BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST
OF BERRYMAN RANCH 98-45
ID. NO. 02-313557-00 3
ASSESSMENT NO. 2050878

PARTIAL DECISION AND ORDER

A formal hearing on the Taxpayer's protest was held on March 17, 1998, before Margaret B. Alcock, Hearing Officer. Berryman Ranch ("Berryman") was represented by Barbara Vigil, its attorney. The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. At the hearing, it was agreed to bifurcate the proceeding to have the legal issue determined first, with the taxpayer reserving the right to raise objections to the numbers used as the basis for the assessment at a later date. The matter was submitted for decision on August 6, 1998. Based on the evidence in the record and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. As a private landowner, Berryman has the right to obtain up to 15 hunting permits per year from the state. Each permit allows Berryman to authorize a third party to purchase a private land license from the New Mexico Department of Game and Fish to hunt elk on Berryman's land. *See* Taxpayer Exhibit 1.

2. The license year runs from April 1 through March 31. Within each license year, the state allows specific animals to be hunted during specific periods of time by means of specific weapons. For example, for the license year April 1, 1995 through March 31, 1996, mature bull

elk could be hunted by rifle during the following periods: October 21-October 25, October 28-November 1, October 7-October 11, November 4-November 8. Taxpayer Exhibit 1.

3. During the early 1990s, Berryman entered into three agreements denominated "Lease for Hunting Rights." The first agreement was between Berryman and John Faseler for the ten-year period January 1, 1990 through December 31, 1999. The second agreement was between Berryman and Ray Morgan for the five-year period January 1, 1992 through December 31, 1996. The third agreement was between Berryman and Robert Guillary for the five-year period January 1, 1992 through December 31, 1997.

4. Each agreement provided that for an annual payment of $2,000, Berryman would "let, lessee, demise to lessee non-exclusive hunting rights on the real property known as the Berryman Ranch situated in Rio Arriba County, New Mexico."

5. Each agreement further provided: "Lessee agrees to abide by all state laws of the State of New Mexico and stipulations made by Property Owner."

6. Each year, the three hunters agreed among themselves that each hunter would select one of the designated hunting periods allowed by the state and limit himself to hunting during that period. This arrangement was not part of the hunters' written agreements with Berryman.

7. The only right granted to the hunters by Berryman was the non-exclusive right to go onto ranch property during the hunting periods designated by the state for the purpose of hunting. The hunters were not authorized to use the Berryman Ranch at other times or for other purposes.

8. The owners of Berryman Ranch and their employees and guests continued to occupy the ranch property during the time the hunters were present.

9. Berryman would not deal with outfitters who were in the business of bringing large hunting parties onto private land because Berryman wanted to deal directly with the people it allowed onto the ranch.

10. Berryman did not pay New Mexico gross receipts tax on its receipts from selling hunting access to its land.

11. On July 19, 1996, the Department issued Assessment No. 2050878 to Berryman in the amount of $1,713.90, representing, gross receipts tax, penalty and interest on Berryman's receipts from the Leases for Hunting Rights during the period January 1, 1992 through December 31, 1995.

12. On August 22, 1996, Berryman filed a protest of the assessment, together with a request for a retroactive extension of time to file the protest. The request for extension of time was granted by the Department.

DISCUSSION

The issue presented is whether Berryman's Lease for Hunting Rights was a conveyance of an interest in real property, a lease of real property or a license to use real property. The distinction is important because receipts from the sale or lease of real property may be deducted from gross receipts under NMSA 1978, Section 7-9-53 (1995 Repl. Pamp.). Receipts from a license to use real property are not deductible and are subject to gross receipts tax. Berryman argues that the right to hunt on the land of another is a profit a prendre, and that its agreement with the hunters conveyed an interest in real property. Alternatively, Berryman takes the position that the agreement represents a lease of real property. The Department argues that the non-exclusive right to hunt on Berryman Ranch is a license to use real property.

PROFITS A PRENDRE.

The term "profit a prendre" is defined as "[a] right exercised by one person in the soil of another, accompanied with participation in the profits of the soil thereof. A right to take a part of the soil or produce of the land." Black's Law Dictionary, 1211 (Rev. 6th Ed. 1990). This right constitutes an interest in real property, which is generally transferable and inheritable. Hahner, *An Analysis of Profits A Prendre*, 25 Or. L. Rev. 217, 241 (1946); *J. W. Jones Construction Co. v. Revenue Division*, 94 N.M. 39, 43, 607 P.2d 126, 130 (Ct. App. 1979, Sutin concurring). A profit a prendre may be acquired by deed or lease[1] and may be held as an exclusive right or a non-exclusive right in common with the owner of the property or with a small group of other nonowners. *See*, discussion in Hahner, *supra*, pp. 227-228, 234. *See also*, Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land*, para. 1.04[4] (Rev.Ed. 1995).

Berryman contends that the right to hunt on the land of another is a profit a prendre and that its Lease for Hunting Rights conveyed an interest in real property. In support of its position, Berryman quotes the following passage from *Allen v. McClellan*, 75 N.M. 400, 403, 405 P.2d 405, 407 (1965):

> The landowner...does own, as private property, the right to pursue game upon his own lands. That right is property, just as are the trees on the land and the ore in the ground, and is subject to lease, purchase and sale in like manner. The right to hunt on another's premises, the right of venery, is an *interest in real estate in the nature of an incorporeal hereditament...* (emphasis Berryman's).

At issue in *Allen* was whether the state's inclusion of private land in a game management area denied the plaintiffs hunting privileges enjoyed by other, similarly situated landowners in violation of the plaintiffs' constitutional rights to due process and equal protection of the laws.

[1] The Department argues that a profit a prendre must be conveyed by formal deed. Response Brief at 2. This view is too restrictive. New Mexico courts have consistently recognized the use of "leases" to convey mineral rights and royalties, which are profits a prendre. *Barela v. Locer*, 103 N.M. 395, 398-399, 708 P.2d 307, 310-

The New Mexico Supreme Court concluded that it did, holding that the state could not create a game refuge on private land unless it first obtained the landowner's consent or acquired the necessary interest in the land by eminent domain. The passage Berryman quotes from *Allen* is itself a quote from a Florida case on the same issue. The language Berryman places in italics is dicta. The court in *Allen* held that a landowner's right to pursue game on his own land is a property right that cannot be taken by the state without just compensation. The holding in *Allen* did not address the issue of whether the right to hunt on another's land is an interest in real property.

There are a number of cases from other jurisdictions that recognize hunting rights as profits a prendre. *See*, Annotation, *Right Created by Private Grant or Reservation to Hunt or Fish on Another's Land*, 49 ALR 2d 1395, 1404, Section 7 (1956). At least some commentators assert, however, that these decisions are based on a misapplication of the legal principles underlying profits a prendre. As discussed in Bruce & Ely, *supra*, para. 1.04[2][a][i]:

> [i] **Water, fish, and game**. If the object in question is not really part of the property involved, then theoretically the landowner cannot grant a profit in that item. For example, because no one owns flowing water or fish or game in their natural habitats, the owner of the land on which one of these objects is found cannot convey away that item. Therefore, the right to enter and take water, fish, or game logically should be found to be either an easement or a license, depending on the nature of access intended; it should not be considered a profit.
>
> ...
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> Hunting and fishing rights are commonly categorized as profits rather than as easements or licenses. This anomaly may be attributed to an unwarranted application of the English common-law concept of ratione soli, which gave landowners certain property rights to wild animals found on their property. Sometimes, however, hunting and fishing rights have been found to constitute a license or an easement.

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311 (1985). Ultimately, the nature of the interest created depends on the intent of the parties, not the name given to the transferring document.

See also, Hahner, *supra*, at 221 ("A strict adherence to the definition of a profit as laid down by the cases and by textbook writers would exclude hunting and fishing privileges from classification as profits....").

In New Mexico, the state holds title to wild animals in trust for its citizens. In *State ex. rel. Sofeico v. Heffernan*, 41 N.M. 219, 225, 67 P.2d 240, 243 (1936), the New Mexico Supreme Court soundly rejected the appellee's argument that wild animals belong to the owner of the land where the animals are located:

> Appellee supports this argument with a citation from Holdsworth's History of English Law.... It is appellee's contention that the generally accepted American doctrine, to wit, that the state, in the exercise of its police power, has the right to regulate the taking of game so as to protect the same in the interest of the food supply, is a mere fiction.... [W]e are not impressed with this intriguing argument. We believe the prevailing American doctrine sound in law, principle, and common sense.

Given the supreme court's refusal to accept outdated concepts of English law as a basis for vesting ownership of wild animals in private landowners, it makes no sense to rely on these same concepts to find that a grant of hunting rights qualifies as a profit a prendre.

Perpetuating the misapplication of law underlying decisions from other jurisdictions could well create a cloud on title to real estate held by New Mexico landowners who allow third parties to hunt on their land. Absent restrictive language in the granting document, a profit a prendre is both transferable and inheritable. It is highly unlikely that property owners who give hunters written permission to access their land intend to burden the land with a freely transferable interest in real property. In *Luevano v. Group One*, 108 N.M. 774, 778, 779 P.2d 552, 556 (Ct. App. 1989), the court recognized similar concerns behind the public policy favoring easements appurtenant over transferable easements in gross, stating: "Construing doubtful easements as easements in gross would allow assignment of the easement to strangers to the area who could

then control the use of the property. Such construction could also result in increased burdens on land beyond that contemplated by the original grantor."[2]

Berryman does not own the elk and other wild animals found on its land. Accordingly, these animals are not "profits" of the land subject to transfer by Berryman. In order for someone to whom Berryman grants hunting rights to legally hunt on Berryman's land, he must first obtain a license from the New Mexico Department of Game & Fish. If a hunter were to kill an elk on Berryman's land based solely on the document entitled "Lease for Hunting Rights", that hunter would be in violation of New Mexico law. *See*, Taxpayer Exhibit 1 and NMSA 1978, Section 17-3-1 ("No person shall shoot, hunt, kill, injure or take, in any manner, any game animal...without paying for, and having in his possession, the proper license required by law...."). The Lease for Hunting Rights granted each hunter non-exclusive access to Berryman's land for the purpose of hunting in accordance with the requirements of New Mexico law. The Lease for Hunting Rights did not—and legally could not—grant the hunter a right to shoot or kill wild elk located on the land, nor did it convey a profit a prendre.

LEASE v. LICENSE.

As an alternative to its position that the Lease of Hunting Rights conveyed a profit a prendre, Berryman argues that it was a true lease of an interest in real property and therefore qualifies for the deduction provided in NMSA 1978, Section 7-9-53. "Leasing" is defined in NMSA 1978, Section 7-9-3(J) as:

[2] A review of the evidence raises questions concerning Berryman's intent to convey an interest in real property to the hunters accessing its land. Maurice Ezell, the Berryman's certified public accountant, testified that unlike other landowners, Berryman would not deal with outfitters who were in the business of bringing large hunting parties onto private land. Berryman wanted to know and deal directly with the people it allowed onto the ranch.

> any arrangement whereby, for a consideration, property is employed for or by a person other than the owner of the property, except that the granting of a license to use property is the sale of a license and not a lease.

In *Cutter Flying Service, Inc. v. Property Tax Department*, 91 N.M. 215, 219, 572 P.2d 943, 947 (Ct. App. 1977), the court defined leasing as "an agreement under which the owner gives up the possession and use of his property for a valuable consideration and for a definite term." *See also*, *Transamerica Leasing Corporation v. Bureau of Revenue*, 80 N.M. 48, 51,450 P.2d 934, 937 (Ct. App. 1969). As noted in 3 Thompson on Real Property, Sections 1031 and 1032 (Thompson ed. 1994):

> The relation of landlord and tenant cannot be inferred as a matter of law from the mere fact of lawful occupancy. The tenant must acquire some definite control and possession of the premises.
> ...
> It is said that the difference between a license and a lease is that a lease gives to the tenant the right of possession against the world, while a license creates no interest in the land, but it is simply the authority or power to use it in some specific way.

And in Bruce & Ely, *supra*, para. 11.01:

> A lease conveys exclusive possession of the premises to the tenant, and thus, the tenant holds an estate. In contrast, a licensor retains legal possession of the land, and the licensee has only a privilege to enter for a particular purpose.

Based on the evidence in this case, it is clear that the hunters allowed onto Berryman Ranch did not acquire the dominion and control necessary to constitute a leasehold interest in the ranch. The only right granted to each hunter was the non-exclusive right to go onto Berryman's property during the limited hunting periods designated by the state for the purpose of hunting. The hunters were not authorized to use Berryman Ranch at other times or for other purposes. The owners of Berryman Ranch and their employees and guests continued to occupy the ranch

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This desire to prevent strangers from obtaining access to the ranch indicates an intent to create a license, which is

property during the time the hunters were present. Although the hunters agreed among themselves that each would limit his hunting to one of the designated hunting periods allowed by the state, this arrangement was not part of their written agreements with Berryman. Nothing in the agreements prohibited Berryman from entering into additional "leases" with other hunters who would be entitled to come onto the ranch during the same periods.

Berryman argues that the Department's characterization of non-exclusive hunting rights as a license rather than a lease is contrary to Section 7-1-53 because hunting rights are not listed among the exceptions set out in Subsection (B), which states:

> (B) Receipts from the rental of a manufactured home for a period of at least one month may be deducted from gross receipts. Receipts received by hotels, motels, rooming houses, campgrounds, guest ranches, trailer parks or similar facilities, except receipts received by trailer parks from the rental of a space for a manufactured home for a period of at least one month, from lodgers, guests, roomers, or occupants are not receipts from leasing real property for purposes of this section.

Berryman appears to argue that receipts from the transfer of any right or interest in real property must be treated as lease receipts unless the receipts come within the exceptions listed in Subsection (B). This construction of the statute is too narrow. First, there is nothing to indicate that the legislature intended the listing in Subsection (B) to be exclusive. Second, a transaction must meet the legal definition of a lease before receipts from that transaction will qualify as lease receipts deductible under Section 7-9-53. In this case, Berryman's transfer of non-exclusive access rights does not meet the legal requirements for creation of a leasehold estate. The Lease of Hunting Rights created a license to use real property, not a lease of real property.

CONCLUSIONS OF LAW

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personal to the licensee, not a freely transferable interest in real property.

1. Berryman filed a timely, written protest to Assessment No. 2050878, and jurisdiction lies over the parties and the subject matter of this protest.

2. Berryman's Lease for Hunting Rights was not a conveyance of an interest in real property or a lease of real property, and Berryman is not entitled to claim the deduction provided in NMSA 1978, Section 7-9-53 (1995 Repl. Pamp.).

3. Berryman's Lease for Hunting Rights was a license to use real property, and Berryman's receipts from the license are subject to gross receipts tax.

For the foregoing reasons, the Taxpayer's protest IS DENIED.

DONE, this 1st day of September 1998.