

## Opinion No. 75-38

July 18, 1975

**BY:** OPINION OF TONEY ANAYA, Attorney General

**TO:** Honorable Matias L. Chacon State Senator 239 Onate Street, N.W. Espanola, New Mexico 87532

### QUESTIONS

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1. Can the Department of Game and Fish prosecute persons for securing general bull-elk licenses in two consecutive years when the department sold the licenses to these persons?
2. Would such person be entitled to a refund of the price of the second license?

#### CONCLUSIONS

1. Yes.
2. No.

### OPINION

#### {\*112} ANALYSIS

1. Chapter 14, Art. 2, Sec. 1 of the State Game Commission's Regulation No. 558 provides in pertinent part:

It shall be unlawful for anyone to apply for a public elk license for a "P" area (in 1974, Elk Areas P-1, P-2, P-3, P-4, P-5, P-6, or P-7), if he held a 1973 public elk license for a "P" area. It shall be unlawful for anyone to apply for a 1974 general bull elk license if he held a 1973 general bull elk license. Those who apply for a "P" area elk license as first choice may not apply for a general bull elk license as second choice.

This provision is also set forth in the brochure given by the Department to every person who inquires about or applies for a hunting or fishing license. See **Hunting New Mexico**, 1974-1975 License Years, p. 7.

The prohibited conduct is application for a license. The fact that a sale was made is irrelevant except insofar as it is proof that an application was made. The purpose of this restriction is to maximize the number of people able to hunt game -- a purpose sanctioned by Section 53-1-1, NMSA, 1953. The rationale for the manner in which the

restriction is imposed is that it is much easier for the person making application to ascertain whether he made application {\*113} the previous year than it is for the Department. Promulgation of this provision is within the Commission's broad power to ". . . make such rules and regulations . . . as it may deem necessary to carry out all the provisions and purposes of this act," Section 53-1-11, NMSA, 1953 Comp., and there is no constitutional objection to the imposition of the burden of ascertainment on the public.

2. License fees are to be turned over to the state treasurer for deposit in the game protection fund. Section 53-3-5E, NMSA, 1953 Comp. (P.S.). Money in the game protection fund may be used only for the purposes provided in the game and fish laws. Section 53-1-8, NMSA, 1953 Comp. There are no provisions for reimbursement of license fees in any circumstances; therefore, persons who have purchased a second license illegally are not entitled to reimbursement for the second license.

By: Thomas Patrick Whelan, Jr.

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