

October 9, 2026

OPINION
OF
RAÚL TORREZ
Attorney General

Opinion No. 2026-12

To: The Honorable Nathan P. Small, Representative D-Doña Ana, District 36
 The Honorable William P. Soules, Senator D-Doña Ana, District 37
 The Honorable Meredith A. Dixon, Representative D-Bernalillo, District 20
 The Honorable Linda Trujillo, Senator D-Santa Fe, District 24
 The Honorable Sarah Silva, Representative D- Doña Ana & Otero, District 53
 The Honorable Carrie Hamblen, Senator D-Doña Ana, District 38
 The Honorable Charlotte Little, Representative D-Bernalillo, District 68
 The Honorable Elizabeth “Liz” Stefanics, Senator D-San Miguel, Santa Fe, Torrance, &
 Valencia, District 39
 The Honorable Kristina Orteiz, Representative D-Taos, District 42
 The Honorable Heather Berghmans, Senator D-Bernalillo, District 15
 The Honorable Christine Chandler, Representative D-Los Alamos, Sandoval, & Santa Fe,
 District 43
 The Honorable Angel M. Charley, Senator D-Bernalillo, Cibola, McKinley, Socorro, &
 Valencia, District 30
 The Honorable Andrea Romero, Representative D-Santa Fe, District 46
 The Honorable Michelle Paulene Abeyta, Representative D-Bernalillo, McKinley,
 Valencia, San Juan, Socorro, & Cibola, District 69
 The Honorable Susan K. Herrera, Representative D, Rio Arriba, Sandoval, Santa Fe, &
 Taos, District 41
 The Honorable Joseph Franklin Hernandez, Representative D-San Juan, District 4
 The Honorable Anita Gonzales, Representative D-San Miguel & Torrance, District 70
 The Honorable Debra M. Sariñana, Representative D-Bernalillo, District 21

Re: Attorney General Opinion – Elk and Bighorn Sheep Hunting Licensure

Questions

1. Is the outfitter set-aside allocation system constitutional under New Mexico’s anti-donation clause, N.M. Const. art. IX, § 14?

2. Is it lawful for the Department of Wildlife to allocate Bighorn Sheep licenses based on hunting units rather than a per-unit basis, as it does for other big game species, and where that practice effectively increases the number of licenses counted for determining whether any such licenses are designated for the pool of outfitter-mandated licenses?
3. What are the constitutional implications of these issues in terms of the State's obligation to manage New Mexico wildlife in trust "for the benefit of the people of the state"? In other words, is the outfitter set-aside or Bighorn Sheep license allocation system constitutional under New Mexico's Public Trust Doctrine, N.M. Const. art. XX, § 21?

Answers

1. The outfitter set-aside in NMSA 1978, Section 17-3-16(B)(1)(a) (2011) violates New Mexico's anti-donation clause on two independent grounds.

First, the 2011 statute conditioned set-aside access on outfitters' investment in New Mexico and employment of New Mexico residents, a genuine exchange for the State's conveyance of exclusive tag access. A 2012 federal injunction dismantled those requirements for individual outfitters, destroying the constitutional bargain. Without those conditions, the set-aside confers substantial commercial value on private parties in exchange for nothing beyond licensing fees they would owe regardless. The State is bound by the 2012 injunction and cannot unilaterally restore the invalidated requirements.

Second, and independently, the anti-donation clause requires that consideration bear a reasonable relationship to the value being transferred. The licensing fees that remain after the injunction are so grossly disproportionate to the market value of set-aside access that the transaction is a donation in substance, even if it nominally involves some payment.

2. Because the outfitter set-aside is unconstitutional as enforceable, licenses allocated through it are tainted by the same constitutional defect. The Department's practice of aggregating Bighorn Sheep tags across hunt units to artificially trigger set-aside thresholds compounds that problem: if the record reflects no conservation or administrative rationale for the aggregation practice other than generating outfitter set-aside allocations, that practice presents an independent anti-donation clause problem.
3. The Public Trust Doctrine assigns to the Legislature the obligation to protect the State's natural resources for the maximum benefit of all New Mexicans. Whether the current licensure scheme satisfies that obligation is a question committed to the Legislature, not to the courts or this office.

Background

New Mexico's Legislature has enacted detailed legislation to ensure that hunting and fishing within the State is properly regulated in accordance with state priorities. *See* NMSA 1978, §§ 17-3-1 to -34 (1912, as amended through 2025). Elk and similar game hunting is therefore limited to

those who have tags in specific areas referred to as “units,” which are allocated through “hunt codes.” NMSA 1978, § 17-2A-1 (1996). There is a high demand of elk and other big game for hunting in New Mexico but a low supply. The State Wildlife Commission sets the number of available tags based on a variety of ecological measurements such as population size and suitable habitat. NMSA 1978, § 17-1-14 (2015); NMSA 1978, § 17-1-26 (2025); *see, e.g.* 19.13.14.14–16 NMAC (setting the number of elk tags by hunt). For example, in the 2025-26 season 102,653 people applied for 22,783 elk tags available in the draw. N.M. Dep’t of Wildlife, Drawing Odds Summary Report (2025), <https://wildlife.dgf.nm.gov/hunting/applications-and-draw-information/how-new-mexico-draw-works/>. Because demand outstrips supply, those interested in acquiring elk and other big game tags must submit applications, which are then subject to a randomized drawing each year (the draw).

Competition for these tags is intense. In the 2022-23 season, the Department issued approximately 1,584 elk tags through the outfitter set-aside pool. Of those, roughly 90 percent went to nonresident hunters contracted with outfitters. New Mexico Wildlife Federation et al., *Take Back Your Elk* 13 (2024) (reporting that nonresidents drew 1,429 of 1,584 outfitter set-aside elk licenses (90.2 percent) during the 2022-23 season, based on data obtained from the New Mexico Department of Wildlife), https://www.takebackyourelk.com/uploads/1/4/8/7/148701374/tbye-2023report-final_web_.pdf. But of the remaining public draw licenses, 19,850 went to residents and 935 to non-residents, reflecting an appropriate preference for New Mexico’s hunters. *Id.* The practical effect of the set-aside is to create a parallel, preferential access channel that benefits nonresident hunters who can afford outfitter-contracted hunts at the expense of New Mexico residents competing in the general draw.

The commercial value of set-aside access is substantial. Outfitters typically charge nonresident clients \$5,000 or more per elk hunt. These fees reflect, in significant part, the substantially increased odds of drawing a tag that the set-aside provides. NMSA 1978, § 17-2A-3. Robert Nott, *Report: Wealthy, Out-of-State Hunters Favored in Elk License System*, Santa Fe New Mexican (Nov. 9, 2023) (noting outfitter-arranged hunts advertised at \$5,000 and upward, with landowner licenses estimated to sell for \$10,000 and higher), https://www.santafenewmexican.com/news/local_news/report-wealthy-out-of-state-hunters-favored-in-elk-license-system/article_bca2ae4c-4404-11ed-90cd-7bcbeb7ed804.html; *see* Ryan Laughlin, *Debate Grows Over New Mexico’s Big Game Draw as Change Is on Horizon*, KOB-TV (June 9, 2026, 8:36 AM) (reporting private land elk tags selling for \$15,000 to \$20,000), <https://www.kob.com/new-mexico/4-investigates-debate-grows-over-new-mexicos-big-game-draw-as-change-is-on-horizon/>. But outfitters only pay the State a registration fee of \$500 or less to qualify for and maintain their outfitter license. No separate premium or market-rate charge is paid to the State in exchange for set-aside tag access.

Other western states have adopted different approaches to big game tag distribution. Arizona, for example, requires that at least ninety percent of big game tags go to residents, applies a preference-point system that improves draw odds over time for unsuccessful applicants, and operates no outfitter-specific set-aside pool. *See* Ariz. Rev. Stat. § 17-332(A) (2022); Ariz. Game & Fish Dep’t, 2026–27 *Arizona Hunting Regulations* 22 (2026), <https://azgfd-portal-wordpress-pantheon.s3.us-west-2.amazonaws.com/wp-content/uploads/2026/05/04081122/2026-27-Arizona-Hunting-Regulations.pdf>. New Mexico’s outfitter set-aside is not tied to habitat access,

land stewardship, or any other wildlife resource benefit to the State. The significance of this distinction is addressed in the Analysis below.

Per statute, the Director of the Department of Wildlife operates a public draw that allocates certain percentages of available licenses to specified groups. Section 17-3-16(B) states that

- (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[, as defined in Section 17-3-16(H),] 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.

Subsection (B)(1)(a) is generally referred to as the “outfitter set-aside.” Subsection (C) allows for distribution of licenses to other categories “[i]f the number of applicants who apply for licenses pursuant to the [above] provisions . . . does not constitute the allocated licenses for either category,” with the caveat that “undersubscribed hunts” shall first be offered to residents, whenever practicable. Section 17-3-16(C).¹

Analysis

1. The outfitter set-aside violates New Mexico’s anti-donation clause because it conveys exclusive access to a public resource without constitutionally adequate consideration.

New Mexico’s anti-donation clause prohibits the State from conveying public resources to private parties without genuine consideration. The outfitter set-aside fails that requirement on two independent grounds. First, the Legislature conditioned set-aside access on concrete economic commitments to New Mexico, but a 2012 federal injunction struck those conditions and left the benefit in place without the bargain. Second, the consideration that remains bears no reasonable relationship to the value the set-aside confers.

a. The outfitter set-aside confers substantial value on a private industry at public expense.

New Mexico’s anti-donation clause is set forth in Article IX, Section 14 of our Constitution. That provision states, in pertinent part:

¹ Our statutes separately allow for the issuance of elk tags to landowners pursuant to specific regulations, and a significant portion of the available elk tags are distributed under that system. *See* §§ 17-3-14.1, -14.2. Those statutes and the landowner licenses issued under that system are outside the scope of this opinion.

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation.

A “donation,” for purposes of Article IX, Section 14, is “a gift, an allocation or appropriation of something of value, without consideration.” *Vill. of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 36, 62 N.M. 18 (text only). The anti-donation clause is implicated in cases where, “by reason of its nature and the circumstances surrounding it,” government action takes on the “character [of] a donation in substance and effect.” *Id.* ¶ 37.

On the other hand, the anti-donation clause is satisfied once the government receives consideration for its expenditure. *State ex rel. Off. of State Eng’r v. Lewis*, 2007-NMCA-008, ¶ 51, 141 N.M. 1. Consideration is “a promise to do something that a party is under no legal obligation to do or to forbear from doing something he has a legal right to do.” *Luginbuhl v. City of Gallup*, 2013-NMCA-053, ¶ 15 (text only).

Wildlife in New Mexico is considered a public resource, and our Supreme Court has long acknowledged that when the State owns the land, the public has the right to hunt on it subject to state law and regulations, and the State effectively holds that common right in trust for the people. *See State ex rel. State Game Comm’n v. Red River Valley Co.*, 1945-NMSC-034, ¶¶ 14, 24, 47, 51 N.M. 207. Hunting licenses are access rights to publicly owned resources.

The issuance of hunting licenses, in and of itself, is not a violation of the anti-donation clause because license fees are paid to the state in exchange for the tags. *See City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1161 (D.N.M. 2008) (indicating that while courts should not “evaluate whether the agreement was a good or bad deal under the Anti-Donation Clause,” they should nevertheless “check for adequate consideration”); *see also* § 17-3-13 (license fee schedule).

Moreover, the issuance of tags to residents does not implicate the anti-donation clause because wildlife is a resource held in trust for New Mexicans—the right to hunt and fish is one already held by New Mexicans. *Red River Valley Co.*, 1945-NMSC-034, ¶¶ 24, 31; *see id.* ¶ 48 (“Broadly speaking, the rule in this country has been that the right of fishing in all waters, the title to which is in the public, belongs to all the people in common.” (text only)).

But the anti-donation clause analysis does not begin and end at the granting of a tag. What the State grants to outfitters via the set-aside is not the tag itself but something economically distinct: the exclusive legal right to broker access to a reserved portion of the tag supply. No other class of persons may offer clients a position in the set-aside pool; the pool exists only because the State created it and reserved it for qualifying outfitters. The set-aside is therefore best understood as a

state-created exclusive franchise over a portion of New Mexico’s public wildlife allocation, analogous to an exclusive concession or government-created market preference.²

Providing exclusive access to a set-aside pool of licenses provides a significant economic benefit to outfitters above and beyond the tag itself. Because the supply of elk is inherently limited, big game tags are a valuable commodity. The outfitter set-aside grants outfitters exclusive power to broker access to ten percent of the big game tag supply. Non-resident hunters can therefore contract with an outfitter for heightened odds of receiving a tag, rather than compete in the unguided nonresident lottery. When the State allows only certain private entities to essentially sell heightened odds to access an otherwise unguaranteed and in-demand public resource, and where those heightened odds result from the State reserving a portion of the entire supply of a public resource for a small class of private entities, the State has allocated “something of value” within the meaning of the anti-donation clause. *See Hosdreg Co.*, 1956-NMSC-111, ¶ 36. Here, that value is apparent from the profits that outfitters enjoy as a result of the outfitter set-aside.

The question, then, is whether the benefits derived from the outfitter set-aside are donations made to private individuals or entities without valuable consideration given to the State in return.

b. Individual outfitters provide no additional consideration to reap the benefits of the outfitter set-aside.

To administer the outfitter set-aside, New Mexico law distinguishes between “outfitters” and “New Mexico outfitters.”

Outfitters are entities that are licensed to hold themselves out as providing “facilities, equipment or services for hunting activities.” NMSA 1978, § 17-2A-1(B) (1996). Like other licensed professions, state law requires outfitters to pass an exam, obtain insurance, pay registration fees, and meet other requirements to obtain and maintain licensure. NMSA 1978, § 17-2A-3 (2001).

But outfitters can only gain access to the outfitter set-aside if they are separately qualified as “New Mexico outfitters.” Section 17-3-16(H). In 2011, the Legislature modified the size of the outfitter set-aside from twelve to ten percent and defined “New Mexico outfitter” to prioritize and protect local outfitter access to the shrunken pool. 2011 N.M. Laws, ch. 186, § 5. In addition to being a validly licensed “outfitter,” a “New Mexico outfitter” is an outfitter:

- (1) with a valid New Mexico state, county or municipal business registration and a valid outfitter license issued by the department of [wildlife];
- (2) that is authorized to do and is doing outfitting business under the laws of this state;

² While outside the scope of the anti-donation question, our Supreme Court has suggested, albeit without deciding the question, that some exclusive grants of hunting and fishing rights might run afoul of the New Mexico Constitution’s franchise clause. *Red River Valley Co.*, 1945-NMSC-034, ¶ 53 (citing N.M. Const. art. IV, § 26).

(3) that has paid property taxes or rent on real property in New Mexico, paid gross receipts taxes and paid at least one other tax administered by the taxation and revenue department in each of the three years immediately preceding the submission of an affidavit to the department of [wildlife];

(4) the majority of which is owned by the person who has resided in New Mexico during the three-year period immediately preceding the submission of an affidavit to the department of [wildlife];

(5) that employs at least eighty percent of the total personnel of the business who are New Mexico residents; and

(6) that has either leased property for ten years or purchased property greater than fifty thousand dollars (\$50,000) in value in New Mexico;

(7) that, if it has changed its name from that of a previously certified business, the business is identical in every way to the previously certified business that meets all criteria;

(8) that possesses all required federal or state land use permits for the hunt; and

(9) that operates as a hunting guide service during which at least two days are accompanied with the client in the area where the license is valid.

Section 17-3-16(H).

The structure of the 2011 amendments reflects a legislative judgment that set-aside access should be conditioned on meaningful investment in New Mexico. The statute required hiring New Mexico residents, paying state taxes, and acquiring property in the State as prerequisites for access to the special drawing pool. Whatever the history behind the 2011 amendments, the face of the statute demonstrates the Legislature's design: set-aside access was available only to outfitters who made concrete, verifiable commitments to New Mexico's economy. That structure is the functional equivalent of consideration, conditioning the set-aside benefit on substantial commitments that benefit the State. 2011 N.M. Laws, ch. 186, § 5; § 17-3-16(H)(3)–(6).

That bargain, however, is not currently enforceable as written. In 2012 in federal court, some outfitters challenged the requirements to become a “New Mexico outfitter” as discriminatory against non-residents in violation of the Privileges and Immunities Clause of the United States Constitution. *McReynolds v. Lane*, No. 12-cv-97, 2012 WL 12886816, at *4–*6 (D.N.M. Mar. 27, 2012). Although the Privileges and Immunities Clause does not protect the right to hunt, it does protect the right to pursue one's calling, such as outfitting. *Baldwin v. Fish and Game Comm. of Montana*, 436 U.S. 371, 378 (1978).

The district court preliminarily enjoined the then-titled New Mexico Department of Game and Fish from enforcing four “New Mexico outfitter” requirements, § 17-3-16(H)(3)–(6), against individual outfitters and unincorporated sole proprietorships. *Id.* at *6–*7. The injunction did not, however,

apply to corporate entities because corporations are not protected under the Privileges and Immunities Clause. In converting the preliminary injunction to a permanent injunction, the Department stipulated that the “New Mexico outfitter” requirements as applied to individuals were severable from the rest of the statute. Stipulated Order Granting Declaratory Judgment and Permanent Injunction, at 2, *McReynolds v. Lane*, No. 12-cv-97 (D.N.M. Apr. 26, 2012), ECF No. 25. As such, the residency requirements remain in full effect for corporations, but Subsections 17-3-16(H)(3)–(6) do not apply to individuals and unincorporated sole proprietorships. 19.30.8.9 NMAC.

It is this federal injunction that poses the anti-donation clause problem. The bargain that the Legislature struck is no longer valid. The Legislature’s promise to set aside an allocation of licenses to outfitters was based on the idea that outfitters would invest in New Mexico and New Mexicans. Individual outfitters no longer need to do so. Accordingly, this office need not “evaluate whether the agreement was a good or bad deal,” it just needs to look at the terms of the original deal, which individual outfitters no longer need to follow. *City of Raton*, 600 F. Supp. 2d at 1161.

To be sure, some requirements remain, § 17-3-16(H)(1)–(2), (7)–(9), but these merely restate requirements that outfitters must already comply with, i.e., they are licensed as outfitters, are who they say they are, obtain proper permits, and are actually engaged in the business of outfitting. These requirements would apply to any outfitter and are not additional consideration. N.M. Att’y Gen., No. 2026-06, at 3 (inquiring, for anti-donation clause purposes, whether “[b]ut for” the benefit, an entity would be forced to comply with certain statutory requirements).

c. If an outfitter provides no additional consideration to participate in the outfitter set-aside, the transaction is unconstitutional under the anti-donation clause.

After the injunction, individual outfitters can participate in the outfitter set-aside pool without meeting statutory requirements to invest in New Mexico. This is unconstitutional.

The anti-donation clause requires consideration. *Lewis*, 2007-NMCA-008, ¶ 51. It follows that a payment already legally required of a party (the requirements to become an outfitter) cannot constitute consideration for a separate benefit (participation in the outfitter set-aside): the party gives up nothing and foregoes nothing by making it. This office has applied this anti-donation principle in other contexts, concluding that statutory obligations an entity would bear regardless of the benefit at issue do not constitute consideration for that benefit. *See* N.M. Att’y Gen., No. 2026-06, at 3 (inquiring whether “but for” the benefit, an entity would comply with obligations required to obtain film tax credit).

The requirements to become an outfitter, like the registration fee, are insufficient consideration to participate in the set-aside. Under Section 17-2A-3(O), the annual fee to be a registered outfitter is \$500. Registration is a general regulatory requirement that applies to every outfitter operating in New Mexico, entirely independent of whether the outfitter participates in the set-aside. 19.30.8.8 NMAC. An outfitter who never uses the set-aside, and whose clients compete in the general draw, owes the identical \$500 fee. The fee is not tied to the set-aside, not calibrated to set-aside participation, and not conditioned on it. It is owed because the outfitter operates a guiding business

in New Mexico, not because the State is granting that outfitter exclusive access to a reserved allocation of big game tags.

Nor does the cumulative regulatory burden of outfitter registration, including the examination, insurance requirements, land use permits, and three-year guiding experience requirement, constitute consideration provided to the State in exchange for set-aside access. Each of those requirements is a condition of operating as a registered outfitter at all. NMSA 1978, § 17-2A-3; 19.30.8.8 NMAC. They apply uniformly to outfitters who use the set-aside and those who do not. They would exist regardless of whether the set-aside program existed. An outfitter does not satisfy these requirements *because of* set-aside access; the outfitter satisfies them to be lawfully registered. The regulatory compliance that all outfitters must maintain as a baseline condition of operation cannot, by definition, constitute consideration specifically exchanged for the set-aside. N.M. Att’y Gen., No. 2026-06, at 3.

For individual outfitters, no separate fee, surcharge, or payment of any kind is required to participate in the set-aside beyond the standard registration fee every outfitter already owes. Individual outfitters receive exclusive access to a segment of a valuable public resource without any payment tied to that access. That is the definition of a donation.

Indirect economic benefits, such as the tourism expenditures, gross receipts tax revenue, and other economic activity generated by outfitter-contracted hunts, are not sufficient consideration either. These indirect benefits do not satisfy the anti-donation clause for two reasons.

First, the indirect benefits are not paid to the State in exchange for set-aside access. They arise from the underlying commercial activity of hunting in New Mexico and are independent of the outfitters’ participation in the set-aside program. Under the “but for” test this office has previously articulated, a benefit that would accrue to the State in any event is not consideration. N.M. Att’y Gen., No. 2026-06, at 3.

Second and more importantly, the anti-donation clause prohibits unrestricted subsidies made on the basis of indirect downstream effects on struggling industries. The mere fact that aid will ultimately lead to “employment for those working the industr[y]” later on is insufficient consideration under the anti-donation clause. *State ex rel. Mechem v. Hannah*, 1957-NMSC-065, ¶ 39, 63 N.M. 110 (holding voucher program for ranchers unconstitutional). Most financial aid will ultimately lead to some type of downstream employment once spent on goods or services—the anti-donation clause demands something more. N.M. Att’y Gen., No. 2026-06, at 3 (finding film tax-credit constitutional because of specific hiring reporting requirements and commitments made to state in exchange for benefits). Absent concrete, “but-for,” commitments to the state, the outfitter set-aside is precisely the type of industry welfare the anti-donation clause forbids.

d. Even if the registration fee were treated as consideration, it is grossly disproportionate to the value the set-aside confers and unconstitutional under the anti-donation clause.

But if this office were to treat the general requirements to become an outfitter, like the \$500 registration fee, as consideration, they are nevertheless woefully insufficient consideration. The

anti-donation clause does not require courts to conduct a searching analysis of consideration. *City of Raton*, 600 F. Supp. 2d at 1161 (declining to analyze whether a transaction was “good or bad deal”). But the consideration must be more than just a chestnut—it must have *some* “value.” See *Lewis*, 2007-NMCA-008, ¶ 51. That is, courts should “merely check for adequate consideration.” *City of Raton*, 600 F. Supp. 2d at 1161.

Other states, like Arizona, interpret their equivalent gift clauses to prohibit granting public benefits that are “grossly disproportionate” to the consideration received in exchange. *Turken v. Gordon*, 224 P.3d 158, 164 (Ariz. 2010). Arizona also recognizes the states have a “special obligation” to receive fair consideration for public lands and resources under its gift clause. *Ariz. Ctr. for L. in Pub. Int. v. Hassell*, 837 P.2d 158, 170 (Ariz. Ct. App. 1991). For example, under Arizona’s constitution, the state would be prohibited from paying \$5 million for a job that contractors would be willing to do for \$5,000. *Id.* at 166. Constitutional anti-donation and gift clauses foreclose the possibility of this type of corruption via overpayment and industry subsidy.³

While New Mexico courts have yet to explicitly adopt the “grossly disproportionate” approach, this office deems it the right interpretation of our anti-donation clause. This approach finds some support in our caselaw. For example, in dicta, our Court of Appeals has observed that our anti-donation clause was satisfied when the State “purchas[ed] land and water rights at market value,” suggesting that some judicial inquiry into consideration may be possible for anti-donation purposes. *Lewis*, 2007-NMCA-008, ¶ 51. Market value need not be the ultimate measurement of consideration in every transaction—it is merely one way to look at value, and a degree of deference to the Legislature is likely appropriate. *City of Raton*, 600 F. Supp. 2d at 1161. Nevertheless, regardless of the measurement used or deference owed, the underlying consideration must constitute some minimum, meaningful, bargained-for benefit to New Mexico and its citizens.

Here, the set-aside confers benefits to outfitters that are grossly disproportionate benefits to any consideration. Post-injunction, individual outfitters pay a \$500 fee to the State to be qualified as both outfitters and New Mexico outfitters. In return, outfitters receive an allocation of roughly 1,500 licenses. But if outfitting industry as a whole were to pay for these licenses on the open market, at a rate of \$10,000 per tag,⁴ they would need to pay \$15 million for the collection of tags they now receive through the outfitter set-aside. See *Nott, supra*. As an industry, there are just shy of 300 outfitters in the state, that pay \$500 each in registration fees, for a total of \$150,000 in fees. N.M. Dep’t of Fish & Game, *Outfitters List* (May 5, 2026), <https://wildlife.dgf.nm.gov/hunting/guide-outfitter-information/>.

³ To be sure, in New Mexico, this type of overpayment would also be prohibited under our procurement statutes. NMSA 1978, § 13-1-102 (2022). Even so, our anti-donation clause provides an important constitutional backstop to prevent corruption in procurement and in other transactions.

⁴ We use the \$10,000 figure drawn from the reported costs to purchase a landowner tag because it is the only tag that is available on the open-market, and thus best representative of the true market value of an elk tag.

In other words, the outfitting industry pays just \$150,000 for \$15 million of New Mexico's valuable elk tags, a *hundred-to-one* benefit.⁵ That is grossly disproportionate by any measure.

The set-aside grants outfitters the exclusive legal right to broker access to a guaranteed allocation of a scarce public resource, and that exclusivity is itself the value at issue. No other class of persons may offer clients a position in the set-aside pool; the pool exists only because the State created it and reserved it for qualifying outfitters. The State has conveyed an exclusive commercial franchise over a portion of a publicly owned resource, and the \$500 registration fee it receives bears no real and substantial relationship to the value of that franchise. That fee is not calibrated to the set-aside, not conditioned on participation in it, and owed in full by outfitters who never use it. It is not consideration for the set-aside in any meaningful sense. In short, the outfitter set-aside is an unconstitutional "gift[] . . . disguised as [a] business transaction[]." *City of Raton*, 600 F. Supp. 2d at 1161.

If the set-aside were struck under the Anti-Donation Clause, the statute explains that if "practicable," any undersubscribed hunts should be redistributed to residents. Section 17-3-16(C). This means the tags previously allocated to outfitters could be reallocated to residents in the public draw, up to a total of ninety four-percent of available draw tags. For now, however, the Department of Wildlife is bound by the federal injunction.⁶

In short, the injunction removed the conditions the Legislature had imposed as a condition of set-aside access, leaving in place only the \$500 registration fee for individual outfitters. That fee is not additional consideration for the set-aside under New Mexico's anti-donation clause. And even if it were, the benefit conferred by the state on outfitters is grossly disproportionate to the fee. The set-aside cannot be sustained on either ground.

2. The Department's practice of allocating Bighorn Sheep tags based on hunting units, rather than a per-unit basis as it does for other big game species, is infected by the anti-donation clause issues discussed above.

Big game hunting is limited to those who have tags in specific areas referred to as "game units." Based on the information provided to this office, it appears that although each game unit might typically have one to two tags, a number too small to trigger an outfitter allocation, the Department combines Bighorn Sheep tags across units to increase the total tags under a hunt code. This practice

⁵ Again, the exchange between residents and the State for tags is not subject to anti-donation scrutiny because the State's wildlife is held in trust for New Mexicans and distributed to New Mexicans in common through the public draw.

⁶ This office disagrees with the Department's previous litigation decisions, but it nevertheless remains bound by that judgment. The time periods to alter that judgment under Rules 59 and 60 have long passed. Fed. R. Civ. P. 59(b) (motion to alter judgment must be filed in 28 days); Fed. R. Civ. P. 60(c) (motion for relief from judgment must generally be filed within a year). At this point, modifications to the judgment and injunction are likely only possible if there has been an intervening change in law. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 388 (1992).

could increase the number of licenses counted for purposes of determining whether any are designated for the pool of the outfitter set-aside, and thereby increase the number of outfitter set-aside tags. As already explained, regardless of the method of allocation, the outfitter set-aside is unconstitutional as enforceable.

To the extent the Department's *only* reason on the record for these boundaries is creating a set aside for outfitters (as opposed to another permissible reason), that practice is also unconstitutional because it increases the value of the benefits conferred on outfitters. *Cf. Sw. Pub. Serv. Co. v. N.M. Pub. Regul. Comm'n*, 2025-NMSC-013, ¶ 59 ("We presume that administrative action is correct and that the orders and decisions of the administrative body are valid and reasonable." (text only)).

In reaching this conclusion, we do not intend to suggest that the Department lacks authority to determine how big game tags are issued or measured. Indeed, as this office already explained, the Department's construction is likely permissible as a matter of pure statutory construction (although our previous opinion did not address the relevance of the anti-donation clause). N.M. Att'y Gen., No. 2022-06 (Apr. 5, 2022) (opinion regarding New Mexico State Game Commission's application of the term "hunt code"); *Sw. Pub. Serv. Co.*, 2025-NMSC-013, ¶ 59 (holding that agency action enjoys a "presumption of regularity"). The relevant statutes suggest that the Department has considerable latitude to make decisions in administering big game tags, particularly where those decisions relate to the population of certain big game species or other practical considerations in which the Department has specialized expertise. *See* §§ 17-3-1 to -34; *Martinez v. State Eng'r Off.*, 2000-NMCA-074, ¶ 22, 129 N.M. 413 (providing that agencies have authority necessarily implied by statute); *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 12, 120 N.M. 579 (providing that courts defer to agency expertise, especially when considering technical facts). We only conclude that, following our reasoning above, if the Department's only stated rationale in the record is to create a greater number of set-aside tags, the practice furthers the anti-donation problems of the outfitter set-aside.

3. Protecting New Mexico resources pursuant to the Public Trust Doctrine is generally reserved for the Legislature.

Finally, we have been asked if the allocation system is constitutional under New Mexico's Public Trust Doctrine, N.M. Const. art. XX, § 21. The public trust doctrine provides that:

[t]he protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.

Id. In New Mexico, "[t]he public trust doctrine is a common law doctrine that has traditionally applied to public navigation and fishing rights over tidal lands and in the state laws of this country." *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 13 (text only). It is "a matter of state law, and the States retain residual power to determine the scope of the public trust." *Id.* (text only).

However, arguments concerning the duty to protect New Mexico’s natural resources “must be raised within the existing constitutional and statutory framework and not alternatively through a separate common law cause of action,” so as not to “circumvent and render a nullity” legislation. *Id.* ¶ 15. Specifically, “Article XX, Section 21 of our constitution recognizes the duty to protect the atmosphere and other natural resources, and it delegates the implementation of that specific duty to the Legislature.” *Id.* ¶ 16.

In short, to the extent the public trust doctrine applies to game in New Mexico and the protection of those resources for the “maximum benefit of the people,” the Legislature has established a comprehensive statutory and regulatory scheme to protect such resources. *See* N.M. Const. art. XX, § 21; *see also Atencio v. State*, 2026-NMCA-011, ¶¶ 24–29 (noting that the public trust duty does not guarantee any individual or group a specific quality or degree of control over natural resources beyond the assurance that the control will not contradict the use and development of the resources for the maximum benefit of all New Mexicans).

Conclusion

New Mexico’s constitution holds that public resources belong to all New Mexicans. The anti-donation clause enforces that principle by prohibiting the State from conveying value to private parties without genuine consideration in return. The outfitter set-aside in Section 17-3-16(B)(1)(a) violates that prohibition. The Legislature enacted a constitutional program in 2011 by conditioning set-aside access on real investment in New Mexico: employment of New Mexico residents, payment of state taxes, and acquisition of property. A federal court, at the Department of Wildlife’s own urging, dismantled those conditions in 2012. What remains is a program that reserves ten percent of New Mexico’s big game tags for the exclusive commercial benefit of outfitters, in exchange for licensing fees that would be owed regardless and that bear no relationship to the value being transferred. That is a donation in substance, whatever its form. The Department’s practice of aggregating Bighorn Sheep tags across hunt units to trigger set-aside thresholds, when the record reflects no independent justification for that aggregation, compounds the constitutional defect rather than curing it. A state program that transfers the exclusive right to broker access to a public resource without genuine consideration, and at the expense of the residents that resource belongs to, bears the character of a donation in substance and effect. The New Mexico Constitution prohibits it.

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