11 maintain that “[t]he factual record establishes, at a minimum, a question of fact as to
12 whether [Defendants have] carried out [their] statutory and regulatory
13 responsibilities in a manner that reasonably protects private property.”

14 {22} Defendants argue that as a matter of law, the conduct cannot have caused a
15 nuisance in fact because (1) “no liability may attach to the State for damage caused
16 by wild” animals such as elk; and (2) “Plaintiffs’ nuisance claims [are] mandated by
17 statute and carried out through duly promulgated regulations,” which cannot be
18 considered “wrongful or unreasonable conduct.” Defendants’ arguments raise
19 questions not of fact, but of law—what are the contours of a nuisance claim against
20 a state agency, involving the implementation of policy that attempts to regulate an

1 unpredictable natural environment. We therefore examine in greater detail the law
2 of nuisance.

3 {23} The concept of nuisance is generally defined by the resulting harm, rather than
4 the act that caused the harm. *See Moreno v. Marrs*, 1984-NMCA-077, ¶ 27, 102
5 N.M. 373, 695 P.2d 1322 (explaining that the law of nuisance “has reference to the
6 interests invaded, to the damage or harm inflicted, and not to any particular kind of
7 act or omission which has led to the invasion” (internal quotation marks and citation
8 omitted), *abrogated on other grounds by Baldonado v. El Paso Nat. Gas Co.*, 2008-
9 NMCA-010, 143 N.M. 297, 176 P.3d 286. This feature distinguishes a nuisance
10 claim from a negligence claim, because “[l]iability for negligence is based on want
11 of care, while liability for nuisance exists regardless of the degree of care exercised
12 to avoid injury.” *Wofford v. Rudick*, 1957-NMSC-098, ¶ 9, 63 N.M. 307, 318 P.2d
13 605; *Padilla v. Lawrence*, 1984-NMCA-064, ¶ 11, 101 N.M. 556, 685 P.2d 964
14 (same). The harmful act must be one that “falls into the usual categories of tort
15 liability,” but that categorization is relevant only to whether the act is “of a kind that
16 subjects [the defendant] to liability.” *Moreno*, 1984-NMCA-077, ¶ 28 (internal
17 quotation marks and citation omitted). A “nuisance” therefore exists if the harm is
18 caused, but an actor is generally only accountable if a negligent or intentional act
19 was a cause of that harm. *See id.*; *see also* Restatement (Second) of Torts § 824
20 (1979) (“The conduct necessary to make the actor liable for either a public or a

1 private nuisance may consist of (a) an act; or (b) a failure to act under circumstances
2 in which the actor is under a duty to take positive action to prevent or abate the
3 interference with the public interest or the invasion of the private interest.”).

4 {24} Because the common feature of all nuisance is a nontrespassory harm to
5 property interests, nuisance disputes arise among different types of parties—
6 including private landowners, individuals, businesses, and the government. *See, e.g.,*
7 *Espinosa v. Roswell Tower, Inc.*, 1996-NMCA-006, ¶ 3, 121 N.M. 306, 910 P.2d
8 940 (involving a state agency that claimed a nuisance against a private business for
9 damage caused by violations of asbestos removal regulations); *Town of Clayton v.*
10 *Mayfield*, 1971-NMSC-061, ¶ 1, 82 N.M. 596, 485 P.2d 352 (involving a city’s
11 action against private individuals for injunctive relief for the operation of a junk
12 yard). And nuisance claims have been brought against the government. *See, e.g.,*
13 *Gonzalez v. Whitaker*, 1982-NMCA-050, ¶ 1, 97 N.M. 710, 643 P.2d 274 (involving
14 suit by private parties against an agency to stop the issuance of a permit to a third
15 party, alleging public and private nuisance); *Titus*, 2011-NMCA-038, ¶ 14
16 (involving a citizen’s challenge to the government’s designation of particular acts as
17 a nuisance); *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*
18 (*Los Ranchos III*), 1994-NMSC-126, ¶ 11, 119 N.M. 150, 889 P.2d 185 (involving

1 an action against a municipality to stop a public works project as a nuisance).⁴ We
2 find the analysis in *Los Ranchos III* to be helpful in our current context.

3 {25} In *Los Ranchos III*, our Supreme Court considered whether a permitted and
4 approved public works project, that was authorized by law, could be a nuisance. The
5 petitioner, a village government, asserted a claim for public nuisance against the city,
6 based on the anticipated construction of a bridge, and requested “injunctive relief to
7 halt” the project. *Id.* The bridge plans were created by various government groups
8 that had received approvals and permits from multiple state and federal entities, as
9 well as the voters. *Id.* ¶¶ 3-7, 10. Many of the permits, agreements, and approvals
10 had already been unsuccessfully challenged in various courts. *Id.* ¶¶ 6, 8, 10.
11 Although the Court rejected the city’s position that the exercise of “municipal
12 discretion is beyond the control of the courts,” *id.* ¶ 14 (internal quotation marks
13 omitted), because judicial review “is implicit and inherent in the common law,” *id.*
14 ¶ 15, the Court nevertheless acknowledged that judicial review is subject to “scope
15 and timing” limits, *id.* ¶ 16. To that end, the Court explained that to address conflicts
16 between public rights, public needs, and other interests, “the municipality can

⁴ This Court had twice previously considered this dispute, in *City of Albuquerque v. State ex rel. Los Ranchos de Albuquerque (Los Ranchos I)*, 1991-NMCA-015, 111 N.M. 608, 808 P.2d 58, and *State ex rel. Los Ranchos de Albuquerque v. City of Albuquerque (Los Ranchos II)*, 1993-NMCA-147, 119 N.M. 169, 889 P.2d 204, before our Supreme Court took up the issues raised in *Los Ranchos III*.

1 exercise its discretionary authority to adopt a public policy whose objective is the
2 greatest public good.” *Id.* ¶ 18. The city had the discretion to build the bridge and
3 was “most qualified to evaluate engineering problems, traffic patterns, and all the
4 other subtleties involved in such a project.” *Id.* ¶ 20. Therefore, when reviewing
5 those types of decisions, the “courts will not interfere with the exercise of municipal
6 powers that are strictly discretionary,” provided that “the decisions remain within
7 lawful bounds.” *Id.* ¶ 20. The Court explained the limitations of judicial review: “As
8 long as the municipality acts within its sphere of discretion we will not inquire into
9 the wisdom of the act even if it is an economic mistake, a municipal extravagance,
10 and an improper burden upon the taxpayers, as so often urged in contests of this
11 nature.” *Id.* ¶ 22 (internal quotation marks and citation omitted).

12 {26} The next question was whether the building of the bridge could “be abated as
13 a public nuisance” when the project had been “duly authorized by law.” *Id.* ¶ 24. The
14 Court broke this inquiry into two relevant parts: whether the bridge had been duly
15 authorized and whether such authorization then meant that the city had an absolute
16 defense against a nuisance claim. *Id.* ¶¶ 24, 63. The Court first explained that “duly
17 authorized by law” meant receiving all of the required approvals “pertinent to that
18 particular project,” *id.*, and that whether a project was “duly authorized by law” was
19 a factual question, *id.* ¶¶ 33-34. The Court next turned to how the principles of
20 nuisance interacted with a duly authorized public works project. *See id.* ¶¶ 50-68.

1 “A public works project, unlike a private construction project, is a product of the
2 exercise of the legislative power” and carries with it “[t]he presumption . . . that the
3 project is publicly scrutinized and balanced against all interests, public and private,
4 upon which it will have impact.” *Id.* ¶ 57. The analysis then turns to whether a “duly
5 authorized”⁵ public works project could be determined to be a public nuisance in
6 fact. *Id.* ¶¶ 58, 62.

7 {27} The *Los Ranchos III* Court came to two answers. First, “due authorization” is
8 an absolute defense to a claim for public nuisance in fact if the claim is for
9 anticipatory nuisance—the nuisance claim is brought before the public works project
10 has begun. *Id.* ¶ 63. This is because if the bridge was “found to be duly authorized,”
11 a presumption would be supported “that the balancing of interests by the [c]ity was
12 thorough and fair.” *Id.* ¶ 67. To do otherwise would require the courts to “pretend
13 that our knowledge of bridge building is superior” to the experts that had “debated
14 and collaborated on this project.” *Id.* Second, “due authorization” is a qualified
15 defense to a claim for public nuisance in fact if the claim is brought when “the public
16 works project is in existence and poses a present nuisance.” *Id.* ¶ 63. In this second

⁵According to Section 30-8-1, “[a] public nuisance consists of knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority.” The *Los Ranchos III* Court explained that “[a]s this statute relates to public works projects,” the term “due authorization” was synonymous with the term “lawful authority,” which is the converse of an action “without lawful authority.” 1994-NMSC-126, ¶ 62.

1 context, the courts might “decide that despite the defense the project is still a
2 nuisance,” *id.*, because the operation or maintenance of the public works project
3 causes harm or damage, *see id.* ¶ 55. For example, even if authorized to be
4 constructed, the construction, maintenance, or operation of a sewage treatment
5 facility or fencing around a public area—or the construction of a bridge—could
6 create a nuisance that resulted in damage. *See id.* (citing *State ex rel. N.M. Water*
7 *Quality Control Comm’n v. Hobbs*, 1974-NMSC-064, 86 N.M. 444, 525 P.2d 371
8 (involving a sewage treatment facility) and *Barker v. City of Santa Fe*, 1943-NMSC-
9 012, 47 N.M. 85, 136 P.2d 480 (involving fencing)).

10 {28} We see no reason to distinguish a public works project performed by a
11 municipality from a wildlife management project performed by state agencies. Both
12 are authorized by law to conduct the projects. *Compare Los Ranchos III*, 1994-
13 NMSC-126, ¶¶ 24-25 (describing the municipality’s authority), *with* NMSA 1978,
14 § 17-1-1 (1921); § 17-1-26 (establishing the Commission’s authority to regulate);
15 §§ 17-1-5, -9 (delegating authority from the Commission to the Department), *and*
16 § 17-3-14.1 (providing for the Department’s authority to issue landowner elk
17 hunting permits). A municipality uses its discretionary authority to balance the
18 public good with other interests. *Los Ranchos III*, 1994-NMSC-126, ¶¶ 18-20, In the
19 same way, the Legislature declares public policy and establishes the basic standards
20 for carrying out the law, and state agencies, through a limited delegation of

1 legislative power, determine what acts are necessary to conform to the basic
2 standards established by the Legislature and to enforce legislative policy. *Cf. State*
3 *ex rel. State Park & Recreation Comm’n v. N.M. State Auth.*, 1966-NMSC-033, ¶ 27,
4 76 N.M. 1, 411 P.2d 984 (considering the delegation of authority from the
5 Legislature to agencies); *City of Albuquerque v. N.M. Pub. Regul. Comm’n*, 2003-
6 NMSC-028, ¶ 16, 134 N.M. 472, 79 P.3d 297 (“[A]n act of an administrative agency
7 which is authorized by the Legislature has the force and effect of law.” (alteration,
8 internal quotation marks and citation omitted)). Like a municipality’s permitting
9 decision, the exercise of agency discretion includes fact-finding determinations and
10 enforcement decisions, which are subject to a highly deferential judicial review. *See*
11 *Duke City Lumber Co. v. N.M. Env’t Improvement Bd.*, 1984-NMSC-042, ¶¶ 7-14,
12 101 N.M. 291, 681 P.2d 717 (establishing the standard of review for agency
13 decisions); *cf. State ex rel. Norvell v. Arizona Pub. Serv. Co.*, 1973-NMSC-051, ¶ 35,
14 85 N.M. 165, 510 P.2d 98 (considering the primary jurisdiction doctrine and noting
15 that a court “should exercise its discretion with an understanding that the
16 [L]egislature has created the agency in order to afford a systematic method of fact[-
17]finding and policymaking and that the agency’s jurisdiction should be given priority
18 in the absence of a valid reason for judicial intervention” (internal quotation marks
19 and citation omitted)). In this way, the relationship between the Legislature’s policy-
20 making and Defendants’ fact-finding mirrors the authority of a municipality “to

1 adopt a public policy whose objective is the greatest public good” in circumstances
2 “[w]hen public rights and needs come in conflict with other interests.” *See Los*
3 *Ranchos III*, 1994-NMSC-126, ¶ 18. We therefore apply the *Los Ranchos III*
4 governing principles to Plaintiffs’ nuisance claim.⁶ But to do this, we must detour to
5 define the parameters of that claim.

6 {29} Plaintiffs argue that “the nuisance is the State’s ongoing management of the
7 elk herds and refusal to mitigate the foreseeable consequences of those policies that
8 have resulted in an unreasonable invasion of Landowner[s’] private use and
9 enjoyment of the land.” At one end of this nuisance spectrum, Plaintiffs disclaim any
10 notion that the elk themselves are the nuisance, and at the other end, they also deny
11 that the nuisance is the regulations or policies that support them. Instead, Plaintiffs
12 focus on Defendants’ implementation of the regulatory program by way of

⁶*Los Ranchos III*, 1994-NMSC-126, ¶ 62, involved a public nuisance, and in the present case, Plaintiffs assert both public and private nuisance claims. In the present context, the distinction between the harms has no impact on our analysis. The distinction between a public and private nuisance lies primarily in the right impacted. A public nuisance is “described as an unreasonable interference with a right common to the general public” and a private nuisance “is an unreasonable interference with the private use and enjoyment of land.” *See City of Sunland Park*, 2005-NMCA-128, ¶¶ 40-41 (distinguishing between a private and public nuisance based on the kind of interest invaded and number of people impacted). Plaintiffs’ nuisance claims do not turn on distinctions between differing interests, and so we do not separately address public and private nuisance. But we caution that the distinction may play a role in some cases.

1 discretionary decisions—decisions “below policy level” that are not dictated by law
2 but that are within Defendants’ discretion to enforce legislative policy.

3 {30} Those discretionary decisions, as has been noted, stem from multiple statutes
4 and regulations. Defendants have the authority to regulate wildlife, issue licenses for
5 landowner permits to hunt elk, to authorize population management hunts, and to
6 manage the depredation program. *See* § 17-1-26 (providing for the Commission’s
7 authority to make rules and regulations and establish services that it “deem[s]
8 necessary to carry out all the provisions and purposes of this act, and all other acts
9 relating to game and fish”); § 17-3-14.1 (providing landowner permits); 19.31.14.13
10 NMAC (allowing for the authorization of population management hunts);
11 19.31.14.6 NMAC (providing for public licenses); 19.30.5.8 NMAC (providing
12 EPLUS licenses); 19.30.2.8 NMAC (providing procedures for the depredation
13 program). The Department, with “the verbal concurrence of the” Commission
14 chairperson or a designee, “may adjust the number of licenses or authorizations up
15 or down by no more than twenty percent to address significant changes in population
16 levels or to address critical department management needs,” and authorizations or
17 licenses in a particular area “may be adjusted beyond this amount as necessary to
18 meet management objectives.” *See* 19.31.14.8 NMAC. Plaintiffs do not assert that
19 Defendants have acted contrary to these regulations and policies. Instead, Plaintiffs
20 argue that Defendants’ refusal to use these discretionary tools to reduce the elk

1 population constitutes a nuisance in fact, and they seek abatement of that nuisance
2 in the form of injunctive relief.⁷ Defendants response is two-fold: (1) Defendants’
3 conduct is duly authorized by law because Plaintiffs’ core argument arises from
4 policy-based decisions regarding the elk population, and (2) regardless, a claim for
5 nuisance cannot be established based on harm caused by wildlife. We agree, to an
6 extent, with Defendants.

7 {31} Plaintiffs’ claimed nuisance resembles the anticipatory nuisance described in
8 *Los Ranchos III*. As discussed, although due authorization to perform a project is an
9 absolute defense to a claim that a permitted (or authorized) project will be a nuisance

⁷ A civil nuisance claim is a tort. *See Padilla*, 1984-NMCA-064, ¶ 9 (“[Nuisance] is a civil wrong based on a disturbance of rights in land.”); Restatement (Second) of Torts § 821A (1979) (defining types of nuisances); *cf. Moreno*, 1984-NMCA-077, ¶ 27 (“Nuisances are types of damage—the invasion of [public and private interests], by conduct which is tortious because it falls into the usual categories of tort liability.”). Under the Tort Claims Act, the state is immune for any tort seeking monetary damages unless immunity is waived. *See* NMSA 1978, § 41-4-4 (2001) (“A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except” where waived by statute). In response to Defendants’ earlier-filed motion to dismiss, Plaintiffs argued in the district court that parties may recover injunctive relief against the state as set forth in NMSA 1978, § 41-4-17(A) (1982). The district court denied the motion to dismiss, and the question of immunity is not before us in this interlocutory appeal relating to the later summary judgment motions, nor have the parties addressed the appropriateness of injunctive relief under these circumstances. *See Insure N.M., LLC v. McGonigle*, 2000-NMCA-018, ¶ 6, 128 N.M. 611, 995 P.2d 1053 (identifying the factors to be balanced when determining whether to grant injunctive relief); *see also Fernandez v. Farmers Ins. Co. of Ariz.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 (“The general rule is that cases are not authority for propositions not considered.” (internal quotation marks and citation omitted)).

1 in the future, due authorization is only a qualified defense for a present nuisance. *Id.*
2 ¶ 63. In the bridge context, after the permits are issued, a nuisance claim could arise
3 later from ongoing acts that were necessary to construct or maintain the bridge. *Id.*
4 While the permit approvals of the bridge can be separated from the construction or
5 maintenance, nothing in this case sets the regulatory program itself apart from the
6 discretionary decisions necessary to implement that regulatory program. Plaintiffs’
7 assertion that the nuisance is the intentional or negligent implementation of the
8 discretionary aspects of the regulatory program is akin to saying that the *permit* in
9 *Los Ranchos III* is the nuisance. There, before it was built the permitted bridge could
10 only be measured “by its compliance with the approval process itself.” *Id.* ¶ 67. So
11 too, the implementation of the regulatory program can only be measured by
12 compliance with the regulations, authorizing statutes, and policies. For this reason,
13 the ongoing implementation of the regulatory program is akin to ongoing permit
14 approvals for the bridge—as if each step of building and maintenance of the bridge
15 were permitted and approved as it happened. The distinction made by the *Los*
16 *Ranchos III* Court between anticipatory and present nuisance has no role to play
17 here. Defendants were duly authorized to make discretionary implementation
18 decisions and no other separate act or omission of Defendants’ caused harm. As a
19 result, the absolute defense established in *Los Ranchos III* applies to Defendants’
20 acts and omissions in implementing the regulatory program.

1 {32} Plaintiffs nevertheless attempt to impute the damage caused by the elk to
2 Defendants and note that in other circumstances, nuisance claims have been
3 established even though the harm was caused by wildlife, referring primarily to cases
4 in which cattle operations have been established to be nuisances based, in part, on
5 harm caused by insects that were attracted by the cattle operation. *See, e.g., Padilla,*
6 *1984-NMCA-064, ¶¶ 4, 6; Scott, 1983-NMCA-022, ¶ 26.* In these cases, however,
7 the nuisance claims were brought against private actors who ran cattle operations
8 and not government agencies responsible for overseeing cattle operations. *See*
9 *Padilla, 1984-NMCA-064, ¶ 1; Scott, 1983-NMCA-022, ¶¶ 4-6; Moreno, 1984-*
10 *NMCA-077, ¶¶ 28-29* (explaining that accountability for a nuisance requires harm
11 “by conduct” that is “of a kind that subjects [the defendant] to liability” (internal
12 quotation marks and citation omitted)). While these cases do not discuss permitting,
13 analogy to *Los Ranchos III* is perhaps helpful. *See 1994-NMSC-126.* The cattle
14 operators’ acts were duly authorized by law to the extent that they were allowed to
15 operate by the government, but after receiving permission, the permit afforded only
16 a qualified defense for their ongoing operations and any future nuisance. *Id.* ¶ 63. In
17 the present case, the challenged act or failure to act is Defendants’ discretionary
18 implementation of the regulatory program. No other act—like building the bridge or
19 running a cattle operation—followed Defendants’ acts that were duly authorized by
20 law. Instead, as Plaintiffs argue, “the elk are the instrument” that caused the harm.

1 The harm caused by the elk “is not of a kind that subjects [Defendants] to liability”
2 for nuisance. *See Moreno*, 1984-NMCA-077, ¶ 28 (internal quotation marks and
3 citation omitted); *see also* Restatement (Second) of Torts § 824 (1979) (requiring an
4 act or omission “to make the actor liable” for nuisance).

5 {33} The parties in the present case dispute the proper size of the elk population in
6 Catron County. Plaintiffs want the courts to compel Defendants to use regulatory
7 tools so that there are fewer elk. But Defendants have engaged in legislatively-
8 approved policy-making and fact-finding to manage the elk population. *Cf.*
9 *Gonzalez*, 1982-NMCA-050, ¶ 8 (noting in the context of a primary jurisdiction
10 analysis that the balance between the courts and administrative agencies “depends
11 on whether the questions presented are exclusively factual issues within the peculiar
12 expertise of the commission or if statutory interpretation or issues of law are
13 significant” (internal quotation marks and citation omitted)). The relief sought by
14 Plaintiffs—the authorization of population management hunts—involves conditions
15 and terms that would cast the judiciary as a semi-permanent and ill-suited
16 administrator in the implementation of the regulatory program. *See Los Ranchos III*,
17 1994-NMSC-126, ¶ 22 (cautioning against placing “courts in the untenable role of
18 administration rather than adjudication”).

19 {34} The opportunity to challenge the rules and regulations of the Commission
20 “concerning hunting or fishing” is made available by statute. NMSA 1978, § 17-1-

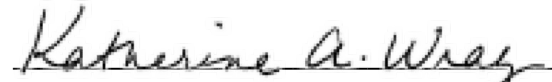
1 27 (1921) (explaining that a petition challenging any “rule or regulation promulgated
2 by the commission” requires the commission to “grant a public hearing” and “give
3 full opportunity for all persons to be heard on the point in controversy”); *see also*
4 19.30.17.10 NMAC (describing the opportunity for written comment about
5 proposed rules); 19.30.17.11 NMAC (describing the procedural rules for public
6 hearings regarding rule making); 19.31.14.4 NMAC (providing notice that the Elk
7 Rule will expire in 2027); Rule 1-075 NMRA (describing the appeal process for
8 certain agency decisions). And, to the extent that the law allows for discretionary
9 action or inaction that harms the public—it is for the Legislature to address a policy
10 imbalance and narrow or delineate the scope of an agency’s authority. *See State ex*
11 *rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 22, 125 N.M. 343, 961 P.2d 768
12 (“Generally, the Legislature, not the administrative agency, declares the policy and
13 establishes primary standards to which the agency must conform” and “[t]he
14 administrative agency’s discretion may not justify altering, modifying or extending
15 the reach of a law created by the Legislature.”); *id.* ¶ 41 (explaining that the
16 Legislature “sets boundaries for the agency’s exercise of the authority granted by the
17 Legislature”). Thus, relief for the harm alleged by Plaintiffs is not foreclosed but
18 must be made by an appropriate challenge to the Commission’s rules and regulations
19 or by obtaining a change in policy effectuated by the Legislature.

1 {35} For these reasons, we conclude that Defendants were entitled to summary
2 judgment on Plaintiffs' claim for nuisance. The district court's denial of summary
3 judgment on this claim is therefore reversed.

4 **CONCLUSION**

5 {36} We affirm in part and reverse in part, and we remand for proceedings
6 consistent with this opinion.

7 {37} **IT IS SO ORDERED.**

8 
9 **KATHERINE A. WRAY, Judge**

10 **WE CONCUR:**

11 
12 **JENNIFER L. ATTREP, Judge**

13 
14 **GERALD E. BACA, Judge**