

Opinion No. 03-06

November 19, 2003

OPINION OF: PATRICIA A. MADRID, Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney General

TO: The Honorable William H. Payne, State Senator, P.O. Box 14823, Albuquerque, N.M. 87191

QUESTION

Do the State Game Commission's regulations governing the allocation of elk hunting licenses on the Valles Caldera National Preserve ("Preserve") for the 2002-2003 season comply with state laws governing the allocation of hunting licenses by special drawing?

CONCLUSION

No. As applied to the issuance of licenses for bull elk hunting in the Preserve, the regulations are inconsistent with state law, which specifies how licenses issued through a special drawing must be allocated among state residents and non-residents.

FACTS

The State Game Commission's regulations governing the allocation of elk hunting licenses on the Preserve for the 2002-2003 season provide that 100 percent of bull elk licenses will be issued to persons who have obtained access to the Preserve for elk hunting in a lottery for that purpose held by the Valles Caldera Trust. These procedures have been questioned under NMSA 1978, Section 17-3-16 (1997), which requires that 78% of licenses issued through a public drawing be allocated to New Mexico residents.

ANALYSIS

I. The Valles Caldera National Preserve

In 2000, Congress passed the Valles Caldera Preservation Act, 16 U.S.C.A. §§ 698v to 698v-10, under which the United States purchased the Baca Ranch in the Jemez Mountains in Northern New Mexico. The Act establishes the Preserve as a unit of the National Forest System. § 698v-3. The Preserve is managed by the Valles Caldera Trust ("Trust"), which is governed by a nine member Board of Trustees ("Board"). §§ 698v-4, 698v-5.

Congress envisioned the Preserve as a "working ranch under a unique management regime which would protect the land and resource values of the property and

surrounding ecosystem while allowing and providing for the ranch to eventually become financially self-sustaining." 16 U.S.C.A. § 698v(a)(8). Congress also found that the Preserve could "provide numerous recreational opportunities for hiking, fishing, camping, cross-country skiing, and hunting." § 698v(a)(6). The Trust is authorized to "assess reasonable fees for admission to, and the use and occupancy of, the Preserve" for recreational purposes, § 698v-6(e)(2), and to:

reasonably limit the number and types of recreational admissions to the Preserve, or any part thereof, based on the capability of the land, resources, and facilities. The use of reservation or lottery systems is expressly authorized to implement this paragraph.

§ 698v-6(e)(3).

Although the Trust is authorized to limit access to the Preserve based on the type of recreational activity to be conducted, Congress expressly provided that:

Nothing in [the Valles Caldera Preservation Act] shall be construed as affecting the responsibilities of the State of New Mexico with respect to fish and wildlife, including the regulation of hunting, fishing and trapping within the Preserve, except that the Trust may, in consultation with the Secretary [of Agriculture] and the State of New Mexico, designate zones where and establish periods when no hunting, fishing or trapping shall be permitted for reasons of public safety, administration, the protection of nongame species and their habitats, or public use and enjoyment.

16 U.S.C.A. § 698v-3(f) (emphasis added).

II. Licenses to Hunt Elk on the Preserve in 2002-2003

We understand that elk hunting was approved on the Preserve for 2002-2003 following extensive consultations between the Trust's Board and the Game and Fish Department ("Department"). By agreement with the Trust, the Department allocated a total of 90 mature bull elk and 150 antlerless elk (cow) licenses to the Preserve. The Trust arranged to allow access to the Preserve for bull elk hunting by lottery, as permitted under 16 U.S.C.A. § 698v-6(e)(3), quoted above.

For those who successfully gained access, the Game and Fish Commission's regulations governing the distribution of licenses for hunting bull elk on the Preserve provide:

(1) 100 percent of the mature Bull elk licenses allocated to Sub-Unit 6B [1] for the 2002-2003 season shall be issued to the holders of Valles Caldera National Preserve access agreements.

(2) The holders of Valles Caldera National Preserve access agreements shall be identified by the Valles Caldera National Board of Trustees.

(3) Valles Caldera National Preserve Licenses shall be valid for one hunt in Sub-Unit 6B for which the bag limit is one mature bull elk as specified on the Valles Caldera National Preserve access agreement.

19.31.8.24(M)(1)-(3) NMAC (2002). For antlerless elk hunting in the Preserve, the regulations provide that licenses shall "be issued through the public draw."

19.31.8.24(M)(4) NMAC.

The Department's allocation of bull elk hunt licenses to persons who have obtained access to the Preserve for that purpose by lottery raises a question under state laws pertaining to the issuance of hunting licenses by special drawing. The statutes governing hunting licenses and permits prohibit hunting without "the proper license required by law for the year in which the ... hunting ... is done." NMSA 1978, § 17-3-1 (1967). An application, in a form provided by the Department of Game and Fish, must be submitted before a person may receive a license. § 17-3-5(A) (1995). When the Department deems it appropriate, a special drawing may be held among applicants to allocate licenses for a hunt. § 17-3-16. For hunting licenses issued from a special drawing, 78% of the licenses must be issued to New Mexico residents, 12% to nonresidents who will be guided by a New Mexico outfitter or guide and 10% to nonresidents who are not required to be guided by a New Mexico outfitter or guide. § 17-3-16(B). The statute also specifies the fees for nonresident licenses issued in a special drawing and provides for situations where applications for licenses issued in a special drawing do not constitute the specified allocations for residents and nonresidents. § 17-3-16(C)-(E).

As discussed above, the Valles Caldera Preservation Act gives the Trust exclusive authority to regulate access to the Preserve for recreational uses, including hunting, with a lottery system. § 698v-6(e)(3). Under this authority, the Trust elected to conduct a lottery to determine who would gain access to hunt bull elk on the Preserve. The Department, in turn, awarded licenses to those who gained access through the Trust's lottery. These procedures, taken together, effectively allocate licenses in a special drawing contrary to the requirements of Section 17-3-16. (Presumably, licenses for antlerless elk hunting on the Preserve, which the Commission's regulations specify will be issued through a public draw, were properly allocated under Section 17-3-16.)

The drawing is not rendered permissible because it was conducted by the Trust under federal law. We do not believe that the legislature intended that Section 17-3-16's requirements could be avoided by simply having an entity other than the Department conduct a special drawing. Moreover, although the Trust is authorized to regulate access to the Preserve, including through a lottery system, those regulations are not controlling in this instance. Whether federal law preempts state law in a particular case is a matter of express or implied Congressional intent. **See *Southwestern Bell Wireless, Inc. v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185, 1190**

(10th Cir. 1999) (discussing the situations where federal law preempts state law), **cert. denied**, 530 U.S. 1204 (2000); **Montoya v. Mentor Corp.**, 122 N.M. 2, 4, 919 P.2d 410 (Ct. App. 1996) (explaining that there is a "strong presumption against preemption" unless it is clearly Congress' purpose). [2] Here, the Valles Caldera Preservation Act, as quoted above, expressly provides that it may not be construed to affect New Mexico's regulation of hunting within the Preserve. **See** 16 U.S.C.A. § 698v-3(f). This shows Congress' clear intent that the Act **not** supercede New Mexico's laws pertaining to the issuance of hunting licenses. Thus, the Trust cannot use its authority to regulate access in a manner that interferes with the application of Section 17-3-16.

Should the Department and Trust determine that a special drawing remains the best way to issue licenses for bull elk hunting in the Preserve, we recommend that either the Trust conduct its lottery for access according to the allocation requirements of Section 17-3-6 or the Department amend its regulations to provide for a public draw consistent with Section 17-3-6's requirements, like that in effect for antlerless elk hunting on the Preserve.

[1] Sub-Unit 6B consists of all lands within the Preserve. See Game and Fish Commission Rule 19.30.4.9(T) NMAC (2001).

[2] Congress' power to preempt state law stems from the Supremacy Clause of the U.S. Constitution, which provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof..., shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.