



10-1975

Kleppe v, New Mexico

Lewis F. Powell Jr.

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vg

Note

Wuuu

3 9/ct invalidated the Wild Free-Roaming Horses Act, finding no Commerce Clause basis for Congressional regulation.

Act is intended to protect Wild horses.

SG says DC's decision threatens other Fed. statutes which protect wild life, their sanctuaries, etc.

PRELIMINARY MEMO

Summer List 3, Sheet 1

No. 74-1488

SECRETARY OF INTERIOR

v.

NEW MEXICO

THREE-JUDGE COURT

Appeal from D. N. Mex. (Seth, Cir. J., Payne, Mechem) (per curiam)

Federal/Civil

Timely

1. SUMMARY: On February 28, 1975, in a suit instituted by the State of New Mexico, a three-judge district court declared unconstitutional the Wild Free-Roaming Horses and Burros Act of 1970, 16 U.S.C. §§ 1331-1340, as exceeding Congress' power under the Territory and Property Clause of the Constitution, Art. IV, sec. 3. SG appeals, contending that the statute is a valid exercise of congressional power under both the Property and Commerce Clauses.

Note
DXP

2. FACTS: In January 1974, a New Mexico rancher complained to Interior Department officials that wild burros were roaming onto his land where they occupied themselves in various mischievous activities. Federal officials were unmoved by the complaint, so the rancher took his grievance to more sympathetic state officials. Agents of New Mexico's Livestock Board then undertook a roundup of the intruders and auctioned 19 of them off. Upon learning of this disposition, Interior Department officials asserted jurisdiction over the burros pursuant to the above statute and demanded their return to the public domain. New Mexico responded by filing the present suit, seeking a declaration that the statute was unconstitutional and requesting an injunction against its enforcement. A three-judge court was convened and granted New Mexico's motion for summary judgment. The district court concluded that the legislation exceeded Congress' power. Specifically, the court held that the Territory and Property Clause authorized only statutes designed to protect public lands, where the statute under scrutiny went beyond this limited purpose to protect animals found on the lands. In addition, the court perceived no textual basis in the statute for upholding it as an exercise of the commerce power.

The Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, was enacted to prevent the continued destruction of wild horses roaming on public lands in the western United States. Section 1 of the Act expresses Congress' determination that "these horses and burros are fast disappearing from the American scene" and mandates that these animals "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." The Act conferred authority on the Secretary of the Interior to manage and protect the animals, and to d

so "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U. S. C. § 1333(a). If horses or burros stray onto privately owned land, the Act directs federal officials to have the animals removed, but "[i]n no event shall such [animals] be destroyed except by the agents of the Secretary." 16 U. S. C. § 1334. Criminal sanctions are imposed on persons removing or harassing the animals, and for processing the remains of a wild horse or burro into commercial products.

3. CONTENTIONS: SG argues that the question is substantial, inasmuch as senseless slaughter of the animals for sport or profit has drastically reduced their numbers, and since the district's removal of federal protection raises the spectre of the animals' extinction. SG contends that the decision on the merits is dead wrong, being based on a myopic reading of the Territory and Property Clause. Under the district's analysis, the SG fears that many salutary federal programs designed to protect wildlife are invalid. See, e.g., National Wildlife Refuge System Act of 1966 16 U. S. C. § 668 et. seq.; Fur Seal Act of 1966, 16 U. S. C § 1151 et. seq.; Endangered Species Act of 1973, 16 U. S. C § 1531 et. seq. SG contends that the district's result eliminates Congress' implicit power to protect wild animals, an authority which derives from its plenary jurisdiction over federal territory.

4. DISCUSSION: The SG correctly critiques the district's strange result. This Court has consistently interpreted the Territory and Property Clause expansively. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330-338. That Clause reasonably extends federal authority to preserve the resources of public lands, as well as the land itself. It has been unquestioned, for example, that the government can constitutionally regulate the extraction and disposal of mineral

resources found in public lands. Ashwander v. TVA, 297 U. S. at 332. Protection of natural resources in the public domain reasonably extends to protection of wildlife, as evidenced by the host of federal measures in this respect cited by the SG and by amicus. Even if the district's spurious interpretation could wash, one purpose of the present statute in granting regulatory authority to the Secretary was to protect the public lands themselves from damage caused by excessive herd population. 16 U. S. C. § 1333(b), (c). Finally, the Act is aimed in part at preventing the commercial exploitation of these animals, 16 U. S. C. §§ 1333(d), 1338(4), a purpose within the compass of the Commerce Clause. The district's constitutional analysis is, in short, highly suspect.

Appellee has waived filing a response.

Starr

Op in app of juris
st

7/11/75

AF

As expected a motion to dismiss or affirm has been filed by New Mexico. Amicus briefs have ~~been~~ been filed by Nevada State Board of Agriculture, the Pacific Legal Foundation, the International Association of Fish and Conservation Commissioners, and the State of Idaho. Obviously it would serve little purpose to ~~xxxxx~~ detail or even summarize all of their arguments here since this ~~xxx~~ case is a sure grant. But to ~~give~~ give you an idea of the areas which this case is likely to focus on the following are some of the major points which are made:

1. New Mexico argues that this statute exceeds Congress' power under the property clause. It differentiates cases such as Ashwander which dealt with riparian water rights associated with the purchase of a dam site ~~from the federal government,~~ and other cases dealing with mineral and water rights closely associated with the land.* It points out that wild and free-roaming horses and burros do not issue from the soil and ~~have~~ are not "real" property.

2. New Mexico argues that the Commerce Power is not relevant here since Congress did not attempt to justify the statute here based on that power. There were no statements or findings concerning any effect on ~~Commerce.~~ Commerce. The three-judge court specifically found that there was no interstate or international migration of these horses.

3. Thus the government's assertion that other federal acts will be affected by the decision here is wrong. The state's brief effectively distinguishes most ~~of~~ of the Acts cited by the ~~g~~ government based on the ground that they contain specific provisions to the effect that nothing in the Act will affect the jurisdiction of the state with respect to fish and wildlife. See N.M. Brief 15 n. 4; Nevada Brief 11; P.L.F. Brief 6-7. The point is also made that the Acts which give full authority to the federal government were premised either on the commerce power ~~or~~ or the power over international relations (ie. migratory animals and international agreements). detail

4. The briefs ~~detail~~ the great harm which these free roaming animals cause and that under the 10th Am. the ~~xxx~~ states must have some power to deal with them.

~~... distinguishing the power of the federal government over public lands generally as ... its power over specific lands which it has ...~~

CONFERENCE 9-29-75

Court USDC, D. N.M.
Argued, 19...
Submitted, 19...

Voted on, 19...
Assigned, 19...
Announced, 19...

No. 74-148

SECRETARY OF THE INTERIOR, Appellant

vs.

NEW MEXICO, ET AL.

5/27/75 Appeal filed.

Note

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....													
Rehnquist, J.				✓									
Powell, J.				✓									
Blackmun, J.				✓									
Marshall, J.				✓									
White, J.				✓									
Stewart, J.				✓									
Brennan, J.				✓									
Douglas, J.								✓					
Burger, Ch. J.								✓					

BOBTAIL MEMORANDUM

TO: Justice Powell

FROM: Carl R. Schenker

DATE: March 22, 1976

No. 74-1488 KLEPPE v. NEW MEXICO

I recommend reversal.

It is a little difficult to know how properly to conceptualize this case, due to the somewhat scattergun arguments thrown up by the appellees (hereinafter referred to as the "state"). The state appears to argue both (1) that there is no federal power and (2) that, even if there is, there is a superior authority in the state blocking federal regulation.

A. The State's Superior Authority

I turn first to disposing of this argument in order to focus attention on issue (1).

It appears to me that if there is federal authority the state has no special interest that prevents the exercise of that authority. (This, of course, is usually the case with congressional authority.) The state relies both on its special power over wildlife and on some vague notion of the Tenth Amendment.

(a) The wildlife argument. Previous cases of this

Court establish that, given a source of authority, the federal government can legislate over wildlife despite the state's interests in wildlife. See Missouri v. Holland, 252 U.S. 416 (more stringent conservation measures in federal law authorized under the treaty power); Hunt v. United States, 278 U.S. 96 (federal killing of animals despite state laws authorized under Property Clause).

(b) The Tenth Amendment argument. This argument seems to be that because of the Tenth Amendment the federal legislative power over nonceded federal lands is too limited to support anything that might be construed as an exercise of police power. Or, as the state puts it, the federal government is just like an ordinary proprietor of land when the federal land has not been ceded by the State. This argument is effectively rebutted in the SG's reply brief. Moreover, the argument is on its face rebutted by the Property Clause itself. It is clear that that clause gives the federal government authority that a private owner of land never would have. In fact, the Hunt case is an example of federal action taken on federal land that a private individual could not have taken.

Thus, there is no affirmatively protected enclave of state authority in this case. The sole question is whether there is a lack of power in the federal government to pass the Act, thus creating a negative bar to the exertion of federal authority.

B. Congressional Authority

I will address only the Property Clause issue, because it seems clear to me that that Clause provides the federal government the authority exercised in this case. (I underscore "this" because here the animals were seized while on federal property. The state complains about some possible applications of the Act where animals, for example, were seized while on private property. Different questions would arise as to that kind of federal regulation, and the Government might be forced in such a case to rely on the Commerce Clause rather than the Property Clause to exercise authority.) *

It appears to me that this is essentially a case of first impression. Cases like Ashwander, which deal with natural resources, are not dispositive because those resources are traditionally part of the land. They therefore come within the Property Clause's grant of power to dispose, which assuredly is absolutely plenary:

The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States

The authority exerted here is different. The federal government here asserts the power to manage animals pursuant to the "needful regulation" grant". The District Court accordingly was correct not to look to the disposition cases. On the other

* See Appendix, p. 5.

hand, I think the District Court took a crabbed view of the "needful regulation" power. In essence, the court held that, at least insofar as animals are concerned, the "needful regulation" power extended only to protecting the real property from damage by animals, the issue in Hunt.

Nothing in the logic or language of the "needful regulation" power suggests such a "protection" limitation. The language is certainly expansive enough to cover the assertion of authority here: "all needful Rules and Regulations respecting . . . Property belonging to the United States." Here the federal government has established a regulation concerning trespasses on its land that interfere with a use of the land specifically approved by Congress - the preservation of the animals. There is no logical reason why the federal government cannot assert the power to protect this use of its land, just as it could protect other uses of the land. In short, I agree with the SG that the specific application of the Act in issue in this case is well within an authority that should be defined more broadly than the District Court defined it.

Further, the Act appears valid as applied here even if a somewhat more crabbed view^{is} taken of the Property Clause (along the lines pursued by the District Court). Congress noted in the Act that the animals were important to the maintenance of a proper ecosystem on the federal lands. That ecosystem includes fauna, over which the Property Clause undoubtedly extends. Thus,

in order to "protect" the fauna on the land, it is "needful" to regulate the animals, for example, because of their fertilizing the fauna.

C. Conclusion:

It seems to me that the foregoing establishes the federal authority on the facts of this case. Since the only portion of the Act really at issue in this declaratory judgment case was that dealing with the seizure of animals on federal land, I would reverse. It will then be necessary to remand for consideration of the cause of action that the District Court did not reach.

Carl.

Appendix:

As noted at p. 3, the animals actually seized in this case were on federal land, but the state complains about various other possible applications of the Act. Even though this is a declaratory judgment, I would duck the other complaints made by the state. First, there may not be a "case or controversy" as to other possible applications of the Act. Because of this uncertainty, it should not be presumed that assertions of power not justified by the Property Clause will ever be made under the Act. Second, despite the assertions of the state it is possible that the Act in fact applies only to animals on federal land. See the definition of "wild free-roaming horses and burros" in § 2(b), found in the Jurisdictional Statement.

3 J/ct invalidated "Wild Free Ranging
Horses & Burros Act"

A Rancher, who was lessee of public land in N. Mex from Park Service, rounded up 19 burros & sold them at public ~~of~~ auction. Fed Gov't demanded return of burros.

N. Mex. Livestock Bds. brought this 3 J/ct action to invalidate & enjoin Act.

Govt. relies on "Prop. Clause" (Art IV, § 3), & also Commerce Clause

In this case, no dispute that burros were on Fed land.

Art IV is plenary: "to make all needful and necessary regulations ~~respecting~~ respecting property" owned.

3 J/ct held Art IV gave right to protect "property" - not animals on the prop.

Act provides that burros may not be "removed, harassed or slaughtered" from or on Govt prop.

Randolph (S G)

Act derived from Congress' power to make "needful" rules & regs w/ respect to Fed property.

Govt does not claim "ownership" of burrow - they are within public domain.

There are "federal" animals - wild animals that previously had been domesticated.

Congress could fence all of its land. The Act takes "lesser" means to protect animals.

Congress ~~is~~ was not attempting to protect an endangered species.

Whether Govt may regulate burrow on private land is not before us.

Harris (ant AG N. Mex)

No ^{direct} testimony that these burros were ever on Stephenson's fee land. The burros he ~~may~~ saw on fee land may have been different burros. But 32/CT could have inferred they were same. See testimony of Stephenson.

Argues that this case does involve ~~the~~ provision of Act that purport to reach private land as well as public land.

Contends that state owns these burros - whether on public or private land.

Disputes ESG on his position that only issue in this case is validity of Act w/respect to public land. ~~ESG~~ Harris argues the entire Act is before us, & is invalid because Act covers private lands also.

Harvie (cont)

Some a Nat. Park is
different - ~~is~~ under different
statutes. States consent?

Migratory Bird Act adopted
pursuant to Treaty w/ Canada.

Revers 9-0

The Chief Justice

Revers

No reason given.

xxxxxxx Stevens, J. Revers

Think issue is as to private land also in here. The State brought this action, & it was claimed that burros had strayed from private to public land.

The Rancher, who claims burros were damaging his land, had standing here.

We should decide rights where animals have strayed from private land. Statute is OK when animals are on public land.

Section 4 is ~~unconst~~ unconst.

(I don't understand)

Brennan, J.

~~Stevens~~ Revers

Difficult case - but inclined to think DC was right.

x x x

After discussion, Bill changed to Revers

Stewart, J.

Revers

Only Q is Const. power of Congress to enact this statute. We need not consider here possible invalid applications of the statute

These is power under ~~Commerce~~ Property Clause.

Act of Congress presumed valid

Need not reach Commerce Clause

White, J.

Rever

5 states may make rules as to wild animals - unless & until Fed law preempts - as to Govt. property.

Property Clause vests authority in Congress.

But this does not give Congress authority except ~~as to~~ where animals are on

Powell, J. gov't land

Powell - Rever

Prop. Clause vests power in Congress, & Act is valid certainly as to Fed. land

Need not reach private land issue

Marshall, J.

Rever

Burros not "wild animals". Their states have no authority
Prop. Clause outside

Blackmun, J. Rever

Commerce Clause not applicable

But Act of Congress is valid under Prop. Clause.

Rehnquist, J. Rever

Fed jurisdiction is concurrent - not exclusive.

Here as to public land, Congress - under Prop. Clause - has authority to regulate.

Sally do a

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

*Join note for
me.*

June 10, 1976

No. 74-1488 - Kleppe v. New Mexico

Dear Thurgood,

I am glad to join your opinion for
the Court in this case.

Sincerely yours,

Mr. Justice Marshall

Copies to the Conference

June 10, 1976

No. 74-1488 Kleppe v. New Mexico

Dear Thurgood:

Please join me.

Sincerely,

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



June 10, 1976

Re: 74-1488 - Kleppe v. New Mexico

Dear Thurgood:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to be 'JPS', is written below the word 'Sincerely,'.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 10, 1976

RE: No. 74-1488 Kleppe v. New Mexico

Dear Thurgood:

I agree.

Sincerely,



Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 10, 1976

Re: No. 74-1488 - Kleppe v. New Mexico

Dear Thurgood:

I agree.

Sincerely,




Mr. Justice Marshall

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 11, 1976

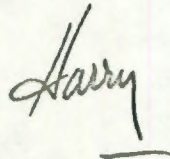


Re: No. 74-1488 - Kleppe v. New Mexico

Dear Thurgood:

Please join me.

Sincerely,



Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 11, 1976

Re: No. 74-1488 Kleppe v. New Mexico

Dear Thurgood:

Please join me.

Sincerely,




Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 14, 1976



Re: 74-1488 - Kleppe v. New Mexico

MEMORANDUM TO THE CONFERENCE:

Thurgood's circulated opinion in this case has all votes but mine. He reverses the three-judge court by upholding the constitutionality of the Act as applied in this case. I think his reasoning is sound and the disposition correct. Congress clearly has broad powers pursuant to the Property Clause and that power reasonably extends, as he concludes, to the protection of wildlife found on the public lands.

I find incongruous, however, the proposal to skirt the issue of whether the Act would be constitutional if applied to animals on private lands. This fails to come to grips with the hard fact that the district court permanently enjoined enforcement of the entire Act. As it now stands, the opinion leaves me in doubt as to the constitutionality of § 4 of the Act. It also seems to invite relitigation because, as the facts of this case show, these New Mexico burros roam on both public and private land. Accordingly, under my reading, the three-judge court on remand is at liberty to leave its injunction intact to the extent that it enjoins enforcement of § 4. I am of the view that to "punt" entirely on this issue will tend, under the circumstances of this case, to leave a good many people in a quandary. I think I will write along the following lines:

The District Court's judgment invalidated the entire Act on grounds that Congress was powerless to enact legislation designed to protect unclaimed horses and burros. Its order permanently enjoined the Secretary from enforcing or executing the measure. The result reached by the Court today upholds the Act only as applied in this case, where the burros were physically seized while roaming on public land. The practical effect of the decision therefore seems to me negligible. The record shows, and the District Court expressly found, that burros in the particular region of New Mexico in question roam on private lands as well as on federally owned property.

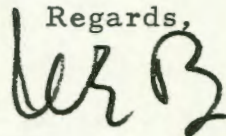
Under these circumstances, I find it difficult to understand why the Court avoids the issue of the constitutionality of Section 4 of the Act. Section 4, among other things, provides that if animals stray onto private land, the owner may inform appropriate federal officials who shall arrange to have the animals removed. The provision expressly prohibits the landowner from destroying or "harassing" stray animals, even though they happen to be on private property.

I find no infirmity in Section 4. Since the animals protected by the Act are free-roaming, Congress could reasonably assume that, lest the Act in practice become a dead letter, federal protection needed to be extended to those animals which "stray from public lands" Section 4 implements Congress' assumption, which, as the facts of this case show, was an eminently sound one. And if Congress enjoys "complete power" over the public lands, as the Court today rightly reaffirms, ante, at 12, including the protection of wildlife, then that power manifestly extends to animals which are "on public lands", § 2(b), and "stray" therefrom onto privately owned land.

The Court's opinion (at p. 18) suggests that the very limited holding rests on the fact that it is not "appropriate in this declaratory judgment proceeding to determine the extent . . ." to which Congress has power to protect these animals when they roam on private ranch land.

The Court fails to acknowledge the propensity of burros to go wherever the grass is green, and it is inconceivable that they will not repeat the trespass. The ranchers are entitled to know whether they are limited by federal law or only by restraints imposed by the State, and we should decide the issue.

Regards,



Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
THE CHIEF JUSTICE

June 16, 1976

Re: 74-1488 - Kleppe v. New Mexico

Dear Thurgood:

The enthusiasm that the rancher-water Justices exhibited for my scholarly analysis of the grazing problems leads me to abandon the idea of separate writing. I assumed ranchers would want to be free to shoot trespassing burros but if Byron and Bill Rehnquist want to put wild burros on a new form of "welfare," I will submit!

In short, I join you.

Regards,

Mr. Justice Marshall

Copies to the Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
Join TM 6/16/76	agree 6/10/76	join TM 6/10/76	join TM TM 6/10/76	4/5/76 typed draft 6/9/76	TM TM 6/10/76	join TM 6/10/76	join TM 6/14/76	join TM 6/10/76
				1st draft 6/15/76	join TM 6/10/76			
					74-1488	Kleppe v. New Mexico		