

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

DAVID B. TERK,

Plaintiff,

v.

No. 74-837-M Civil

JAMES S. LANE, JR., individually  
and as Director of the Department of  
Game and Fish, State of New Mexico;  
SCOTT BIDEKAIN, THOMAS SALOPEK,  
TOM ARVAS, PAUL KIENZLE III,  
WILLIAM MONTOYA, ROBERT  
ESPINOZA and RALPH RAMOS,  
Individually and as members of the State  
Game Commission, State of New Mexico,

Defendants.

**STATEMENT NOTING DEATH OF PARTY**

Defendants, by and through their General Counsel, Richard B. Wellborn, submit this statement noting the death of the Plaintiff, pursuant to FRCP 25(a). On May 7, 2013, Plaintiff's counsel of record, John J. Jackson, III, confirmed to undersigned counsel that Plaintiff is, in fact, deceased. *See also* Exhibit 1 (obituary of David B. Terk, posted at website <http://files.usgwarchives.net/tx/ector/obits/odessa/2000/obit/041100.txt>, indicating date of death as April 9, 2000).

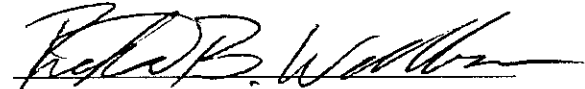
Defendants will file commensurately with this statement Defendants' Second Motion for Relief from Judgment and a memorandum in support of said motion. Pursuant to Rule 25(a), if any party, the decedent's successors or representatives do not move for substitution within ninety

Statement Noting Death of Party – Page 1

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(90) days after service of this statement noting death, the action by or against the decedent must be dismissed.

Respectfully submitted by:



Richard B. Wellborn  
General Counsel  
New Mexico Department of Game and Fish  
1 Wildlife Way  
Santa Fe, New Mexico 87507  
(505) 476-8008

#### **CERTIFICATE OF SERVICE**

I certify that, on May 8, 2013, I have served a true copy of the foregoing STATEMENT NOTING DEATH OF PARTY by certified United States mail, return receipt requested, with sufficient prepaid postage, on the Plaintiff at the following addresses:

- Plaintiff's *Pro Hac Vice* Counsel of Record, at his address of record:

John J. Jackson, III, Esq.  
3900 North Causeway Boulevard  
Suite 1045  
Metairie, LA 70002

- Plaintiff's *Pro Hac Vice* Counsel of Record, at, upon information and belief, his most current address:

John J. Jackson, III, Esq.  
4501 Neyrey Drive  
Metairie, LA 70002-1420

- Plaintiff's Admitted Associate Counsel of record, at his address of record:

James R. Scarantino  
Post Office Box 1457  
Albuquerque, NM 87103

- Plaintiff's Admitted Counsel of Record, at, upon information and belief, his most current address:

James R. Scarantino  
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John Suthers, Attorney General  
Ralph L. Carr Colorado Judicial Center  
1300 Broadway, 10th Floor  
Denver, Colorado 80203

- The State of Idaho, Amicus Curiae:

Lawrence P. Wadson, Attorney General  
Office of the Attorney General  
700 W. Jefferson Street  
Boise, ID 83720-0010

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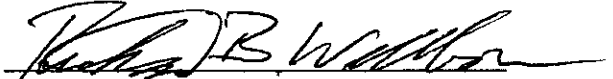
John Swallow, Attorney General  
350 North State Street, Ste 230  
Salt Lake City, UT 84114-2320

- The State of Wyoming, Amicus Curiae:

Gregory A. Phillips  
123 Capitol Building  
200 W. 24th Street  
Cheyenne, WY 82002

- Associated Local Counsel for the States of Colorado, Idaho, Oregon, Utah and Wyoming:

Gary K. King, Attorney General for the State of New Mexico  
408 Galisteo Street  
Villagra Building  
Santa Fe, NM 87501



Richard B. Wellborn

## Exhibit 1

<http://files.usgwarchives.net/tx/ector/obits/odessa/2000/obit/041100.txt>

OA Online Obituaries.

April 11, 2000

Permian Basin Obituaries

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terk041100.jpg (13532 bytes) David B. Terk

ODESSA &#151; David B. Terk, age 70, of San Antonio, died Sunday, April 9, 2000.

He was a Korean War Veteran, serving in the ninth Infantry Unit where he received the Bronze Star.

Mr. Terk was the CEO of Terk Distributing Company and American Beverage Company.

He was an outdoor enthusiast dedicated to wildlife conservation, and a member of many organizations such as, The Grand Slam Club, Texas Southwestern Cattle Raisers Association, International Sheep Hunters Association, Safari Club International and Ducks Unlimited.

Mr. Terk was a world class marksman in competitive shooting, and was honored to represent his country in the World Cup. Del Rio was a second home for many years where he enjoyed ranching at the Sycamore Creek Ranch and Cienegas Ranch.

Survivors include his wife, Joyce L. Terk; daughters, Kristin Rebecca Belt and husband, Wheat, Kimberly Terk Murphy and husband, Michael; grandchildren, Mitchell, Morgan, and McKenna; sister, Sara Shiloff and husband, Robert; brothers, Roger Terk, Michael Terk and wife, Cindy, and Jay Terk.

A memorial services will be at 4 p.m. Wednesday at Porter Loring North Chapel.

In lieu of flowers, memorials may be made to The David B. Terk Lymphoma Research Fund, c/o Cancer Therapy & Research Center, P.O. Box 1657, San Antonio, Texas, 78296-1657, (210) 616-5552. Arrangements with Porter Loring Mortuary North.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

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No. 74-837-M Civil

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WILLIAM MONTOYA, ROBERT  
ESPINOZA and RALPH RAMOS,  
individually and as members of the State  
Game Commission, State of New Mexico,

Defendants.

**MEMORANDUM IN SUPPORT OF  
DEFENDANTS' SECOND MOTION FOR RELIEF FROM JUDGMENT**

Defendants submit this memorandum in support of their second motion for relief from judgment pursuant to FRCP 60(b)(5). Defendants' motion is proper and should be granted because the law underlying this Court's prior judgment has changed, and continued operation of the judgment is now contrary to law, unjust and inequitable.

**I. History of the Case**

The applicable history of this case is as follows:

On August 12, 1974, Plaintiff, at the time a Texas resident and a hunter, filed an action against Defendants, the Director of the New Mexico Department of Game and Fish

(“Department”) and each of the members of the New Mexico State Game Commission (“State Game Commission” or “Commission”), seeking declaratory and injunctive relief. Plaintiff alleged that the Defendants, acting under color of state law, were depriving him of rights and privileges secured to him by the Privileges and Immunities Clause of Article IV, § 2 of the U.S. Constitution and the Fourteenth Amendment. Specifically, Plaintiff challenged the constitutionality of the portions of § 53-1-1 *et seq.* NMSA 1953 Comp., as amended, which provided for the imposition of higher fees for the purchase of hunting licenses by nonresidents than by residents of the State of New Mexico, and by which the State Game Commission, by regulation, provided for the allocation of hunting licenses for bighorn sheep, oryx and ibex more favorably to New Mexico residents than to nonresidents.

Determining that recreational hunting is not a fundamental right or privilege of national citizenship and therefore not subject to the protection of the Privileges and Immunities Clause, this Court ultimately decided the case by applying the rational relationship test under the Equal Protection Clause of the Fourteenth Amendment. Memorandum Opinion and Order 11-12, 14, hereinafter referred to as “1977 Memorandum and Order”. It held that the fee differential was reasonable and rationally related to a legitimate state interest, but that the license allocation was not. *Id.* at 14-15. Thus, with respect to the license allocation, this Court issued a Judgment and Order, dated October 28, 1977, permanently enjoining the Defendants:

from enforcing any statute, regulation, policy, practice, custom or usage which unequally allocates available licenses for the game species of 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.

*f*



Judgment and Order, at 1-2, hereinafter referred to as “1977 Judgment and Order” or “Permanent Injunction”.

Plaintiff appealed this Court’s decision as to the fee differential. Relying on *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371 (1978) (holding that a similar hunting license fee differential in Montana did not violate the Equal protection Clause or the Privileges and Immunities Clause), the U.S. Supreme Court, in a *per curiam* opinion, ultimately upheld the fee differential. *See Terk v. Gordon*, 436 U.S. 850 (1978).

This Court’s decision as to the license allocation remained un-challenged until October 15, 1997, when Defendants sought relief from this Court’s Judgment and Order. At that time, Defendants argued that the *Baldwin* decision constituted a change of law that undermined the reasoning of this Court’s 1977 Memorandum Opinion and Order upon which the Permanent Injunction was based. However, as this Court pointed out in its Memorandum and Order, filed January, 1998, the 1977 Memorandum Opinion and Order was based not on the Privileges and Immunities Clause, but rather on the Equal Protection Clause, and the *Baldwin* case – which addressed only a fee differential and not license allocation – did not affect this Court’s analysis of New Mexico’s license allocation under the Equal Protection Clause. Accordingly, it denied Defendants’ motion.

Consequently, the permanent injunction issued by this Court in its 1977 Judgment and Order is still in effect. As a result, even though Defendants have been authorized for forty nine (49) years under New Mexico law to provide for unequal allocation of licenses as to all

game species,<sup>1</sup> they have declined to do so with respect to bighorn sheep, oryx and ibex since 1977 because of this Court's Permanent Injunction.

## **II. The Law Applicable to this Case has Changed in Favor of Defendants**

Over thirty five years have passed since this Court issued its 1977 Judgment and Order permanently enjoining Defendants from allocating hunting licenses for bighorn sheep, oryx and ibex more favorably to residents than to nonresidents. Since that time, the law applicable to this case has changed. The three constitutional principles most commonly used to challenge nonresident hunting regulations – the Privileges and Immunities Clause, the dormant Commerce Clause and the Equal Protection Clause – have been addressed, either by Congressional legislation or applicable decisional law, to the effect that no legal basis exists – and certainly no legal basis alleged in Plaintiff's Complaint or relied upon by this Court – to invalidate New Mexico's regulatory scheme providing for unequal license allocation based on residency.

As noted above, the Supreme Court, in *Baldwin*, upheld a fee differential in the State of Montana. The Court held that elk hunting by nonresidents was not protected by the Privileges and Immunities Clause because that activity did not bear upon the vitality of the Nation as a single entity and thus was not basic to the maintenance or well-being of the Union. Though that case dealt with a fee differential instead of a license allocation, the

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<sup>1</sup> New Mexico law has provided for unequal license allocation since 1964. See § 53-3-7 NMSA 1953 Comp., enacted by Laws 1964 (1st S.S.), ch. 17, § 7. Under this statute, determinations as to license allocation were made by the State Game Commission. Plaintiff focused this lawsuit only on the allocation as to bighorn sheep, oryx and ibex, because, when the lawsuit was filed, those were the only species for which the Game Commission provided for unequal license allocation, and thus the only species for which he could allege harm sufficient to establish standing. In 1997, § 17-3-16 NMSA (providing for a game license allocation preference for New Mexico residents) was signed into law and remains in effect today.

rationale – that elk hunting is not protected under the Privileges and Immunities Clause – applies equally to bighorn sheep, oryx and ibex hunting. Thus, Defendants submit that *Baldwin* serves to preclude challenges under the Privileges and Immunities Clause to license allocations based on residency.

Also since the 1977 Judgment and Order, Congress passed, and the President signed into law, the Reaffirmation of Resident and Nonresident Hunting Act of 2005, Pub. L. No. 109-13, § 6036, 119 Stat. 231, which provides, at 289-290:

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.

This Act “has unmistakably foreclosed dormant Commerce Clause petitions challenging state hunting and fishing statutes that treat nonresidents differently than residents.” *See Schutz v. Thorne*, 415 F.3d 1128, 1138 (10<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006).<sup>2</sup>

But most importantly since that time, the 10<sup>th</sup> Circuit Court of Appeals upheld a discriminatory nonresident hunting allocation regulation in the State of Wyoming which, notably, was even more restrictive of nonresidents in comparison to residents than New Mexico’s regulatory scheme is.<sup>3</sup> *Id.* As did this Court with New Mexico’s regulatory

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<sup>2</sup> The Plaintiff’s Complaint did not allege any violations of the dormant Commerce Clause, nor did this Court consider the dormant Commerce Clause when entering its 1977 and 1998 orders. It is mentioned here to illustrate how comprehensively both Congressional and Court action has served to preclude challenges to differential nonresident hunting regulations in the United States.

<sup>3</sup> Whereas New Mexico’s scheme provides for lower fees and allocates a higher percentage of licenses for residents, *see, infra.*, Wyoming’s statutes provided for lower fees and a higher percentage of license allocations for

scheme, the Court of Appeals analyzed Wyoming's discriminatory statutes by applying the rational basis test under the Equal Protection Clause of the Fourteenth Amendment.

However, in contrast to this Court's determination, the Court of Appeals determined that Wyoming's **hunting license fee differential and its license quota are both** rationally related to legitimate state purposes and are thus 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. 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 1135-1136.

These reasons and “legitimate state purposes” are equally applicable to New Mexico, as is the clear intent of the Court of Appeals by virtue of the language it chose to use in laying out the reasons that provide the rational basis for such preferential licensing schemes; namely, “Many reasons exist ... *for states* [– plural –] to adopt a preference scheme.”

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residents, AND it exempted residents from a requirement that hunters in wilderness areas obtain a guide. Compare, Wyo. Stat. Ann. §§ 23-2-101 (2002), 23-1-703(e) (2002) and 23-2-401 (2002).

(Emphasis added). Indeed, as the Court noted, the analysis of the reasonable relationship of the regulation to the means is a legal, not a factual, issue. *See, id.* at 1135. “Under rational basis review, ‘a legislative choice is not subject to courtroom factfinding [sic] and may be based on rational speculation unsupported by evidence or empirical data.’” *Id.* (citing *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993); and *Powers v. Harris*, 379 F.3d 1208, 1225 (10<sup>th</sup> Cir. 2004)). Moreover, “those attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it.’” *Id.* “Under [the rational basis] standard, ‘statutory classifications will be set aside only if no grounds can be conceived to justify them.’” *Id.* (citing *McDonald v. Bd. Of Election Comm’rs*, 394 U.S. 802, 809 (1969)). “Nor should courts in reviewing challenged classifications ‘... second guess the wisdom, fairness, or logic of legislative choices or inquire into legislative motivations’”. *Id.*

Pursuant to the rational basis standard of review under the Equal Protection Clause, “courts will uphold [a law] if it is rationally related to a legitimate end.” *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 532 (10<sup>th</sup> Cir. 1998). In 1977, this Court found that New Mexico’s fee differential did meet the rational basis standard, but that its license allocation did not. Since that time, the 10<sup>th</sup> Circuit Court of Appeals applied the same test to a license allocation statute that is substantively almost identical to New Mexico’s,<sup>4</sup> and found that such a statute is indeed rationally related to legitimate state purposes and, therefore, constitutional under the Equal Protection Clause.

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<sup>4</sup> Wyoming’s statute, § 23-1-703(e), *supra*, reserved 80% of moose and 75% of bighorn sheep, mountain goat and grizzly bear licenses to residents. New Mexico’s current statute, § 17-3-16 NMSA 1978 provides that 84% of licenses issued by special draw (such as licenses for bighorn sheep, oryx, ibex, deer, elk, pronghorn antelope and others) be issued to residents.

### III. The Change in Law Warrants Relief from the Permanent Injunction

Based on the principle of *stare decisis*, as the appellate court for the United States District Court for the District of New Mexico, the decisions of the 10<sup>th</sup> Circuit Court of Appeals are binding on this Court. *See* 28 USC 1291 (the courts of appeal have jurisdiction of appeals from all final decisions of the district courts of the United States); and 28 USC § 1294(1) (appeals from a district shall be taken to the courts of appeals for the circuit embracing the district). The 10<sup>th</sup> Circuit Court of Appeals' decision in *Schutz* has changed the decisional law applicable to this case since this Court issued its 1977 Memorandum Opinion and Order and Permanent Injunction.

Under *Schutz*, New Mexico's license allocation is rationally related to a legitimate state purpose and, therefore, constitutional under the Equal Protection Clause. Also, as discussed above, it is prohibited by neither the Privileges and Immunities Clause nor the dormant Commerce Clause. Accordingly, there is no longer any legal basis alleged by Plaintiff or relied upon by this Court issuing the Permanent Injunction.

FRCP 60(b)(5) provides:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: ... the judgment ... is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable....

Because the 10<sup>th</sup> Circuit Court of Appeals has applied the rational basis standard to reach the opposite conclusion of that reached by this Court, this Court's Permanent Injunction is based on an application of decisional law that, as it applies in this case, has been reversed.

Defendants are entitled to relief under Rule 60(b)(5). By itself, and as a matter of law, this fact warrants relief under Rule 60(b)(5).


Additionally, the same constitutional principle – in this instance, the Equal Protection Clause – cannot equitably serve to prohibit in one state the very type of regulatory scheme it permits in another. This too, by itself, warrants relief under Rule 60(b)(5).

Thus, both as matters of law and equity, Defendants are entitled to relief under Rule 60(b)(5). They request that this Court vacate its 1977 Judgment and Order permanently enjoining the Defendants

from enforcing any statute, regulation, policy, practice, custom or usage which unequally allocates available licenses for the game species of 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.

Doing so will enable Defendants to allocate licenses for bighorn sheep, oryx and ibex in the same manner, and pursuant to the same state statute, as it does for other game species in the State of New Mexico.<sup>5</sup>

Respectfully submitted by:



Richard B. Wellborn  
General Counsel  
New Mexico Department of Game and Fish  
1 Wildlife Way  
Santa Fe, New Mexico 87507  
(505) 476-8008

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<sup>5</sup> While license allocation based on residency has been allowed under New Mexico law since 1964, *see* § 53-3-7, *supra*, the Department declined to do so as to *any* game species after this Court issued its Permanent Injunction as to bighorn sheep, oryx and ibex, until 1997. Since § 17-3-16, *supra*, was signed into law in 1997, the Department has allocated licenses based on residency as to game species other than bighorn sheep, oryx and ibex.

## CERTIFICATE OF SERVICE

I certify that, on May 8, 2013, I have served a true copy of the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS' SECOND MOTION FOR RELIEF FROM JUDGMENT by certified United States mail, return receipt requested, with sufficient prepaid postage, on the following<sup>6</sup>:

- Plaintiff's *Pro Hac Vice* Counsel of Record, at his address of record:

John J. Jackson, III, Esq.  
3900 North Causeway Boulevard  
Suite 1045  
Metairie, LA 70002

- Plaintiff's *Pro Hac Vice* Counsel of Record, at, upon information and belief, his most current address:

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- The State of Colorado, Amicus Curiae:

John Suthers, Attorney General  
Ralph L. Carr Colorado Judicial Center  
1300 Broadway, 10th Floor  
Denver, Colorado 80203

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<sup>6</sup> Defendants are not attempting to serve Plaintiff, as Plaintiff has deceased. See Statement Noting Death of Party, which statement is being filed by Defendants commensurately with the filing of this Memorandum.



- The State of Idaho, Amicus Curiae:

Lawrence P. Wadson, Attorney General  
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Richard B. Wellborn

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**DEFENDANTS' SECOND MOTION FOR RELIEF FROM JUDGMENT**

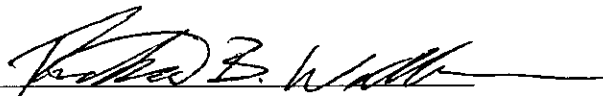
Defendants,<sup>1</sup> by and through Richard B. Wellborn, General Counsel for the New Mexico Department of Game and Fish, request this Court, pursuant to FRCP 60(b)(5) for an order relieving Defendants from the permanent injunction issued by this Court on August 25, 1977. The decisional law upon which the permanent injunction was issued has changed, and Defendants are entitled to relief from the permanent injunction as a matter of law and equity.

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<sup>1</sup> The persons previously named as Defendants in this case were so named by virtue of their holding the public offices identified in the caption to this matter. All original Defendants have ceased to hold those public offices, and the caption has been changed, pursuant to FRCP 25(d), to substitute the names of the persons currently holding those offices. The scope of the substitution of the current office-holders as Defendants is intended to be limited in scope to their capacity as public office holders. None of the substituted Defendants consents to serving as Defendants in their personal or "individual" capacities, despite being so named in the caption.

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Respectfully submitted by:



Richard B. Wellborn  
General Counsel  
New Mexico Department of Game and Fish  
1 Wildlife Way  
Santa Fe, New Mexico 87507  
(505) 476-8008

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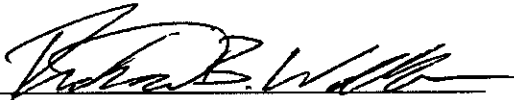
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Richard B. Wellborn