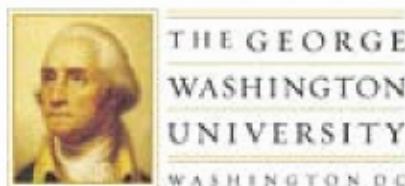


The Burger Court Opinion Writing Database

Kleppe v. New Mexico
426 U.S. 529 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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.

- 2 -

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,

W.B.

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,

WEB

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 POTTER STEWART

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,

P.S.
1/

Mr. Justice Marshall

Copies to the Conference

✓
Supreme Court of the United States
Washington, D. C. 20543
22

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

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: JUN 9 1976

Recirculated: _____

No. 74-1488, Kleppe v. New Mexico

Mr. Justice Marshall delivered the opinion of the Court.

At issue in this case is whether Congress exceeded its powers under the Constitution in enacting the Wild Free-Roaming Horses and Burros Act.

I

The Wild Free-Roaming Horses and Burros Act (the Act), 85 Stat. 649-651, 16 U.S.C. (Supp. IV) §§ 1331-1340, was enacted in 1971 to protect "all unbranded and unclaimed horses and burros on public lands of the United States," § 2(b) of the Act, 16 U.S.C. § 1332(b), from "capture, branding, harassment, or death." § 1 of the Act, 16 U.S.C. § 1331. The Act provides that all such horses and burros on the public lands administered by the Secretary of the Interior through the Bureau of Land Management (BLM) or by the Secretary of Agriculture through the Forest Service are committed to the jurisdiction of the respective Secretaries,

PP 10/17

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall
Circulated: JUN 15 1976

Recirculated: _____

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SUPREME COURT OF THE UNITED STATES

No. 74-1488

Thomas S. Kleppe, Secretary of the Interior, Appellant, *v.* State of New Mexico et al. On Appeal from the United States District Court for the District of New Mexico.

[June —, 1976]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is whether Congress exceeded its powers under the Constitution in enacting the Wild Free-Roaming Horses and Burros Act.

I

The Wild Free-Roaming Horses and Burros Act (the Act), 85 Stat. 649-651, 16 U. S. C. (Supp. IV) §§ 1331-1340, was enacted in 1971 to protect "all unbranded and unclaimed horses and burros on public lands of the United States," § 2 (b) of the Act, 16 U. S. C. § 1332 (b), from "capture, branding, harassment, or death." § 1 of the Act, 16 U. S. C. § 1331. The Act provides that all such horses and burros on the public lands administered by the Secretary of the Interior through the Bureau of Land Management (BLM) or by the Secretary of Agriculture through the Forest Service are committed to the jurisdiction of the respective Secretaries, who are "directed to protect and manage [the animals] as components of the public lands . . . in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." § 3 (a) of the Act, 16 U. S. C. § 1333 (a). If protected horses or burros "stray from

✓ 5
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,

Harry

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 10, 1976

6

No. 74-1488 Kleppe v. New Mexico

Dear Thurgood:

Please join me.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

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

PR

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 11, 1976

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

Dear Thurgood:

Please join me.

Sincerely,

W.W.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

1 ✓
✓

June 10, 1976

Re: 74-1488 - Kleppe v. New Mexico

Dear Thurgood:

Please join me.

Sincerely,



Mr. Justice Marshall

Copies to the Conference