

The *Terk* Injunction & Impacts to Department



Background

- In 1974, David Terk filed an action against the Commission and the Director of the Department of Game and Fish (“Defendants”) seeking declaratory and injunctive relief
- Terk challenged: 1) the allocation of a disproportionately larger number of licenses of oryx, ibex, and bighorn sheep to residents v. nonresidents and 2) higher license fees for nonresidents
- The court upheld the fee differential (Plaintiff appealed but the U.S. Supreme Court affirmed) but struck down the disproportionate allocation. The Defendants did not appeal the court’s decision with respect to allocation of licenses which resulted in an injunction.



The Injunction

- Following the court's 1977 decision, the Defendants were enjoined from "enforcing any statute, regulation, policy, practice, custom or usage which unequally allocate[d] available licenses for game species for Rocky Mountain and Desert Bighorn Sheep, Oryx and Ibex between residents and non-residents of the State of New Mexico solely on the basis of residency."
- In 1997, the Commission and the Department sought judicial relief from the injunction. Such efforts proved unsuccessful, and Defendants were ordered to pay attorneys fees to Terk.



Three Legal Principles to Lift Injunction

- *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978), established recreational hunting is not a privilege under the Constitution's Privileges and Immunities Clause
- The Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005 became law in the U.S. which served to foreclose a dormant Commerce Clause barrier to state regulation of fish and wildlife
- *Schultz v. Thorne*, 415 F.3d 1128 (10th Cir. 2005) rejected an equal protection argument and noted "residential preferences are commonly considered a benefit of state citizenship for finite resources such as wildlife...."



Defendants' Arguments

- The law has changed
 - Statutory (17-3-16) v. Policy
- Department frustrates the will of the Legislature by complying with the injunction
- Terk is now deceased
 - Hearing on standing
 - Argued time is of the essence, as the draw was fast approaching, and the Department did not want to violate state law again this year.



Order

- Judge Armijo delivered an order lifting the injunction within the time parameters we asked for, in order to comply with state law for this year's draw.
- In her order, Judge Armijo identified the three legal principles supporting the state's regulation of wildlife.
- Importantly, she noted: "The injunction entered by the Court prohibits State officials from carrying out State law.... [T]here is no established basis in current federal law for enjoining the State of New Mexico from applying preference for resident hunters provided by State law."



Order cont.

- Judge Armijo concluded her order stating: “Defendants have established that **prospective** enforcement of the Judgment and Order of the Court is **no longer equitable** and that their motion for relief is timely.” (emphasis added).



Department's Actions Following Order

- As we had argued time was of the essence, the Court had noted we were frustrating the will of the Legislature and preventing State officials from complying with State law, and continuing to enforce the injunction was no longer equitable, the Department moved swiftly to comply with State law.
 - Issued press releases
 - Allowed applicants to register with an outfitter
 - Allowed applicants to delete their applications



Financial Impacts

Successful Applicants					
	2013-2014		2014-2015		
Species	Res	NR	Res	NR	
Oryx	1,464	104	1,300	125	
Bighorn Sheep	22	15	36	4	
Ibex	188	77	223	42	
Revenue					
	2013-2014		2014-2015		
Species	Res	NR	Res	NR	
Oryx	\$ 223,992	\$ 167,440	\$ 198,900	\$ 201,250	\$ 8,718.00
Bighorn Sheep	\$ 2,616	\$ 47,400	\$ 4,758	\$ 12,640	\$(32,618.00)
Ibex	\$ 19,364	\$ 123,970	\$ 22,969	\$ 67,620	\$(52,745.00)
					<u>\$(76,645.00)</u>



License distribution

17-3-16. Funds; special drawings for licenses. (2011)

B. Beginning with the licenses issued from a special drawing for a hunt code that commences on or after April 1, 2012:

(1) licenses shall be issued as follows:

(a) ten percent of the licenses to be drawn by nonresidents and residents who will be contracted with a New Mexico outfitter prior to application; and

(b) six percent of the licenses to be drawn by nonresidents who are not required to be contracted with an outfitter; and

(2) a minimum of eighty-four percent of the licenses shall be issued to residents of New Mexico.

C. If the number of applicants who apply for licenses pursuant to the provisions of Paragraphs (1) and (2) of Subsection B of this section does not constitute the allocated licenses for either category, then the additional licenses available may be granted to another category of applicants. The director shall offer first choice of undersubscribed hunts to residents, whenever practicable.

D. If the determination of the percentages in Subsection B of this section yields a fraction of:

(1) five-tenths or greater, the number of licenses to be issued shall be rounded up to the next whole number; and

(2) less than five-tenths, the number of licenses shall be rounded down to the next whole number.



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Special Hunt Public Draw Quota "pools"			
	Resident	Outfitter	Non-Resident
# of Licenses	84%	10%	6%
4	3.36	0.4	0.24
	3	0	0
9	7.56	0.9	0.54
	8	1	1
25	21	2.5	1.5
	21	3	2



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	.56	.9	.54
	8	1	0
20	16.8	2	1.2
	16	2	1
	.8	0	.2
	17	2	1
25	21	2.5	1.5
	21	2	1
	0	.5	.5
	21	2	1
		Next in line	1

