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WILD HORSES OFF PRIVATE LANDS

WILD HORSE AND BURRO ACT: Private land owners are entitled to a mandamus requiring the Secretary of the Interior to remove wild horses which have strayed from public lands onto their private lands. *Roaring Springs Associates v. Andrus*, 12 E.R.C. 1557 (D. Ore. 1978).

Roaring Springs Associates is a co-partnership owning land in eastern Oregon. This private land is unfenced and is bordered on one side by federally owned land. Wild free roaming horses have often drifted from the federal land to the private land. Roaring Springs Associates had contacted the nearest federal marshal and agent of the Secretary of Interior (Secretary) and requested that the wild horses be removed. When the federal agents refused to remove the horses, Roaring Springs Associates brought a mandamus action seeking an order compelling the federal government to remove them.¹

Roaring Springs Associates brought the mandamus action pursuant to 28 U.S.C. § 1361.² This statute gives to the federal district courts original jurisdiction over mandamus actions which seek to compel a federal officer or a federal agency to perform a duty that they are legally required to perform.³ Section 1361 is applicable if it appears that (1) the plaintiff's claim is clear and certain and (2) the duty of the officer is ministerial and so plainly prescribed as to be nondiscretionary.⁴

Both Roaring Springs Associates and the federal government moved for summary judgment. In examining the case, the federal district court determined that there were two basic issues involved. First, do defendants owe a clearly prescribed ministerial duty to the plaintiffs to remove the wild horses from the plaintiff's land. If the court had found that there is such a duty, then the second issue was whether the plaintiff's claim was nonetheless barred by the doctrine of sovereign immunity.⁵

As to the first issue, the plaintiff claimed that the government's

1. *Roaring Springs Associates v. Andrus*, 12 E.R.C. 1557 (1978).

2. 28 U.S.C. § 1361 (1976).

3. *Id.*

4. *Id.*

5. 12 E.R.C. at 1558.

duty arises from the Wild Horse and Burro Act⁶ which provides that "if wild free roaming horses or burros stray from public lands onto privately owned land, the owners of such land may inform the nearest federal marshal or agent of the Secretary who shall arrange to have the animals removed"⁷

The federal government made four claims which support its contention that there is not a clearly prescribed ministerial duty owed to the plaintiff. Firstly, the government claimed that the horses had not strayed onto the plaintiff's land and, therefore, it owed no duty to the plaintiff under the statute.⁸ In support of this assertion, the government pointed to the Oregon estray laws which defines "estrays" as "livestock of any unknown person which is unlawfully running at large or being permitted to do so, or which is found to be trespassing on land enclosed by an adequate fence."⁹ Thus, by incorporating the Oregon statutory definition of "estrays" into the federal statute, the government argued that the horses were not estrays because the land involved is open range and, by definition, "estrays" are livestock found on land where they are not permitted to be legally.¹⁰

The Oregon District Court rejected this definitional argument. It pointed out that although Congress had not defined the word "stray" in the Wild Horse and Burro Act, there was no indication in the record that Congress intended to incorporate state estray laws. The court noted that Congress used the word "stray" as a verb; thus a definition of "stray" was not necessary. The court also determined that the congressional intent surrounding the Wild Horse and Burro Act was to protect wild horses.¹¹ Therefore, the court concluded, there is no reason to believe that Congress intended the enforcement of the Wild Horse and Burro Act to be subject to state law and thereby to vary from state to state.¹²

The government's second argument was that the Secretary had promulgated a specific regulation¹³ pursuant to §1334 which imposes a duty on the Secretary to remove wild horses from private lands which are *fenced*. The regulation does not include the removal of wild horses from land which is unfenced and in an open range area.¹⁴

6. Wild Horse and Burro Act, 16 U.S.C. §1331 *et seq.* (1976).

7. *Id.* §1334.

8. 12 E.R.C. at 1558.

9. ORE. REV. STAT. §607.007(1).

10. 12 E.R.C. at 1559.

11. 12 E.R.C. at 1559.

12. 12 E.R.C. at 1559.

13. 43 C.F.R. §4750.3 (1978).

14. *Id.*

The court agreed with the government's reading of the regulation. Therefore, it had to determine whether the regulation conflicted with the Wild Horse and Burro Act. It is the courts, not administrative agencies, who must decide questions of statutory construction.¹⁵ After examining the statute, the court determined that the Wild Horse and Burro Act imposes a duty on the Secretary to remove wild horses from private lands upon notice from the private land owner. This statute, the court held, is not limited in its applicability to only some private land owners. If the government's claim that the regulation passed pursuant to the Wild Horse and Burro Act limits the applicability of the Act, then states could remove the protection provided by the Act by declaring that all lands are in an open range.¹⁶

The next argument of the government was that Congress, in passing the Wild Horse and Burro Act, intended to protect wild horses and not private land owners.¹⁷ The court quickly rejected this contention because, as the court had already determined, the statute requires the Secretary to remove the animals from private lands. This mandate serves to protect the animals by keeping them on public lands where they can be controlled and guarded by the government. It also gives the private land owner an easy and cost free way to remove the animals from his/her land. Thus, the land owner is less apt to shoot or injure the animals in an attempt to remove them.¹⁸

Lastly, the government claimed that the manner in which the Secretary protects the horses is within his discretion and, therefore, a mandamus action does not lie to dictate the exercise of this discretion. The court found that the manner in which horses are protected is within the discretion of the Secretary, but that the removal of the wild horses is clearly a ministerial duty.¹⁹

Having determined that the Secretary did owe a duty to the plaintiff, the court then examined the issue of whether the doctrine of sovereign immunity affected the plaintiff's right to relief. According to this doctrine, mandamus relief that expends itself on the public treasury is barred unless the federal officer being sued is alleged and found to have acted either unconstitutionally or beyond the scope of his statutory authority.²⁰

Congress has appropriated over three million dollars to be used in the wild horse and burro management program. Oregon had received

15. *Patagonia v. Board of Gov. of Fed. Res. Sys.*, 517 F.2d 803, 812 (9th Cir. 1975).

16. 12 E.R.C. at 1559.

17. *Id.* at 1559.

18. *Id.* at 1560.

19. *Id.* at 1560.

20. *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

\$475,000 of this amount.²¹ The Secretary has access to these funds. Merely because he desires to spend the allocated funds for activities other than removing horses from private lands, does not mean that the funds are unavailable for this purpose. Thus, the court held that the plaintiff's claim was not barred by the doctrine of sovereign immunity and that the government owes a duty to private land owners to remove wild horses and burros so long as the funds are available.²²

The federal district court granted the plaintiff's motion for summary judgment and held that mandamus relief was available to it. This is a well-reasoned decision. Congress has determined that the wild horses that roam throughout many of our western states are part of our American heritage. Thus, their protection is a task appropriately undertaken by Congress. Horses can damage grazing land. This is a real threat to some land owners. One solution available to the Secretary is to fence the federal lands upon which wild horses and burros graze. If the costs of removing roaming animals from private lands is similar in amounts to the cost of fencing the federal lands upon which they roam, then fencing may be the solution.

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21. 12 E.R.C. at 1560.

22. *Id.* at 1560.