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WILD HORSES AND BURROS ACT PREEMPTS STATE AUTHORITY

ENVIRONMENTAL LAW—Property clause of Constitution held to give Congress power to regulate Wild Horses and Burros on Federal Land and pre-empt State Legislation over same. *Kleppe v. New Mexico*, 426 U.S. 529, 49 L.Ed.2d 34, 96 S.Ct. 2285 (1976).

The Congressional finding and purpose of Chapter 30, Protection of Wild Horses and Burros is “that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West: that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American Scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands.”¹

In order to accomplish the protection of wild horses and burros and establish some form of regulatory agency for enforcing this Act, Congress began by giving the Secretary of the Interior the authorization to proclaim such regulation.² Thus, on August 7, 1973, the Secretary of the Interior executed an agreement with the New Mexico Livestock Board, the agency which enforces the New Mexico Estray Laws.³ This agreement acknowledged the Secretary’s authority to manage and protect any wild free-roaming horses and burros and established the procedures for the claims of private parties.

The problem began when some three months later the New Mexico Livestock Board terminated the agreement by claiming that the Federal Government had no power over the control of the wild horses and burros on federal land. This conflict was raised in Court when on February 1, 1974, a New Mexico rancher, Kelley Stephenson, reported to the Livestock Board that wild burros were interfering with his livestock operation. The land on which the wild burros had been seen was federal property which Stephenson had access to

1. 16 U.S.C. § 1331 (1970).

2. 16 U.S.C. § 1336 (1970).

3. NMSA (1953) § 47-14-1 *et seq.*

by a special permit issued under the Taylor Grazing Act.⁴ The New Mexico Livestock Board answered Stephenson's complaint by rounding up 19 wild burros and then proceeded to dispose of the animals by its usual practice, an auction, held on February 18, 1974. The Bureau of Land Management then asserted jurisdiction and demanded the Board return the burros to public lands.

On March 4, 1974, the New Mexico Livestock Board filed suit in the United States District Court for the District of New Mexico seeking a declaratory judgment of the unconstitutionality of the Wild Horses and Burros Act and an injunction against any further enforcement of the Act by the Secretary of the Interior. The three judge court held the Fourth Article of the Constitution gives Congress only the power to regulate public lands and protect them from damage. The Court ruled that Congress had exceeded its power by attempting to regulate and protect the animals that lived on the public lands. The court went on to permanently enjoin the Secretary of the Interior from enforcing any provisions of the Act.

Justice Marshall, for a unanimous Court, held that Congress had the power to decide whether the Property Clause did apply for "needful" regulations "respecting" the public lands.

New Mexico argued that the Property Clause did not support the Act and attempted to base the argument on a strict reading of several cases. The Court, in reviewing the argument, carried it to the conclusion that Congress lacks the power to act contrary to state law. Finding such an argument to be without merit, the Court went on to interpret New Mexico's argument to show that the outcome of such an argument would question Congress' derivative legislative powers. Legislative jurisdiction is acquired from a range of exclusive federal jurisdiction. By enacting federal legislation, Congress automatically overrides conflicting state law under the Supremacy Clause.

New Mexico's other argument attempted to deny Congress exclusive jurisdiction over the federal lands within the border of the State of New Mexico. The cases relied upon by New Mexico were noted by the Court to be contrary to its argument. Furthermore, the Court conceded that the Act did not establish exclusive federal jurisdiction over the public lands in New Mexico. The Act simply overrode the portion of the New Mexico Estray Law by its regulation of federally protected animals. New Mexico contended that the Act violated any traditional state power over wild animals. The Court refuted this argument by explaining the state still had all its trustee and police powers over wild animals, adding that this was only restrained by the

4. 48 Stat. 1270, as amended, 43 U.S.C. § 315(b) (1970).

rights given to the Federal Government by the Constitution. The Court concluded the Property Clause gives Congress the power to protect wildlife on public lands, state law notwithstanding.

The fourth and final section of the opinion does not limit interpretations and applications of the case to Property Clause questions of the future. Because this was a declaratory judgment proceeding, the Court thought it inappropriate to determine the extent, if any, to which the Property Clause does empower Congress to protect animals on private lands. Whether such regulation is even attempted by the Act is also a question left for future litigation.

New Mexico expressed concern that the Act might be read to provide federal jurisdiction over every wild horse or burro that might at any time set foot upon federal land. The Court declined the opportunity to decide this question, explaining that it is the practice of the Court to leave open questions regarding the scope and constitutionality of legislation whenever such question is outside the context of a concrete case.

Thus, while the ruling in this particular case supports protection of wild horses and burros on Federal lands, the question of the permissible reach of the Act over private lands is still unanswered.

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