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January 4, 2011

Tod W. Stevenson
Director, NM Department of Game & Fish
One Wildlife Way
P.O. Box 25112
Santa Fe, NM 87504

Re: Opinion Request – Application of Resident and Nonresident Special Drawing for Hunting Licenses

Dear Mr. Stevenson,

You requested our opinion on the effect that certain federal legislation has on the application of resident and non-resident special drawing quotas for hunting licenses. Specifically, you would like to know if the Reaffirmation of State Regulation of Resident and Nonresident Hunting of Act of 2005 (the "Act") allows the New Mexico Department of Game and Fish (the "Department") to apply a special drawing quota to hunting licenses for bighorn sheep, ibex, or oryx. As explained more fully below, the Act relates to the ability of states to regulate hunting within their borders without offending the "dormant" Commerce Clause of the Constitution. Thus, the Department may apply a special drawing quota for hunting licenses that differentiates between residents and non-residents and not violate the dormant Commerce Clause. Although the Act does not address whether such differential treatment violates the Equal Protection Clause of the Fourteenth Amendment, we believe it would pass muster under that Clause as well based on recent precedent from the 10th Circuit.

Background

Pursuant to state statute, the Department is authorized to utilize special drawings that allocate hunting licenses differently between residents and non-residents. See NMSA 1978, § 17-3-16 (1964, as amended through 1997). The statute authorizes seventy-eight percent of hunting licenses to be issued to New Mexico residents and twenty-two percent to non-residents. *Id.* The Department applies this special drawing quota to hunting licenses for elk, deer, pronghorn antelope, and javelina, but does not apply it to licenses for bighorn sheep, ibex, and oryx. According to your letter, the Department excludes these categories because of an adverse ruling in *Terk v. Gordon* ("Terk I"), No. 74-387-M, slip op. (D.N.M. Aug. 26, 1977).

In *Terk I*, a Texas resident sued the Department challenging the imposition of higher hunting license fees for nonresidents¹ and the allocation of licenses in favor of residents. *Terk I*, No. 74-387-M, slip op. at 1, 6. The Texas resident claimed that the fee differential and license allocation violated the Constitution's Privileges and Immunities Clause, Art. IV, § 2, and the Fourteenth Amendment. *Id.* at 1. At that time, the fee differential was applied to all categories of hunting licenses, but the license allocation was only applied to licenses for bighorn sheep, ibex, and oryx. *See id.* at 2-3.

The district court ultimately decided the case under the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 11-14. It concluded that the fee differential was rationally related to a legitimate state interest and was thus permissible under the Equal Protection Clause. *See id.* at 12-14. The district court, however, found no rational basis for allocating licenses differently between residents and nonresidents and therefore struck down the Department's license allocation. *See id.* at 14.

The Texas resident appealed the portion of the decision that upheld the fee differential. *See Terk v. Gordon* ("*Terk II*"), 436 U.S. 850 (1978). The U.S. Supreme Court, relying on *Baldwin v. Fish & Game Comm'n.*, 436 U.S. 371 (1978), affirmed the district court. In *Baldwin*, the Court held that a similar hunting license fee differential in Montana did not violate the Constitution's Equal Protection Clause or Privileges and Immunities Clause. *Baldwin*, 436 U.S. at 388, 391. The district court's decision regarding the license allocation was not challenged, and it was therefore not addressed on appeal. *Terk II*, 436 U.S. at 851. Thus, the original ruling on this issue in *Terk I*, is arguably still binding on the Department.

The Reaffirmation of State Regulation of Resident and Nonresident Hunting Act of 2005

The Reaffirmation of Resident and Nonresident Hunting Act of 2005, Pub. L. No. 109-13, § 6036, 119 Stat. 231, 289-90, provides:

It is the policy of Congress that it is in the public interest for each State to continue to regulate the taking for any purpose of fish and wildlife within its boundaries, including by means of laws or regulations that differentiate between residents and nonresidents of such State with respect to the availability of licenses or permits for taking of particular fish or wildlife, the kind and numbers of fish and wildlife that may be taken, or the fees charged in connection with the issuance of licenses or permits for hunting and fishing.

Congress enacted the Act after the Ninth Circuit held that Arizona's hunting license allocation, which limited the number of hunting permits issued to nonresidents to ten percent, violated the "dormant" Commerce Clause of the Constitution. *See Conservation Force, Inc. v. Manning*, 301 F.3d 985 (9th Cir. 2002); *see generally* Jodi A. Janecek, *Comment: Hunter v. Hunter: The Case*

¹ While not the subject of this inquiry, the Department continues to apply a fee differential to resident and nonresident hunting license pursuant to NMSA 1978, Section 17-3-13 (1964, as amended through 2010).

for Discriminatory Nonresident Hunting Regulations, 90 Marq. L. Rev. 355, 365-70 (2006). The “dormant” Commerce Clause, which prohibits states from discriminating against interstate commerce, is not directly found in any constitutional provision. *See United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). Rather, it has long been inferred from the Commerce Clause, U.S. Const. Art. I, § 8, which states that “Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the Several States . . .” *See id.*

The dormant Commerce Clause, however, does not apply when Congress specifically authorizes the states to regulate a specific instance of interstate commerce. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) (“Congress may redefine the distribution of power over interstate commerce by permitting the states to regulate commerce in a manner which would otherwise not be permissible”) (internal quotation marks and citation omitted). When Congress takes such action, “the dormancy ends, thus leaving the courts obliged to follow congressional will.” *Schutz v. Thorne*, 415 F.3d 1128, 1138 (10th Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006). This is the case with the passage of the Act. *Id.* Thus, with the passage of the Act “Congress has unmistakably foreclosed dormant *Commerce Clause* petitions challenging state hunting and fishing statutes that treat nonresidents differently than residents.” *Id.*

Although the Act removes any dormant Commerce Clause barrier to the Department allocating hunting licenses based on residency, it does not affect the adverse ruling in *Terk I*, which was premised on the Equal Protection Clause of the Fourteenth Amendment. While the Act has no bearing on *Terk I*, a more recent opinion from the Tenth Circuit may call into question the reasoning applied in *Terk I*.

In *Schultz v. Thorne*, the Tenth Circuit Court of Appeals upheld Wyoming’s discriminatory nonresident hunting regulations, which included both a fee differential and a license “quota.” 415 F.3d at 1137. The Court held that both the fee differential and license quota were rationally related to legitimate state purposes and were therefore constitutional under the Equal Protection Clause. *Id.* As the Court explained:

Many reasons exist, in fact, for states to adopt a preference scheme. Residential preferences are commonly considered a benefit of state citizenship for finite resources such as wildlife resources, higher education, or access to state run facilities. . . . In-state residents, for example--especially those who hunt or fish--have a vested long-term interest in the sustainability of Wyoming’s wildlife management system. This includes not just political support for such programs, but direct financial support through fees and taxes. In-state residents may be counted on more reliably to hunt in Wyoming year after year, thus supporting long-term game and fish habitat preservation, herd management, new species programs . . . or, finally, the more mundane aspects of wildlife programs such as adequate highways, off-road and hiking trails, fire protection, and search and rescue programs. While out-of-state hunters also contribute directly and indirectly to these programs through hunting and fishing license fees and sales taxes, their financial support does not replace that made by Wyoming residents.

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The in-state preference is a logical and reasonable way to reward this support and foster the long-term success of wildlife management programs.

Id. at 1136.

We are unable to identify any reason why the same analysis would not apply to the application of the Department's special drawing quota to *all* hunting licenses. While we understand that the Department excludes licenses for bighorn sheep, ibex, and oryx from its drawing quota because these categories were specifically at issue in *Terk I*, we see no principled purpose for the distinction. As we understand it, sheep, ibex, and oryx were the only categories of licenses at issue in *Terk I* because they were the only categories subject to the special drawing quota at that time.

In any event, it appears that the application of the special drawing quota to all categories of hunting licenses is legally defensible. The three constitutional principles commonly utilized to challenge nonresident hunting regulations – the Privileges and Immunities Clause, the dormant Commerce Clause, and the Equal Protection Clause – have all been addressed. As discussed above, the Act and *Schultz* appear to foreclose such challenges under the dormant Commerce Clause and Equal Protection Clause, respectively. In addition, the U.S. Supreme Court has categorized hunting as a recreation and a sport and therefore not a fundamental right that would otherwise fall within the purview of the Privileges and Immunities Clause. *Baldwin*, 436 U.S. at 388. In light of these authorities, the Department may consider reevaluating its policy of excluding bighorn sheep, ibex, and oryx from its special drawing quota.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,


ELAINE P. JULIAN
Assistant Attorney General