

Utah Wildlife Board Meeting

August 22, 2024, Eccles Wildlife Education Center
1157 South Waterfowl Way, Farmington, Utah

The meeting can be viewed live at <https://youtube.com/live/VXIJJaGG7C3g>

Thursday, August 22, 2024 – 9:30 am

1. Approval of Agenda **ACTION**
– Randy Dearth, Chairman

2. CWMU Over-objective Permit Request **ACTION**
– Chad Wilson, Private Lands/Public Wildlife Coordinator

3. Administrative Rule Hearing – Kimberly CWMU – 10:00 am Time Certain **ACTION**
– Randy Dearth, Chairman



SPENCER J. COX
Governor

DIEDRE M. HENDERSON
Lieutenant Governor

State of Utah

DEPARTMENT OF NATURAL RESOURCES

JOEL FERRY
Executive Director

Division of Wildlife Resources

J. SHIRLEY
Division Director

July 17, 2024

Michael Labrum
Attorney at Law
Labrum Law and Investment Group
michael@labrumgroup.com

Re: Kimberly CWMU – Wildlife Board Appeal

Dear Mr. Labrum,

An appeal hearing has been tentatively scheduled for you with the Utah Wildlife Board on **Thursday, August 22, 2024** to present your case regarding the denial of the Kimberly CWMU variance request. The meeting will be held at the Eccles Wildlife Education Center at Farmington Bay, 1157 S. Waterfowl Way, Farmington, UT 84025. Your case will be heard by the Wildlife Board and is scheduled to begin at 10:00 am.

Please be prepared to present your appeal at that time. Mr. Kyle Maynard, assistant Attorney General, will be in attendance representing the state of Utah. Please contact me directly at 801-450-3093 if you are unable to attend this formal hearing.

Please feel free to call with any questions, concerns or requests you may have regarding this hearing. Thank you.

Sincerely,

Staci

Staci Coons
Coordinator, Utah Wildlife Board

cc. Kyle Maynard, Assistant Attorney General
Randy Dearth, Chair, Utah Wildlife Board
Charles Lyons, Assistant Attorney General
Gary Wight, Assistant Attorney General





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DEPARTMENT OF NATURAL RESOURCES

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MEMORANDUM

TO: Wildlife Board

FROM: Chad Wilson, Private Lands/Public Wildlife Coordinator

DATE: Aug 8, 2024

SUBJECT: Cooperative Wildlife Management Unit (CWMU) tools for units that are over the population objective

In June of 2024 the Wildlife Board approved revisions to the CWMU rule. Included in the revision were several tools that could be used on CWMUs on units that have been 10% or more over the population objective the previous three years. One of those tools would be allowing current, eligible CWMU permit holders to purchase an antlerless elk permit. Another tool would be establishing an antlerless elk "Harvest Objective" for a CWMU. If the CWMU is not able to meet the antlerless elk "Harvest Objective" it would initiate additional, agency-directed antlerless elk removal after the hunting seasons have ended. We are recommending the following tools be implemented on the following CWMUs:

CWMU	Recommended tools
Deseret	Antlerless elk permit purchase option for all hunters Season total Harvest Objective of 300 antlerless elk
Ensign Ranches	Antlerless elk permit purchase option for all antlerless hunters
East Fork Chalk Creek	Antlerless elk permit purchase option for all hunters
Grass Valley/Clark Canyon	Antlerless elk permit purchase option for all hunters
Weber Florence Creek/Stillman Creek	Antlerless elk permit purchase option for all hunters

CW



MICHAEL L. LABRUM
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REQUEST FOR AGENCY ACTION

Pursuant to Utah Administrative Rule R657-2 the Kimberly CWMU files this request for agency action to appeal the decision of the Wildlife Board in denying the Kimberly's request to be approved as an Elk CWMU based on allowable acreage variances in Rule R657-37-5(4)(a).

The Request for Agency Action is filed and requested on June 12th, 2024 and the Wildlife Board denied the request for Kimberly's Elk Acreage Variance in November of 2023, requiring both decisions to be based on the current CWMU Administrative Rule R657-37 as of June 12th, 2024, that allows elk acreage variances requests for any ranch under 10,000 acres.

The Kimberly CWMU argues that this agency request does not meet the criteria to be refused under R657-2-6(1). Although the variance request was heard by the Wildlife Board in November 2023, the Kimberly CWMU argues that R657-37-3(2) lists the requirements needed to be approved as an Elk CWMU and the Wildlife Board did not find that the Kimberly failed to meet those requirements. Instead, the Wildlife Board denied the variance request based on "not wanting to set a precedent for small ranches being approved" and fear of opening the flood gates for other small ranches to apply for a variance. The basis for the denial was not based on the required criteria in Rule R657-37-3 and R657-37-5 and therefore further consideration is

necessary and this agency action requesting an appeal of the Wildlife Board's decision should not be not refused.

Further, the purpose of the denial being the fear of setting a precedent that encourages other small ranches to flood the variance process is soon to be moot. The Wildlife Board is set to vote and most likely approve a new CWMU variance rule on June 13th, 2024 that would prohibit any ranches under 9,000 acres to apply for an elk variance. This would eliminate the concern and reasoning behind the denial of the Kimberly Elk Variance. Due to the requested agency action being based on the current rule as of June 12th, 2024 this would be a material change in the reasoning of the denial from November 2023. Therefore, the Kimberly CWMU argues that refusal of this agency action request would not be appropriate due to the material change in circumstances. The elk variance request by the Kimberly CWMU has not been heard by the Wildlife Board under these new circumstances and therefore an appeal by agency action would be appropriate.

Based on the preceding reasons, the Kimberly CWMU requests an agency action under R657-2 to appeal the denial of the elk variance request and approve the Kimberly CWMU for bull elk permits. The appeal and request for agency action is a request for the Wildlife Board to reconsider their decision and support the elk variance request, therefore Kimberly CWMU does not feel it is appropriate to send the request back through the RAC process. The Kimberly CWMU requests a hearing be set before the Wildlife Board meeting pursuant to R657-2-6(3)(b)(i)(A) and R657-2-6(3)(b)(ii)(A).

Dated this 12th, Day of June, 2024


Michael Labrum
Attorney for Kimberly CWMU

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**MOTION AND MEMORANDUM IN SUPPORT OF THE MOTION FOR WILDLIFE
BOARD TO APPROVE THE KIMBERLY CWMU ELK VARIANCE REQUEST**

COMES NOW, Kimberly CWMU, by and through attorney, Michael Labrum, pursuant to R657-2 appeals the Wildlife Board's November 2023 denial of the Kimberly CWMU's Elk Variance request and motions the Wildlife Board to approve the Kimberly CWMU's bull elk variance request pursuant to the current rules R657-37-3(2) and R657-37-5(4)(a) as of June 12th, 2024, and supports the motion with the following memorandum.

INTRODUCTION

The applicant Kimberly CWMU, owned by Tushar Mountain Gold, LLC is a company that spent millions of dollars purchasing the largest contiguous block of private land in the Beaver Mountain hunting unit. The property is located just north of the tallest peaks of the Tushar Mountain range and just 4 miles south of I-70. It is crisscrossed by 8 to 10 trout filled streams and creeks and contains some of the most rugged and steep mountain landscapes in the state of Utah. Despite its colorful history of mining in the late 1800's and early 1900's being the birthplace of the first female Treasurer of the United States under President Eisenhower, time has eroded virtually all evidence of human development. The landscape has been recaptured by tall

pinus, aspens, brush, and bountiful wildlife including elk, deer, bear, cougar, and fox to name a few. The property can be accessed by the Kimberly Mountain Road on the east side and the Sevier Canyon Road to the west. The ranch Boundary is a quick 4-mile drive from I-70.

The applicants have considered any and all options for a return on their investment. All of the individual owners were raised in Utah as evidenced by their local business history in manufacturing. All of the owners not only grew up in Utah and love all aspects of the state's outdoor activities but have nurtured careers in hunting and outdoor related industries. This explains their strong desire to be approved as an elk CWMU and work with the Division of Wildlife to try to maintain and enhance the opportunities available on the Beaver Mountain Unit, even though it has other much more profitably possibilities.

LAW

The required factors for determining whether or not a ranch or existing CWMU can be approved for bull elk permits are contained in rule R657-37-3(2)(a)-(f) as listed: (a) the property is capable of independently maintaining the presence of the respective species and harboring them during the established hunting season, (b) the property is capable of accommodating the anticipated number of hunters and providing a reasonable hunting opportunity, (c) the property exhibits enforceable boundaries clearly identifiable to both the public and private hunters, (d) the CWMU contributes to meeting the division wildlife management objectives, (e) as needed, the CWMU provides reasonable assistance to the division in minimizing and addressing damage to agricultural interests within and adjacent to the CWMU caused by wildlife, and (f) the CWMU meets the technical specifications provided in this rule. The most important of these factors being (a), (b), and (d).

Under (f) of Rule R657-37-3(2) the technical specifications required are listed in R657-37-3(3) one of which is (3)(a) a CWMU for elk or moose must contain at least 10,000 acres. If the ranch has under 10,000 and is asking for bull elk permits, the ranch can ask for a variance from the (3)(a) 10,000-acre requirement pursuant to section R657-37-3(4).

Based on the allowability of a variance from the 10,000-acre requirement under the rule, if a ranch can satisfy the factors under R657-37-3(2) without having 10,000 acres, the ranch should be allowed approval for the bull elk permits.

As provided in the request for agency action accompanying this motion and memorandum, if a ranch is denied the variance by the wildlife board but believes the denial was not based on the required factors, the ranch has a right to appeal the denial based on R657-2 and have a hearing set to have the elk variance request reconsidered by the wildlife board.

ARGUMENT

I. The Kimberly CWMU meets the factors required by Rule R657-37-3(2) to be granted elk permits

As stated above, if an applicant meets the factors under Rule R657-37-3(2) to be an elk CWMU but does not meet the technical specification of possessing 10,000 acres, the applicant can request a variance from the 10,000-acre technical specification pursuant to section R657-37-3(4). Providing a successful hunt to the public and working with the DWR on game management are the most important factors in the rule and CWMU program. If a CWMU can meet those requirements, the Wildlife Board with the authority of R657-37-3(4), should approve an applicant that does not meet the 10,000-acre specification. The Kimberly CWMU meets the factors to be a successful elk CWMU under pursuant to section R657-37-3(2) and should be approved to be an elk CWMU regardless of not meeting the 10,000-acre technical specification.

When an application for an elk CWMU with an acreage variance comes before the Wildlife Board it is imperative that there are statistics and testimonies about the ranch on which the board can rely on to base its decision. This is crucial because the Wildlife Board does not have first-hand knowledge of the abilities of the applicants' ranches to provide successful elk hunts. This is especially true with the Kimberly CWMU. None of the Wildlife Board members have spent any time on the Kimberly CWMU during the hunting season to have gained first-hand knowledge of whether or not the ranch can provide successful elk hunting. Because of this, the Wildlife Board must rely on other parties to base its decisions, most important of whom, includes the DWR biologist for the ranch in question. The biologist for the Kimberly CWMU is, Mike Wardle, and his survey results over 3 years of observing the Kimberly support the ability of the Kimberly CWMU to have highly successful elk hunting. *See* Exhibit A. Biologist Wardle is a neutral party and his classifications should be considered with the most weight by the Wildlife Board in making their decision. According to Mr. Wardle's classifications, the Kimberly CWMU meets the factors needed to be approved as required by R657-37-3(2) on the following basis:

a) R657-37-3(2)(a): The property is capable of independently maintaining the presence of the respective species and harboring them during the established hunting season

In Biologist Wardle's email about the elk on the Kimberly and their presence during the hunting season, he states: "From August to the end of October I have consistently seen good numbers of elk on the property (100+). Mature bulls are present and the habitat is great." *See* Exhibit A. Mr. Wardle's multiple years worth of classifications support R657-37-3(2)(a) that the Kimberly ranch has plenty of elk on the property and they stay there during the hunting season. The Kimberly CWMU meets this requirement under the rule.

b) R657-37-3(2)(b): The property is capable of accommodating the anticipated number of hunters and proving a reasonable hunting opportunity.

In Biologist Wardle's email about the Kimberly CWMU's capability of accommodating the numbers of hunters and quality of hunting opportunity, he states, "I don't think you'd have a problem harvesting 3 or 4 mature bulls on the property with the current distribution of the elk population." See Exhibit A. Mr. Wardle's classifications support the ability of the Kimberly to anticipate 3 to 4 bull elk hunters and do so successfully. Mr. Wardle's multiple years worth of classifications support R657-37-3(2)(b) that the Kimberly ranch can successfully harvest 3 to 4 bulls on the property. The Kimberly CWMU meets this requirement under the rule.

c) R657-37-3(2)(c): The property exhibits enforceable boundaries clearly identifiable to both the public and private hunters

Mr. Wardle communicated that law enforcement had some concern about the ability to enforce the boundaries due to the irregular shape of some areas but is definitely not a driving factor. Although there are not fences on all sides of the property, the CWMU will be properly posted as required by the CWMU rule. Further, with the popularity of Apps such as OnX Hunt the boundaries are more available to the public and private hunters. Lastly, the boundaries were already accepted as satisfactory by the Wildlife Board when it approved the Kimberly Deer CWMU in 2023. The Kimberly CWMU meets this requirement under the rule.

d) R657-37-3(2)(d): The CWMU contributes to meeting the division wildlife management objectives

The Kimberly CWMU and Biologist Wardle have had many lengthy conversations about the management of wildlife and habitat on the private property. Both parties are excited to get started on the ideas discussed to improve elk hunter opportunity, hunt quality, and habitat. Mr. Wardle states, "I love the idea of having a large private landowner on the

Beaver who supports and is actively promoting elk on the unit. I've really appreciated the open communication we've had and feel like we could work together really well. I also don't want to see the property become cabin lots and lose that open space.”

The one concern that Biologist Wardle had with the Kimberly application was the ability to harvest cows. In his email he is correct that we have discussed creative ways to hunt cows which comes with the commitment from the Kimberly CWMU to harvest the cows as requested by the DWR for game management. The Kimberly has never wavered in its desire to partner with the DWR in wildlife and habitat management. One of the ideas is to hunt cows in August when the bull hunts are not happening. The Kimberly CWMU does not agree that the fear of future cow management issues is a reason to decline the bull elk permit request. There could be uncountable different scenarios in the future that the Kimberly will be cooperating with the DWR to achieve, but refusing the application for the fear of all of these variables would be inappropriate. In the alternative, Kimberly argues that not having elk permits and the inability of the DWR to manage the cow elk residing and being pushed in the private property would be more worrisome than how to manage the cows together. The Kimberly CWMU meets this requirement under the rule.

e) R657-37-3(2)(e): As needed, the CWMU provides reasonable assistance to the division in minimizing and addressing damage to agricultural interests within and adjacent to the CWMU caused by wildlife

This factor only applies to situations when wildfire has damaged agricultural interests adjacent to the Kimberly CWMU. The Kimberly CWMU has been open and willing to assist in wildlife and habitat management. It would not change in situations where this factor would apply. As stated in the previous statement by Mr. Wardle, he and the Kimberly

owners/operators have been in communications about management that is needed in any situation.

f) R657-37-3(2)(f): The CWMU meets the technical specifications of this rule

The Kimberly CWMU does not meet the 10,000-acre technical specification of this rule, but R657-37-3(4) allows a variance from the technical specification of 10,000 acres in section (e) and approval of the elk CWMU if the Kimberly satisfies the other factors in R657-37-3(2)(a)-(e). As previously shown, in sections (a)-(e) the Kimberly CWMU satisfies the factors needed to be approved without meeting the 10,000-acre specification as allowed by rule. The Wildlife Board should approve the Kimberly CWMU's elk variance request based on satisfying all the requirements needed for approval.

Further, the Kimberly CWMU is located in the Southern Region. Every time the Kimberly CWMU comes before the Southern Region Advisory Council to request elk permits or challenge rules that would prohibit the Kimberly from obtaining elk permits, the Southern RAC unanimously votes in the Kimberly's favor. *See* Archived RAC Recordings and Minutes. This should be considered with substantial weight by the Wildlife Board in making their decision. The Southern RAC is comprised of people that have first-hand knowledge of the Kimberly ranch and its ability to be successful in providing public elk hunts. The complete support of the Southern RAC to allow elk permits on the Kimberly CWMU should carry more weight with the Wildlife Board in its decision due to the familiarity of the Southern RAC with the Kimberly ranch.

Of further importance, the Kimberly CWMU resides in the district of Representative Carl R. Albrecht of the House of Representatives. Carl is an avid sportsman and supporter of wildlife. Carl is from Southern Utah and years of first-hand knowledge of the Beaver Mountain

and the Kimberly ranch. Carl is in complete support of ability of the Kimberly CWMU to be successful every year in providing a world class elk hunt to the public. *See* Exhibit B, Letter in support written by Carl Albrecht. This should be considered with substantial weight by the Wildlife Board in making their decision.

To lean on others that have knowledge of an applicant's property is the approach that sometimes has to be taken by the Wildlife Board when the members of the board have not personally been on the ranch during the hunting season to investigate the factors for approval on their own. In this case, everyone with first-hand knowledge of the Kimberly CWMU's ability to provide a successful elk hunting, overwhelmingly supports the request to allow elk tags on the Kimberly.

II. The inclusion of a variance process in the current rule contemplated this exact scenario

The reason the variance process exists is because the drafters of the CWMU rules understood that there are smaller ranches that have high quality hunting acres and can be highly successful in providing public hunting on the private acres. This reasoning is proven true every year by the elk CWMUs that have less than 10,000 acres (which is 20% of the total elk CWMUs) averaging a higher hunter success ratio than the elk CWMUs that are over 10,000 acres. Hunter success is directly related to the quality of the hunting acres not the quantity of hunting acres. When a ranch has high quality hunting acres that don't total the 10,000-acre specification, there needs to be an avenue available to allow that ranch participate in the CWMU program. Giving the public more opportunities to hunt elk and access to otherwise unavailable private land is always a positive. Opening the door for DWR to partner with a large private landowner in wildlife and habitat management on a property that otherwise would not be used for this purpose is always a positive.

III. The Wildlife Board's November 2023 denial of the variance was not based on the appropriate factors as required under R657-37-3(2)

Under the current CWMU rule R657-37-3(2)(a)-(f) are the factors required to determine if a CWMU applicant qualifies to be allowed elk tags. These factors include: (a) the property is capable of independently maintaining the presence of the respective species and harboring them during the established hunting season, (b) the property is capable of accommodating the anticipated number of hunters and providing a reasonable hunting opportunity, (c) the property exhibits enforceable boundaries clearly identifiable to both the public and private hunters, (d) the CWMU contributes to meeting the division wildlife management objectives, (e) as needed, the CWMU provides reasonable assistance to the division in minimizing and addressing damage to agricultural interests within and adjacent to the CWMU caused by wildlife, and (f) the CWMU meets the technical specifications provided in this rule. At the Wildlife Board meeting in November 2023 the Kimberly CWMU acreage variance request for elk permits was presented for approval. The reason for the denial of the request for elk permits by the Wildlife Board was that they did not want to set a precedent of smaller ranches being approved under the 10,000 acres for fear that would cause a flood of applicants. Unfortunately, that is not one of the factors that can be used to deny an application for an elk CWMU. A variance for smaller acre ranches is allowed by rule, R657-37-3(4), and if requested, the Wildlife Board must make a determination for approval based on the applicant's ability to satisfy the factors in R657-37-3(2)(a)-(e). "Setting a precedent that would open floodgates for other small ranches requesting a variance" is not one of the factors allowed in the determination for approval. Therefore, the Wildlife Board's denial of the Kimberly's elk tag request was based on a factor outside of the rule. There was not

a required finding made as to whether or not the Kimberly CWMU satisfied the factors under R657-37-3(2) to be allowed elk permits.

Further, the same scenario happened at the CWMU Advisory Committee meeting. The Kimberly CWMU had the majority of the votes leaning towards approval of the variance request based on the actual factors under the CWMU rule. A single member of the committee took over the discussion and convinced 2 of the other members to change their vote against Kimberly based on the concern about setting a precedent for approving smaller ranches and causing a flood of new variance applications. As discussed previously, concern over setting a precedent that could cause a flood of smaller ranches is not an appropriate reason to vote against Kimberly based on the requirements of R657-37-3(2). Kimberly does not believe the vote by the CWMU Advisory Committee should be considered in the appeal due to it being based on a factor not appropriate under the rule.

The appeal should be granted and the Kimberly CWMU should be approved for elk permits based on the overwhelming factual support that they meet the requirements in the rule for approval.

IV. The Wildlife Board is set to approve an updated rule that would make its concerns moot


On June 13, 2024 the Wildlife Board is set to hear a proposal on amendments to the current CWMU rule. One of the proposed amendments is to change the variance process and not allow any ranch with under 9,000 acres to even apply for elk tags. Odds are, this new amendment will be approved based on its recommendation coming from a committee that was formed to discuss and present changes to the rule. The approval of the 9,000-acre minimum to apply for elk permits would eliminate the risk of a “flood of small ranches applying for a

variance,” which was stated as the reason for the Kimberly’s denial. Considering the Kimberly CWMU’s appeal will be based on the current rule from November 2023 and June 12th, 2024, the Wildlife Board’s chief concern and reason for denial would be moot and would no longer apply in determining the appeal of the denial.

Conclusion

For the multitude of reasons set forth herein that support elk permits on the Kimberly CWMU, the Kimberly CWMU requests that the Wildlife Board approve its request on appeal for elk permits on the Kimberly CWMU.

Dated this 12th Day of June, 2024



Michael Labrum
Attorney for Kimberly CWMU

Exhibit A



Michael Wardle <michaelwardle@utah.gov>

Nov 7,
2023,
1:49 PM

to Teresa, Chad, me

Hey Mike,

Positives:

1 - From August to the end of October I have consistently seen good numbers of elk on the property (100+). Mature bulls are present and the habitat is great. I don't think you'd have a problem harvesting 3 or 4 mature bulls on the property with the current distribution of the elk population.

2 - I love the idea of having a large private landowner on the Beaver who supports and is actively promoting elk on the unit. I've really appreciated the open communication we've had and feel like we could work together really well. I also don't want to see the property become cabin lots and lose that open space.

To include elk on the Kimberly CWMU I have 2 main concerns:

1 - Consistency within the program. Rule obviously allows for a under acreage variance but I'm not aware that one has ever been granted without the blessing of the advisory committee. Especially one that is so far under 10,000 acres.

2 - Antlerless elk harvest. Since it's a high elevation property and the elk move off later in the season, the majority of your antlerless harvest will have to overlap with your bull hunting. We've talked about this a lot and I truly believe you're willing to be creative in when and how you'd kill those cows. Currently the Beaver is under objective so your antlerless harvest is going to be minimal and this probably wouldn't be a big deal. Populations and objectives change though and I worry about what things look like 10 years down the road. If we got to a point that we need to kill 20-30 cows I dont know if we can realistically do it without pushing them off the property.

I know our law enforcement folks have concerns about enforcing the boundaries as well. The lack of a fence and the irregular shape of some of the parcels I know give them concern.

Hopefully this helps let you know where I sit on the issue. It's up to the RACs and Board at this point and I'm good with whatever comes out the other side. I wish you the best,

Mike

Exhibit B

HOUSE OF REPRESENTATIVES
STATE OF UTAH

REPRESENTATIVE
CARL ALBRECHT
DISTRICT 70
BEAVER, IRON, PIUTE AND
SEVIER COUNTIES



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November 18, 2023

Utah Division of Wildlife Resources
c/o Wildlife Board Members

Re: Proposed Kimberly CWMU

Dear Board Members,

The Kimberly CWMU meets every qualification to become a CWMU other than the 10,000-acre requirement. The variance process is allowed by rule and is for unique properties like this one that can provide a highly successful public hunt and meets all the requirements of the CWMU Program without having to meet the 10,000-acre minimum.

The biologist's surveys over the last 3 years have shown we have 100+ elk and lots of mature bulls that stay on the ranch throughout the summer and hunting season which supports the ability to have a highly successful elk hunt on this CWMU. This area has 5,600 acres of the most premier high elevation elk habitat on the Beaver Mountain Unit. Twenty percent of the elk CWMU's are under 10,000 acres. The success rate of Elk CWMUs under 10,000 is 88%. The success rate of Elk CWMUs over 10,000 is 83%. The elk live on this property during both the summer and fall. The six smallest CWMUs range from 6300-8120 acres, and all have a 100% success rate. Good quality acreage is more important than the quantity of acreage. The variance process is not used frequently, but it is allowed by rule for this exact unique type of property. There is nothing in the rule that states the variance process should be limited to a certain number of applicants. The steep, forested, deep canyons of the acreage hold elk even while being pressured.

I have personally been on this property several times. It is steep, rugged, and contains deep canyons, with streams and springs throughout. DWR data supports quality acreage, and you will not find an area that has more quality habitat for elk than this property. CWMU Rules indicate various requests shall be determined based on the characteristics of each unique property. One fifth of the Elk CWMUs are less than 10,000 acres. The Variance Rule allows for consideration if the proposed acreage can produce a successful public hunt and the Beaver Mountain has been one of the most successful in the State. This property satisfies all the requirements of the program. The Divisions own biologist's (Wardle) observations support the ability of the Kimberly CWMU to produce a successful hunt. Approval would provide a great partnership with the State. There are no other CWMUs on the Beaver Unit. A review process is in place after a three-year period.

I believe the Kimberly CWMU should be approved by the Wildlife Board. Should you have questions, please contact me.

Respectfully,

A handwritten signature in cursive script, appearing to read "Carl R. Albrecht".

Representative Carl R. Albrecht
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Attorneys for Utah Division of Wildlife Resources

BEFORE THE UTAH WILDLIFE BOARD,
DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH

KIMBERLY CWMU,
Petitioner,
v.

UTAH DIVISION OF WILDLIFE
RESOURCES,
Respondent.

**UTAH DIVISION OF WILDLIFE
RESOURCES’ RESPONSE TO
KIMBERLY CWMU’S REQUEST FOR
AGENCY ACTION**

The UTAH DIVISION OF WILDLIFE RESOURCES (“Division”), by and through counsel, hereby submits the following Response to the Kimberly CWMU’s *Request for Agency Action and Motion and Memorandum in Support of Request for Agency Action*. In the fall of 2023, Kimberly CWMU requested a variance to be an undersized Elk CWMU. After receiving input from the Division and from the CWMU Advisory Committee, the Wildlife Board voted to deny Kimberly CWMU’s request to be an undersized Elk CWMU in November 2023. On June 12th, Kimberly CWMU submitted this Request for Agency Action to ask the Wildlife Board to reconsider this decision.

BACKGROUND

The Kimberly CWMU applied to become a CWMU in 2023 with 5,774 total available acres. Kimberly CWMU requested a variance to be an Elk CWMU. The CWMU Advisory Committee recommended the variance be denied. The Division reviewed this application and also recommended that the variance be denied. Three (3) of the five (5) Regional Advisory Councils (“RAC”) recommended denying the variance. At the Wildlife Board hearing on November 22, 2023, the Division recommended to deny the variance. However, seeing some support from the RACs, the Division provided a secondary recommendation to approve the variance with some latitude for the Wildlife Board to consider public input on the matter. The Wildlife Board ultimately voted to deny the variance request because it did not want to see more under-acreage Elk CWMUs. Kimberly CWMU now requests the Wildlife Board reconsider its decision via Utah Administrative Code Rule R657-2.

ARGUMENT

The Utah Legislature created the Cooperative Wildlife Management Unit (“CWMU”) program to: (1) provide income to landowners; (2) create satisfying hunting opportunities; (3) increase wildlife resources; (4) provide adequate protection to landowners who open their lands for hunting; and (5) provide access to public and private lands for hunting.¹ The Wildlife Board specified an additional purpose of the CWMU program as “provid[ing] landowners an incentive to manage lands to protect and sustain wildlife habitat and benefit wildlife.”² The Wildlife Board approves statewide management plans for various species of wildlife, particularly big game animals.³ These management plans outline the Division’s goals and plans for specific species

¹ Utah Code Ann. §23A-7-103.

² Utah Admin. Code Rule R657-37-1(f)

³ Utah Code Ann. §23A-11-301

throughout the state. The Wildlife Board, endowed with broad policy making authority, must consider what is needed to protect, propagate, introduce, increase, control, harvest, manage, and conserve protected wildlife.⁴ The Division's and Wildlife Board's ultimate mandate from the legislature is to balance managing and preserving a public resource while providing the public access to hunt and fish.⁵ In consideration of what is needed for elk herd health and how to manage the CWMU program, the Wildlife Board denied Kimberly CWMU's variance request. That denial should stand.

The Wildlife Board has discretion and broad policy making authority when considering CWMU Rule variances.

Utah law states “the Wildlife Board shall establish the polices best designed to accomplish the purposes and fulfill the intent of the laws pertaining to wildlife and the preservation, protection, conservation, perpetuation, introduction, and management of wildlife.”⁶

In creating policy, “the Wildlife Board shall:

- (i) recognize that wildlife and the wildlife's habitat are an essential part of a healthy, productive environment;
- (ii) recognize the impact of wildlife on humans, human economic activities, private property rights, and local economies;
- (iii) seek to balance the habitat requirements of wildlife with the social and economic activities of humans;
- (iv) recognize the social and economic values of wildlife, including fishing, hunting, and other uses; and
- (v) seek to maintain wildlife on a sustainable basis.”⁷

It is in this context that the Wildlife Board passed rules for the CWMU program. Upon receipt of an application, the Wildlife Board must consider the recommendations from the Division and the CWMU Advisory Committee.⁸ At which point the Wildlife Board may approve

⁴ Utah Code Ann. §23A-2-305(1)

⁵ Utah Code Ann. §23A-2-102(2)

⁶ Utah Code Ann. §23A-2-102(2)(a)

⁷ Utah Code Ann. §23A-2-102(2)(b)

⁸ Utah Admin. Code Rule R657-37-5(5)

or deny the application.⁹ The Wildlife Board retains its discretion in reviewing the application and may deny an application even if it meets all of the technical requirements, but otherwise does not fulfill the purposes of the program.¹⁰

Here, the Kimberly CWMU put together its application and went before the CWMU Advisory Committee to plead its case. The CWMU Advisory Committee recommended denying the variance because it was far below the required 10,000 acres. The Division also recommended denying the variance for the same reason. At the Wildlife Board hearing, Chad Wilson, Private Lands Public Wildlife Coordinator for the Division, explained that the 10,000-acre minimum is based on biology – that the average home range of an Elk is 4 sq. miles (or 10,240 acres).¹¹ Chad Wilson also explained that the vast majority of the CWMUs currently operating under the 10,000-acre limit were approved after the 10,000-acre limit was created.¹² All others predate the program and many have ceased operation.¹³

Kimberly CWMU asserts in its Request for Agency Action that a denial based on lack of acreage is invalid when all other factors are met and the possibility for a obtaining a variance on the minimum acreage requirement still exists. Put another way, Kimberly CWMU implies that the acreage minimum is unimportant when the other factors are met.

All facts fall within the Wildlife Board's purview and still do in this appeal, particularly where the Wildlife Board must consider exceptions to the rule, i.e. a variance request that forces the Board to weigh the lack of CWMU size versus its contributions to the CWMU program and wildlife management. Under statute, the Wildlife Board must administer the CWMU program to

⁹ Utah Admin. Code Rule R657-37-5(6)

¹⁰ Utah Admin. Code Rule R657-37-3(6)

¹¹ *Wildlife Board meeting at 7:08:25*

¹² *Wildlife Board meeting at 7:09:58*

¹³ *Id.*

meet the criteria spelled out in Utah Code Ann. §23A-2-102. The Wildlife Board must also consider the purpose of the CWMU program outlined in Utah Admin. Code Rule R657-37-1(2). Even where a CWMU meets all the criteria, the Wildlife Board has the discretion to reject that application where the purposes of the program are not fulfilled.

Here, the Kimberly CWMU does not simply fail to meet the acreage requirement to be an Elk CWMU, but at 5,774 total acres it barely reaches half the minimum requirement. Including the CWMUs that pre-date the 10,000-acre minimum, the Kimberly CWMU would still be the smallest elk CWMU in the program. The CWMU program is meant to provide quality habitat to grow wildlife and provide a quality hunting opportunity. Because the Kimberly CWMU is half the home range of an elk, after a year or two of hunting, there are doubts whether the Kimberly CWMU could provide either.¹⁴ Considering those concerns and the fact that the Wildlife Board does not encourage small CWMUs for the same reason, the Wildlife Board's decision was sound and well within their discretion allowed under Title 23A and Rule R657-37.

The facts surrounding the Kimberly CWMU have not changed and the same concerns regarding acreage remain.

The Kimberly CWMU, in its Request for Agency Action, asserts that the Wildlife Board's November 22nd decision is moot because the Wildlife Board passed a rule on June 13th that limited variances to those with 9,000 or more acres. Put another way, Kimberly CWMU is saying "well precedent is no longer a concern, you should still make an exception for me." In doing so, Kimberly CWMU presents no new circumstances or facts to support its variance request.

¹⁴ Kimberly CWMU quotes Division biologist, Mr. Wardle, stating: "I don't think you'd have a problem harvesting 3 or 4 mature bulls on the property with the *current* distribution of the elk population." However, the last half of that sentence is telling. You cannot predict the future distribution of elk, but the Wildlife Board is tasked with trying to create sustainable solutions. If the Kimberly CWMU harvest 3 or 4 bull and cow elk for three years, there is real possibility that the Elk cease using the area as summer range. Then that habitat is not being put to good use, where now it is benefiting an elk herd and the landowners could still sell trespass permits.

Kimberly CWMUs argument mischaracterizes the concerns here. With no new facts, the Wildlife Board is left considering the same biological concerns that were present on November 22, 2023. Those concerns are not rendered moot by the June CWMU Rule changes. Concerns about precedent may seem limited now, but in reality, granting the Kimberly CWMU variance request would not only undermine the decision made in November, but would also undermine the policy decisions made by the Wildlife Board, CWMU Advisory Committee, and unanimous opinion of the CWMU Rule Committee¹⁵ this past spring to change the CWMU rule.

The Division and CWMU Advisory Committee’s recommendations were and are appropriate for consideration.

Kimberly CWMU is seeking to get its way by bypassing the public process (the CWMU Advisory Committee, the RACs, and public processes) by pursuing this action, which does not allow public input. As stated in the previous section, no substantive facts or circumstances have changed between the November Wildlife Board meeting and this appeal. The only change has been to the CWMU Rule, which further restricted the issuance of variances, sending a statement that variances should be limited in this program. This rule change was run through and approved by the CWMU Advisory Committee, public comment, RACs, and the Wildlife Board. Kimberly CWMU argues that the CWMU Advisory Committee and Division’s recommendations on their variance request should be disregarded because those recommendations are based on the precedential effect of granting the variance.¹⁶

The CWMU application and variance process is intended to be a public process. The CWMU Advisory Committee meetings are public meetings. The RAC and Wildlife Board meetings are public meetings, and the public is afforded time to provide online and in-person

¹⁵ The CWMU Rule Committee aided the Division in the drafting of the recent rule change to R657-37, passed by the Wildlife Board in the June 2024 Wildlife Board Meeting.

¹⁶ See *Kimberly CWMU Motion and Memorandum at pg 10*.

comments. Kimberly CWMU is afforded six opportunities to make public comments and plead its case.¹⁷ All of the documentation is made public. Kimberly CWMU went through this process.

The CWMU Advisory Committee is tasked with providing a recommendation “on the advisability of granting the CWMU application.”¹⁸ A consideration of the precedent set by approving the Kimberly CWMU variance request is well within the purview of the CWMU Advisory Committee as outlined in rule. Likewise, the Division, who is tasked with managing the CWMU program, determines the facts surrounding policy recommendations as the biological authority.¹⁹ A concern about the size of a CWMU and the home range habitat it will provide is well within the purview of the Division. The Wildlife Board is required to consider “the Division’s recommendation; [and] any recommendation from the CWMU Advisory Committee regarding a variance request.”²⁰ The Division and CWMU Advisory Committee’s recommendations are not limited to a short list of criteria, as argued by Kimberly CWMU, but is holistic in its consideration of the CWMU program and the recommendation remains the same – to deny the request.

CONCLUSION

The Wildlife Board should uphold its original decision. Not only does the Division feel that the original decision is biologically sound and in the best interest of the CWMU program (to require adequate acreage to hold and grow wildlife), but a reversal of that decision would be based not on factual changes but pressure from the Kimberly CWMU. The approval of a CWMU variance that is over 4,000 acres smaller than the minimum does more than set bad

¹⁷ The six public hearings are the CWMU Advisory Committee, 4 Regional Advisory Council Meetings, and the Wildlife Board Meeting.

¹⁸ Utah Administrative Rule R657-37-5(4)(d)

¹⁹ Utah Code Ann. §23A-2-102(1)

²⁰ Utah Administrative Rule 657-37-5(5)(b) & (c)

precedent, it undermines the rule itself by calling into question the justification and necessity of the limit set by the Wildlife Board. For the above reasons, the Division asks that the Wildlife Board deny Kimberly CWMU's Request for Agency Action.

DATED this 29 day of July 2024

UTAH DIVISION OF WILDLIFE RESOURCES

/s/ Kyle Maynard _____
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**REPLY TO UTAH DIVISION OF WILDLIFE RESOURCES' RESPONSE TO
KIMBERLY CWMU'S REQUEST FOR AGENCY ACTION**

The Kimberly CWMU, by and through counsel, hereby submits the following Reply to the Utah Division of Wildlife Resources' Response to Kimberly CWMU's Request for Agency Action.

BACKGROUND

A look in more detail of the background of the Kimberly's variance request will shed more light on what happened in the public process and the support that actually existed for the Kimberly. The process starts with the CWMU advisory committee. During the advisory meeting Kimberly had a 4 to 2 vote in favor of the variance with comments that the surveys by the biologist show Kimberly has the elk to be successful and should be given a chance. That is when one member of the committee took over the meeting and convinced 2 votes to go his way based on not wanting to "open the flood gates" for small ranches to ask for variances. The vote ended with 4 against and 2 in favor. In the months after the committee meeting, the 2 members of the committee that changed their votes against the variance have communicated their regret to the Kimberly that they didn't keep their votes in favor.

In the RAC process there were 2 RACs that voted in large majority against, 2 that voted in large majority in favor of the Kimberly variance and one RAC that was split with only 2 votes defeating the RAC from being in favor of the variance. Looking at the actual votes, the public was split down to a few votes on the Kimberly variance request.

If you dig a little deeper, the 2 RACs that voted against the variance based their vote on not wanting to set a precedent that would “open the flood gates” to smaller ranches. It was NOT based on the 10,000-acre elk habitat concern and NOT based on a biological discussion of the actual ability of the Kimberly to meet the requirements and purpose of the CWMU program.

The Central Region RAC was split on the variance request with only 2 votes difference that tipped the decision against the Kimberly. One of the members of the Central Region RAC is also on the advisory committee. He continued his argument against “opening the floodgates” in the RAC meeting and managed to convince 2 extra votes to tip the scales against the Kimberly. The Kimberly representative was told by a few Central RAC members after the meeting that getting the Central RAC (which is traditionally tough on CWMUs) to have that many members in support of the variance was a testament that the Kimberly could be successful hunting elk.

If you look at the 2 RACs that voted near unanimous in the Kimberly’s favor, they based their decision on a discussion of the biological surveys that actually support the Kimberly’s ability to meet the programs’ purpose and requirements. Further, the Southern RAC which is home to the Kimberly CWMU voted unanimously in favor of the variance. This was based not only on the biologist’s surveys, but the members having first-hand knowledge of the property and the large population of elk on the Kimberly CWMU. The region where the ranch is located should carry more weight in the RAC process than regions that have no knowledge of the Kimberly ranch.

The DWR and Kimberly agree on the basis for the denial of the variance by the Wildlife Board. In the DWR's response to the Kimberly's request for agency action, the DWR states in its background section "the Wildlife Board ultimately voted to deny the variance request because it did not want to see more under-acreage Elk CWMUs." The Kimberly agrees that the decision was based on not wanting to set precedent that would "opening the flood gates" to other small ranches. Now that the new CWMU rule eliminates that concern and the concern of setting precedent that would allow smaller ranches, the Kimberly requests the opportunity to have a discussion with the Wildlife Board on the merits of the Kimberly ranch to be successful under the program.

A closer look at the background actually shows a large amount of public and committee support for the Kimberly variance when based on the biological surveys showing the ability to have a successful elk hunt year after year.

REPLY

I. Wildlife Board's discretion and broad policy making authority

The Kimberly does not disagree that the Wildlife Board has broad policy making authority. It is that authority that created the CWMU rules that were in place November of 2023 in order to analyze who can meet the purposes and requirements of the program. The purpose of creating those requirements is to have the same set of criteria to evaluate specific ranches that want to join the program and if they can be successful.

The Kimberly does not disagree that under R657-37-3(6) the Wildlife Board can deny a CWMU that meets the technical requirements but does not meet the purpose of the program. The issue is that the Kimberly *does* meet the purposes of the program so approval would be appropriate. The denial was not based on an evaluation of the specific Kimberly ranch meeting

the requirements and the purposes. The denial was based on a broad concern that approving the Kimberly variance would set a precedent of opening the flood gates to many other small ranches asking for a variance. Now that the concern for setting the precedent argument is moot, and an approval would not set precedent for the future under the new rule, the Kimberly requests a chance to be evaluated on whether its specific property meets the purposes of the CWMU program. Contrary to the DWR statements in their response, there was not an evaluation done on the biological concerns during the November 2023 board meeting.

The purposes of the CWMU program: (a) increase wildlife resources, (b) provide income to landowners, (c) provide the general public access to private and public lands for hunting big game...within a Cooperative Wildlife Management Unit, (d) create satisfying hunting opportunities, (e) provide adequate protection to landowners who open their lands for hunting; and (f) provide landowners an incentive to manage lands to protect and sustain wildlife habitat and benefit of wildlife. Biologist Mr. Wardle's surveys support the Kimberly's ability to meet these purposes and no evidence has been presented otherwise. The Kimberly wants a chance to be evaluated on the purposes of the program because it meets all of those purposes.

II. The misconceptions of the 4 square mile elk home range

There is an elk home range study that keeps coming up in discussions on the origin of the 10,000-acre rule. Although the Kimberly hasn't seen the study produced at any meetings, for the purposes of this reply, Kimberly will address the study as referred to by the DWR. The misconception of a home range study of elk is that their behavior won't change with different influences on their home range. In a vacuum without outside influence, elk may have a home range of 4 square miles (10,240 acres), but add outside influences and this data changes.

When you add high amounts of public pressure around the outside of private property, the elk stay within the 5,774-acre ranch and they don't leave. Their home range is smaller. Inside the Kimberly CWMU is void of the high pressure from the public and it keeps the elk inside the private. This can lead to over population and difficulty managing the elk if the DWR is not able to partner with private land owners to co-manage; hence the CWMU program.

Even harvesting a few bulls and cows in the Kimberly CWMU pales in comparison to the pressure they receive on the public land surrounding the private. With the deep and steep terrain of the Kimberly ranch the elk just move around to the next canyon in the private if pressured. They understand where the larger levels of pressure exist on the public land.

Another factor that affects elk home range that has to be accounted for is desirable habitat. If you have a desert with 2,000 acres of trees, grass, and water in the middle, the elk will be piled in that 2,000 acres and won't leave. Their home range is smaller. The herd of elk on the Northeast section of the Beaver Mountain summer and rut in the Kimberly CWMU. The water and feed rich habitat on the Kimberly ranges from sub-alpine at 10,500ft all the way down to lower elevation 7,400ft of cedar and oak. They have everything they need on the Kimberly. Their home range is smaller.

Further, there have been massive fires that have burned on the north end of the Beaver, one of which was this summer burning over 19,000 acres on the east boundary of the Kimberly. The Kimberly CWMU is one of the largest sections of high elevation timbered bedding areas, with excess water and feed that still stands on the north end of the mountain. The elk have even more incentive to gather in the Kimberly CWMU. Their home range is smaller.

One last issue that is never addressed by the 4-square-mile elk home range theory, is what happens to the elk whose home range is centered one, two, or three miles outside of the

Kimberly CWMU in all directions. Wouldn't the study then support the fact that those elk actually travel *into* the Kimberly CWMU because their home range overlaps with the elk that are centered inside the Kimberly CWMU, which in turn increases the regular population on the private?

III. Hunting elk on the Kimberly CWMU is not going to cause the elk to cease using the ranch as summer range.

The Kimberly believes that the DWR went too far in interpreting Biologist Mike Wardle's comments on the "current" distribution of the elk. The future distribution of elk can change on every range in the state of Utah. Every CWMU in the state is at risk for changing distributions of elk. No CWMUs would exist if the fear of future distribution of elk was the determining factor.

Further, the summer range of an elk is based on elevation, feed, cover, and where they were born. Elk migrate up as winter subsides to follow the new grass that is exposed by melting snow. They get to the cooler and higher elevations to calve. These new calves follow the same pattern as their parents. This is what dictates elk returning to summer range. Not hunting pressure. The theory that it is a real possibility that hunting pressure will change their summer patterns is not a real possibility.

The owners of the Kimberly CWMU have successfully owned and managed another CWMU with less than 9,000 acres named the Old Woman Plateau. A separate part of the Old Woman CWMU is 2,000 acres of winter habitat. The owners have spent 30 years in the CWMU program and spent over \$400,000 of their own money improving the habitat for wildlife on the 2,000-acre piece of property. They harvest bulls 3 to 4 bulls on average every year on the 2,000 acres and the elk keep coming back year after year. The hunting pressure does not change their pattern and desire to return.

Another even more compelling reason to consider the Kimberly CWMU request is that it is not only the largest contiguous private holding on the entire Beaver Unit, but also has the aforementioned experienced owners and managers who focus on devoting the ranch to the improvement wildlife habitat.

IV. How does the public benefit from trespass fees

Kimberly has heard the suggestion of trespass fees come up at meetings. How does this offer extra hunting opportunity and benefit the average hunter in Utah. One of the great benefits of the CWMU program is that it increases hunter opportunity. The tags allotted to the Kimberly CWMU are above and beyond what is allocated for the public land on the Beaver. This increases opportunity for the public to have more hunts in Utah. Trespass fees do not add opportunity for more hunting.

Also, which hunters are paying trespass fees? The hunters paying the high-priced trespass fees on a unit such as the Beaver are the wealthier hunters that can afford it, such as conservation tag purchasers. How does this benefit the regular public hunter in Utah? The Kimberly CWMU does not support giving extra benefits to the wealthier hunters over generating incentives to open the private land to the everyday public draw hunter.

V. Kimberly CWMU believes the quality of the acreage should be weighed as much or more than the quantity

The DWRs interpretation of the Kimberly's acreage argument is incorrect. The DWR states that the Kimberly thinks the 10,000-acre requirement is unimportant. The Kimberly did not make this argument. The Kimberly's argument is that by meeting all of the other factors and purposes of the program, it proves that this specific ranch can be successful without having to meet the 10,000 requirements. The allowable variance under R657-37-5(4)(a) from the 10,000-acre rule would not exist in the rule if the drafters of the rule did not think it was possible to meet

all of the requirements and purposes without having 10,000 acres. This theory is proven correct year after year with 20% of the Elk CWMUs having less than 10,000 acres and having a higher hunter success rate than the ranches above 10,000 acres.

VI. The test is not *when* the current smaller CWMUs were let into the program but *why* they are successful over others

Kimberly agrees that the vast majority of current ranches under the 10,000 acres were let in before the 10,000-acre rule was in effect. Kimberly understands the DWR is trying to make the argument that variances are not given out very often, but why should that matter?

It's not about how many variances have been allowed or when the ranches became part of the program. It's about whether or not a specific sub-10,000-acre ranch can be successful. It's about bringing an elk ranch into the program that can meet the requirements and purposes of the program. It's about adding opportunity to the public where they would not otherwise have the chance. It's about partnerships between private landowners and the DWR to manage habitat and wildlife. Why would promoting these purposes, by partnering with the Kimberly CWMU, be a bad thing?

In Utah, 20% of the current smaller elk CWMUs have shown that it's about the quality of the specific property that makes it successful. The Kimberly CWMU is a special property that will be successful and deserves that opportunity.

VII. With the concern of setting precedent for smaller ranches now moot, it *does* change the discussion in the appeal

The DWR claims with no new facts, the Kimberly should not get to ask for a different decision on appeal. When facts are applied to laws and regulations, the facts can change and the laws or regulations can change. If either of those things change, it changes the discussion on an appeal. The DWR is correct that the facts have not changed, but the rules have. The two issues

on appeal are that the regulations have changed and the biological facts specific to the Kimberly were never evaluated

On appeal, if the regulation has changed, then the discussion changes based on the same set of facts. The reason the Kimberly CWMU was denied is agreed upon by both parties. The Board did not want to set a precedent that would open the flood gates for smaller ranches to apply for variances. Now that the risk of setting this precedent has been eliminated by the new rule, discussion on the facts is now free to be evaluated based on the purpose and requirements of the CWMU program. The Kimberly wants an opportunity to be evaluated on their biological facts as they apply to purpose of the program.

VIII. Approval of the Variance would not undermine new policy decisions

The explanation that was given for the variance process being removed from the new CWMU rule was that it eliminated future need for the DWRs extensive process of having to evaluate each sub-10000-acre ranch separately to see if they could be successful in the CWMU program. And if there were many ranches that applied for a variance, the process would be difficult to properly achieve. The new rule draws a hard line to eliminate the extensive and subjective variance process. The variance rule change was NOT based on the fear of sub-10,000-acre ranches being able to successfully meet the purposes of the CWMU program.

Therefore, allowing the Kimberly an approval for an elk variance would in no way undermine that purpose of the new rule moving forward and there is no risk of setting precedent because it will be based on the old rule. The Kimberly applied for a variance and an appeal before the rule change, and therefore making an appeal decision based on the previous rule is allowed by law.

IX. The Kimberly CWMU is following the process in place

The Kimberly CWMU is not trying to avoid the public process and didn't create the procedures for an appeal. The ability to file for agency action and an appeal of the Wildlife Boards decision is allowed by law. The Kimberly is following the appeal rules and their procedures. The procedures call for a closed-door appeal process. A true discussion and determination based on the specific characteristics of the Kimberly ranch and its ability to satisfy the purpose of the CWMU program never happened in the public process.

CONCLUSION

The Kimberly asks for a chance to have a discussion with the Wildlife Board on whether its specific ranch can meet the requirements and purposes of the program. There is biology that supports the Kimberly CWMU for elk hunting success from the DWR's biologist Mr. Wardle. The variance process existed for the very purpose of evaluating a specific ranch to see if falling under the 10,000-acre requirement would prohibit the ranch from being successful in achieving the purposes of the program. The finding and discussion at the November 2023 Board meeting was whether letting the Kimberly have a variance would set a precedent for other small ranches to flood in with applications. The new rule eliminates the risk of any precedent from this appeal going forward and a decision to allow the Kimberly elk permits is based on the old rule which will no longer be in affect after the appeal. The Kimberly CWMU would like to have its day in front of the Wildlife Board in a ranch-specific fact-based discussion about habitat, wildlife, and whether or not the Kimberly can meet the purposes of the program. Kimberly asks you for this chance, and to show it can partner with the DWR for increased hunter opportunity, habitat and wildlife management, and providing a world class experience for hunters year after year.

Dated this 8th Day of August, 2024

/s/ Michael Labrum
Michael Labrum
Attorney for Kimberly CWMU