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# The Story of *Kleppe v. New Mexico*: The Sagebrush Rebellion as Un-Cooperative Federalism

Robert L. Fischman



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**The Story of *Kleppe v. New Mexico*:  
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Robert L. Fischman and Jeremiah I. Williamson

**ABSTRACT**

The story of *Kleppe v. New Mexico* dramatizes how assertion of federal power advancing national conservation objectives collided with traditional, local economic interests on public lands in the 1970s. This article connects that history with current approaches to natural resources federalism. New Mexico challenged the Wild Free-Roaming Horses and Burros Act, which diminished both state jurisdiction and rancher influence over public rangelands. In response, the Supreme Court resoundingly approved federal authority to reprioritize uses of the public resources, including wildlife, and spurred a lasting backlash in the West. Further legislation passed in the wake of *Kleppe* transformed this unrest into a political movement, the Sagebrush Rebellion. Though *Kleppe* failed to undermine Congress' public land reform agenda, the Sagebrush Rebellion lived to fight another day. Adjudicated rights do not necessarily translate into social facts. This article argues that a strictly legal evaluation of *Kleppe* fails to measure its true significance as a galvanizing event for opposition to public land management reform. The ill-fated litigation became a "successful failure," prompting ranchers and states to employ effective non-judicial means of shaping implementation of rangeland reform. Even as Congress invited states to influence public land management through "cooperative federalism," the *Kleppe* legacy of "un-cooperative federalism" remains a common, useful response.

# **The Story of *Kleppe v. New Mexico*: The Sagebrush Rebellion as Un-Cooperative Federalism**

**Robert L. Fischman<sup>\*</sup> and Jeremiah I. Williamson<sup>\*\*</sup>**

- I. INTRODUCTION
- II. PUBLIC RANGELAND LAW AND THE RISE OF FEDERAL CONTROL
  - A. RANGELAND CONFLICT AND THE TAYLOR GRAZING ACT
  - B. THE WILD FREE-ROAMING HORSES AND BURROS ACT
- III. THE LITIGATION
  - A. NEW MEXICO V. MORTON
  - B. KLEPPE V. NEW MEXICO
    - 1. THE APPEAL
    - 2. THE BRIEFS
    - 3. THE ARGUMENT
    - 4. THE DECISION
- IV. THE SAGEBRUSH REBELLION
  - A. THE FEDERAL LAND POLICY AND MANAGEMENT ACT
  - B. FLPMA'S AFTERMATH
  - C. NEVADA'S ASSEMBLY BILL 413
  - D. ANOTHER FEDERAL COURT CHALLENGE
- V. *KLEPPE'S* ROLE AS A POLITICAL TOOL
- VI. CONCLUSION

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## I. INTRODUCTION

On March 26, 2010, the governor of Utah made national news in signing a new statute giving the state eminent domain authority over almost all federal lands in Utah.<sup>1</sup> At the same time, the governor signed a measure to allocate \$3 million from the state's school trust fund to support litigation over the new authority,<sup>2</sup> which seems clearly unconstitutional under the U.S. Constitution's Property and Supremacy Clauses.<sup>3</sup> Some of the bill's proponents urged the state to target the Grant Staircase-Escalante National Monument, established by President Clinton in defiance of Utah's elected representatives, and still a sore point among many residents.<sup>4</sup> At a February 2010 hearing, a former U.S. Supreme Court law clerk and assistant U.S. attorney, Mike Lee, testified in favor of the discredited legal theory behind the bill.<sup>5</sup> Four months later he shocked the Washington political establishment by defeating three-term incumbent Bob Bennett for the Republican nomination in Utah's Senate race. Lee won the seat the following November.

Why would Utah throw millions of dollars down the drain of futile

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<sup>1</sup> H.B. 143, 58th Leg., Gen. Sess., 2010 Utah Laws 250.

<sup>2</sup> Scott Streater, *Utah Eminent Domain Law More Than a "Message Bill,"* 10 Land Letter (Environment and Energy Publishing) No. 9 (Apr. 1, 2010).

<sup>3</sup> U.S. CONST. art. 4, § 3 (Property Clause) & art. VI (Supremacy Clause).

<sup>4</sup> *Utah Enacts States Rights Challenge to Federal Lands*, Public Land News, April 2, 2010, at 5.

<sup>5</sup> Phil Taylor, *U.S. Not "Sovereign" over Federal Lands, Utah GOP Senate Candidate Says*, 10 Land Letter (Environment and Energy Publishing) No. 9 (July 1, 2010).

litigation? Indeed, why even promote end-run tactics around federal authority instead of employing existing statutory avenues to influence public land management? The answer, of course, is politics. Utah is investing in fuel to stoke the fires of local frustration with federal control over public natural resources. The political movement feeding on the frustration, compounded by judicial setbacks, goes by many names today. But the original label is the “Sagebrush Rebellion.”

The Sagebrush Rebellion was born of similarly hopeless litigation that heightened the anger of traditional commodity users who felt their control over management and property interests on the federal lands weaken. The story of *Kleppe v. New Mexico*<sup>6</sup> illustrates how litigation itself, even when it yields no judicial relief, can serve as a powerful organizing tool for political movements.<sup>7</sup> Social science scholarship richly documents this phenomenon in the context of the civil rights and economic justice movements.<sup>8</sup> But it has yet to illuminate an enduring counterweight to federal control over public lands: the Sagebrush Rebellion. As with other political and social movements, the anti-federal sentiment in Utah (like New Mexico and Nevada before it) can be sustained by

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<sup>6</sup> 426 U.S. 529 (1976)

<sup>7</sup> See MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 278-280 (1994) and STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE* xxx & 8 (2d ed. 2004) on how movement-building outcomes can be more important than direct policy results or creation of new rights.

<sup>8</sup> See e.g. CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998); EVE S. WEINBAUM, *TO MOVE A MOUNTAIN: FIGHTING THE GLOBAL ECONOMY IN APPALACHIA* (2004). We relate this literature to the Sagebrush Rebellion in Part V., *infra*.

“successful failures.”<sup>9</sup>

This article aims to understand a landmark Supreme Court decision as a crucial, early spark of the rebellion by exploring its context and political significance. Such an approach explains why a state embarked on an expensive and risky legal strategy. It also counters the conventional narrative that *Kleppe* stands for expansive federal power under the Constitution’s Property Clause.<sup>10</sup> While that accurately characterizes the legal holding, it fails to account for the case’s role in establishing a strong and ongoing movement to offset federal control over public natural resources. Even as Congress increasingly offers “cooperative federalism” for states to influence public land management, the *Kleppe* litigation’s legacy of “un-cooperative federalism” remains a common and effective response.<sup>11</sup>

In recent years, several popular essay collections have deepened our understanding of fields such as environmental, administrative, and constitutional law by telling the “stories” of court decisions.<sup>12</sup> Story telling reveals the complex

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<sup>9</sup> WEINBAUM, *supra* note 8 at 267.

<sup>10</sup> U.S. CONST. art. IV, sect. 3.

<sup>11</sup> On cooperative federalism, see *infra* notes 241-250 and accompanying text. See also Robert L. Fischman, Cooperative Federalism and Natural Resources Law, 14 N.Y.U. ENVTL. L.J. 179 (2005) (discussing the term and providing examples). “Un-cooperative federalism” is our own coinage to contrast the legacy of *Kleppe* with the statutory approaches. See *infra* note 249 and accompanying text. On the continued popularity of “un-cooperative federalism,” see e.g. Kirk Johnson, *States’ Rights Is Rallying Cry for Lawmakers*, N.Y. TIMES, Mar. 16, 2010.

<sup>12</sup> ENVIRONMENTAL LAW STORIES (Richard J. Lazarus & Oliver A. Houk eds. 2005); ADMINISTRATIVE LAW STORIES (Peter L. Strauss ed. 2006); CONSTITUTIONAL LAW STORIES (Michael C. Dorf, ed. 2004).

motivations and background facts of parties and disputes.<sup>13</sup> It counteracts the tendency of theory to gloss over particulars that reveal important aspects of legal developments.<sup>14</sup> There is no collection of natural resources or federal public land stories, and they are almost entirely absent from the Environmental Law Stories anthology.<sup>15</sup> If there were such a collection, surely *Kleppe* would warrant treatment as a critical buttress of modern natural resources law.<sup>16</sup> All of the major natural resources casebooks feature *Kleppe v. New Mexico* as a principal case.<sup>17</sup>

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<sup>13</sup> See generally, JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (1976) (stories unmask the participants in legal disputes and illuminate underlying humanity); JAMES B. WHITE, *THE LEGAL IMAGINATION* (1973) (seminal work on the role of narrative in understanding the meaning of law).

<sup>14</sup> Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gewirtz, eds. 1996).

<sup>15</sup> ENVIRONMENTAL LAW STORIES (Richard J. Lazarus & Oliver A. Houck eds. 2005). Oliver Houck has told the stories of several natural resources cases, including foreign ones. OLIVER A. HOUCK, *TAKING BACK EDEN: EIGHT ENVIRONMENTAL CASES THAT CHANGED THE WORLD* (2010); Oliver Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 TULANE L. REV. 2279 (1996); Oliver Houck, *Unfinished Stories*, 73 U. COLO. L. REV. 867 (2002). He recounts the U.S. public land law stories of *Sierra Club v. Morton*, 405 U.S. 727 (1972), *Unfinished Stories* at 909-21; *West Virginia Division of the Izzak Walton League of America v. Butz*, 522 F.2d 945 (4th Cir. 1975); *The Water, the Trees, and the Land* at 2291-2299; and *Natural Resources Defense Council v. Morton*, 388 F. Sup.829 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir.), *The Water, the Trees, and the Land* at 2300-2308.

<sup>16</sup> The *Kleppe* decision immediately attracted scholarship in law journals and continues to be a foundational reference point for articles and student notes on natural resources and public land law. See, e.g., Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001); Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L. REV. 617, 617-20 (1985); Dale Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495 (arguing against those who adhere to Property Clause theories inconsistent with the holding of *Kleppe*); Blake Shepard, *The Scope of Congress' Constitutional Power Under the Property Clause: Regulating Non-Federal Property to Further the Purposes of National Parks and Wilderness Areas*, 11 B. C. ENVTL. AFF. L. REV. 479, 489-90, 498-514 (1984); Margaret Elizabeth Plumb, *Case Note, Expansion of National Power Under the Property Clause: Federal Regulation of Wildlife*, 12 LAND & WATER L. REV. 181 (1977); Louis Touton, *Note, The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 823-5, 834-9; Linda Williams, *Constitutionality of the Free Roaming Wild Horses and Burros Act: The Ecosystem and the Property Clause in *Kleppe v. New Mexico**, 7 ENVTL. L. 137 (1977).

<sup>17</sup> GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 163 (6th ed. 2007);

This article shows how the story of *Kleppe* teaches more about public land lawmaking than expounding on the Constitution's Property Clause.

The story of *Kleppe* dramatizes the changing relationship between livestock ranchers and the public rangelands. It describes how an assertion of federal power advancing national conservation objectives collided with traditional, local economic interests on public lands. The legislation challenged in *Kleppe*—the Wild Free-Roaming Horses and Burros Act<sup>18</sup>—diminished the influence of states and ranchers over federal rangelands. The *Kleppe* decision resoundingly approved federal authority to reprioritize uses of the public resources, including wildlife, and spurred a lasting backlash in the West. Further legislation passed in the wake of *Kleppe* intensified this political unrest into the full-blown Sagebrush Rebellion. Though the *Kleppe* litigation failed to undermine Congress' public land reform agenda, the Sagebrush Rebellion lived to fight another day.

In 1970 the Public Land Law Review Commission outlined a reform agenda for Congress.<sup>19</sup> The 1971 Wild Free-Roaming Horses and Burros Act was not a part of that program; but, it turned out to be the opening salvo in a decade-long battle over public land law-making. The 1971 law signaled the loss of

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CHRISTINE A. KLEIN ET AL., NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 90 (2d ed. 2009); JAN G. LAITOS ET AL., NATURAL RESOURCES LAW 1202 (2006); and JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 148 (2d ed. 2009).

<sup>18</sup> Pub. L. No. 92-195, 85 Stat. 649 (1971) (codified as amended at 16 U.S.C. §§ 1331-1340).

<sup>19</sup> PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970).

rancher power over public rangelands in the legislative realm, and the litigation that followed further threatened the influence of the graziers. However, adjudicated rights do not necessarily translate into social facts.<sup>20</sup> This article argues that a strictly legal evaluation of the *Kleppe* litigation fails to measure its true significance as a galvanizing event for the Sagebrush Rebellion movement of the 1970s and the subsequent “wise use” wars over public lands.<sup>21</sup>

Part II of this article sets the stage for the story of *Kleppe* by reviewing the history of ranching conflict on public lands, and the legislation addressing allocation of scarce rangeland resources. While rangeland reform of the 1930s imposed new regulations on public land graziers, the soil conservation purpose served the long-range interest of ranchers. The 1971 Wild Free-Roaming Horses and Burros Act displaced ranching as the de-facto priority use of public rangelands and triggered the Sagebrush Rebellion.

Part III focuses on the lawsuit challenging the 1971 statute and describes the stakeholders, arguments, and ultimate resolution by the U.S. Supreme Court. The unanimous decision in *Kleppe v. New Mexico* now stands as the leading case interpreting the Constitution’s Property Clause as a very broad grant of power to Congress. Though New Mexico failed to persuade even a single justice, its

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<sup>20</sup> STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND SOCIAL CHANGE* 7 (2d ed. 2004).

<sup>21</sup> On the “wise use” wars that succeeded the “Sagebrush Rebellion,” see ROBERT B. KEITER, *KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, & AMERICA’S PUBLIC LANDS* (2003); *WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS* (Charles Davis ed. 1997); Florance Williams, *Sagebrush Rebellion II*, *HIGH COUNTRY NEWS*, Feb. 24, 1992.

litigation promoted greater political momentum in the West to resist public natural resources law reform.

Part IV shows how that resistance shaped the Sagebrush Rebellion. Shortly after the *Kleppe* decision, Congress enacted a comprehensive charter for rangeland management that further inflamed ranchers. They sought to undermine the new statute, and other legislation reforming public land administration. While states participated in the cooperative federalism procedures provided by the legislation, they also engaged in “un-cooperative federalism” through a series of direct challenges to national resource management authority. Part IV examines the federal legislation, its aftermath, and an ill-fated attempt by Nevada to control public rangelands.

Part V explores how social science scholarship helps explain why New Mexico, and subsequently other western states, made lemonade out of courthouse losses. The political consequences of the “un-cooperative” challenges to federal power mostly aided ranchers and other interest groups associated with western state governments. Their embattled solidarity helped elect sympathetic officials and profoundly influenced implementation of the public land statutes.

## II. PUBLIC RANGELAND LAW

The federal government today manages nearly 270 million acres of public rangelands, mostly scattered across sixteen western states. The Bureau of Land Management oversees roughly 160 million acres of these lands, divided into more

than 21,000 allotments authorized for grazing under nearly 18,000 permits.<sup>22</sup> The Forest Service manages grazing on an additional 96 million acres of public land.<sup>23</sup> The size of this part of the public estate has changed little since the 1930s. Before then, disposal dominated federal public land policy. The United States divested itself of considerable acreage through statehood and homestead acts, railroad grants, and other devices.<sup>24</sup> Disposal flowed from the premise that “the public domain ought to be thrown open to private development, free of charge and unfettered by government regulation.”<sup>25</sup> However, the federal government retained a substantial amount of dry, rocky land that was not suitable for agriculture and valuable only as pasturage.<sup>26</sup> These relatively infertile western lands constitute the majority of the public rangelands.

#### A. Rangeland Conflict and the Taylor Grazing Act

Competition for scarce resources on the federal rangelands—forage and water—prompted disputes among public range ranchers,<sup>27</sup> often pitting sheepherders against cattle ranchers.<sup>28</sup> In the early years of grazing on public

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<sup>22</sup> UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT, FACT SHEET ON THE BLM’S MANAGEMENT OF LIVESTOCK GRAZING, <http://www.blm.gov/wo/st/en/prog/grazing.html> (last visited March 30, 2009).

<sup>23</sup> UNITED STATES FOREST SERVICE, ABOUT RANGELANDS, <http://www.fs.fed.us/rangelands/whowere/index.shtml> (last visited March 31, 2009).

<sup>24</sup> GEORGE C. COGGINS ET AL., *supra* note 17 at 89-117.

<sup>25</sup> Charles F. Wilkinson, *The Law of the American West: A Critical Bibliography of the Nonlegal Sources*, 85 MICH. L. REV. 955, 1003 (1987).

<sup>26</sup> Phillip O. Foss, *The Determination of Grazing Fees on Federally-Owned Range Lands*, 41 J. FARM ECON. 535 (1959).

<sup>27</sup> *Id.*

<sup>28</sup> *See, e.g., Omaechevarria v. Idaho*, 246 U.S. 343 (1918).

rangelands, “adjudication of range rights...was mostly by sword and pistol.”<sup>29</sup> Among the conflicts later known as the “range wars” were the Johnson County and Upper Green River wars in Wyoming, the Tonto Basin war in Arizona, and a number of other conflicts in places like the Blue Mountains of Oregon.<sup>30</sup> In 1885, Congress reacted to the conflicts by passing the Unlawful Inclosures Act,<sup>31</sup> which limited one tool that ranchers had used to exclude others: fences. This was but the first of many federal restrictions to come.

Once the range wars quieted, Congress mostly ignored the rangelands for the next fifty years. Passive neglect characterized federal policy over most public rangelands, especially outside of the national forests. Gifford Pinchot did exercise his broad authority under the Forest Service’s organic act to impose permit requirements on graziers using national forest rangelands.<sup>32</sup> The backlash from ranchers was fierce.<sup>33</sup>

Slow recognition of range degradation resulting from mismanagement laid the groundwork for reform.<sup>34</sup> Still, it took the great dust storms of the mid-1930s to prompt congressional enactment of the Taylor Grazing Act of 1934 and its

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<sup>29</sup> M.W. Talbot & F.P. Cronmiller, *Some of the Beginnings of Range Management*, 14 J. RANGE MGMT. 95, 95 (1961).

<sup>30</sup> *Id.*

<sup>31</sup> 43 U.S.C. § 1061. *See also* *Leo Sheep Co. v. United States*, 440 U.S. 668, 684 (1979).

<sup>32</sup> *United States v. Grimaud*, 220 U.S. 506 (1911) (upholding the grazing permits and fees notwithstanding no mention of them in the legislation authorizing national forest management).

<sup>33</sup> Oliver Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 TULANE L. REV. 2279, 2302 (1996).

<sup>34</sup> Talbot & Cronmiller, *supra* note 29, at 97.

1936 amendments.<sup>35</sup> The Act guided management of federally owned rangelands, focusing primarily on preventing degradation and thus stabilizing the livestock industry. It authorized the Secretary of the Interior to establish grazing districts and to manage them through permits.<sup>36</sup> The Act expressed the then-dominant view that livestock grazing was “the highest use of the public lands...pending final disposal.”<sup>37</sup> And final disposal meant “the federal government considered public lands as temporary holdings to be claimed, privatized, and homesteaded as the nation matured.”<sup>38</sup> Paradoxically, however, the Taylor Grazing Act, by authorizing active management of unreserved federal lands, effectively closed the window on “unrestricted entry” of the public lands.<sup>39</sup>

Despite the Taylor Grazing Act’s authorization of greater federal control over public land grazing, in practice the law operated for the benefit of ranchers.<sup>40</sup> The Interior Department delegated most important decisions to local grazing districts and boards. Grazing advisory boards composed exclusively of ranchers

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<sup>35</sup> 43 U.S.C. 315 (1934). On the history of the Act, see E. LOUISE PEFFER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES 1900-50* 214-224 (1951).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Further evidencing the prominence of this view, Congress twice amended the Act to open up more public lands to livestock grazing. In 1936, Congress increased the acreage that could be included in grazing districts from eighty million acres to one hundred and forty million acres. Eighteen years later, Congress removed the acreage limitation altogether.

<sup>38</sup> Nancie G. Marzulla, *Property Rights Movement: How It Began and Where It Is Headed*, in *A WOLF IN THE GARDEN* 39 (Philip D. Brick & R. McGregor Cawley eds., 1996) (discussing pre-1964 Interior Department policy).

<sup>39</sup> PUBLIC LAND LAW REVIEW COMMISSION, *ONE THIRD OF THE NATION’S LAND* 43 (1970).

<sup>40</sup> See Richard T. Braun, *Emerging Limits on Federal Land Management Discretion: Livestock, Riparian Ecosystems and Clean Water Law*, 17 ENVTL. L. 43, 52-58 (1986); and George C. Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 100 (1982).

worked with “stockmen” district administrators to manage rangelands and determine proper grazing intensities.<sup>41</sup> “To Western stockmen, these may have been public lands, but they were *their* public lands.”<sup>42</sup> Even after the United States implemented environmental regulations and comprehensive federal resource planning regimes in the 1970s, the Taylor Grazing Act remains the basic legal framework for allocating range resources.<sup>43</sup>

### *B. The Wild Free-Roaming Horses and Burros Act*

Limited water and forage for livestock, which often brought ranchers into conflict with each other, also pitted the primary users of the public range against wild burros and horses. This is because horses and burros compete directly with livestock for water and forage.<sup>44</sup> Compounding this conflict, horses and burros lacked natural limits on population growth because they had no natural predators on the rangelands.<sup>45</sup> The wild horses and burros that inhabit North America are not native species, but are the descendants of strays and abandoned animals.<sup>46</sup> The oldest lineage traces its roots to the Spanish conquistadors,<sup>47</sup> but today accounts

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<sup>41</sup> Houck, *The Water, the Trees, and the Land*, *supra* note 12 at 2303.

<sup>42</sup> *Id.* at 2301.

<sup>43</sup> See text at *infra* notes 240-248.

<sup>44</sup> Kenneth P. Pitt, *The Wild Free-Roaming Horses and Burros Act: A Western Melodrama*, 15 ENVTL. L. 503, 511 (1985) (noting a “definite temporal and spatial overlap between wild horses and other species”).

<sup>45</sup> *Id.* at 505.

<sup>46</sup> *Id.* at 505-06.

<sup>47</sup> *Id.*

for only a small fraction of the horses and burros inhabiting the public lands.<sup>48</sup>

The majority of the horses in fact owe their existence to the resolute ability of animals that strayed or were abandoned, often when economic circumstances changed, to eke out a living in a harsh land.<sup>49</sup>

Although many ranchers tolerated wild horses for both aesthetic and commercial reasons,<sup>50</sup> others viewed the horses as feral pests. The American market demanded little horsemeat, and horses and burros interfered with the more profitable use of public rangelands--livestock grazing. As a result, federal agents frequently removed wild horses and burros from the public range.<sup>51</sup> Federal agents, however, were not the only people removing wild burros and horses from the public lands. In fact, virtually every western state legislature provided state agencies with the authority to remove abandoned, estray, or unbranded burros and horses.<sup>52</sup> Such laws provided a useful tool for many ranchers who valued the presence of the horses and burros, but at the same time recognized that a lack of

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> RICHARD SYMANSKI, *WILD HORSES AND SACRED COWS* 131 (1985).

<sup>51</sup> *See, e.g.,* *Hatahley v United States*, 351 U.S. 173 (1956) (federal officers removing free-roaming horses pursuant to Utah abandoned horse statute).

<sup>52</sup> *See, e.g.,* ARIZ. REV. STAT. § 3-1336 (1952) (first passed in 1905); CAL. FOOD & AGRIC. CODE § 16521 (1933); COLO. REV. STAT. § 35-44-101 (1969) (first passed in 1903); IDAHO STAT. § 25-2309 (1976); N.M. STAT. ANN. § 47-14-1 (1966); NEV. REV. STAT. § 569.120 (1961); OR. REV. STAT. § 607.007 (1971); UTAH CODE § 4-25-1 (1953); WYO. STAT. §11-24-101 (1913). *See also Protection of Wild Horses on Public Lands: Hearing on H.R. 795 and H.R. 5375 Before the H. Subcomm. on Public Lands of the H. Comm. on Int. and Insular Affairs*, 92d Cong. 147 (1971) (hereinafter "House Hearings") (statement of Dean Prosser, President, Int'l Livestock Brand Conf.).

natural predators necessitated population management.<sup>53</sup>

When the demand for pet food made horse hunting a profitable venture, the broad language of state estray laws facilitated a new business.<sup>54</sup> Private profiteers pursued the horses, often utilizing appalling tactics. One author summarized the process as follows:

Low-flying airplanes drove the wild horses towards mounted cowboys who fired shotguns at the horses to make them run faster. Captured horses were tied to large truck tires to exhaust them and make them easier to handle. Exhausted, they would be packed into trucks so tight that only their weight against each other held them up. Foals, weighing less, often were abandoned to die. Seeking maximum profits, often six and a half cents a pound, the hunters seldom fed or watered the horses and many died en route to the slaughterhouse.<sup>55</sup>

Such atrocities gained national media attention during the 1950s, resulting in the passage of the Wild Horse Annie Act,<sup>56</sup> which prohibited the poisoning of watering holes and the use of motorized vehicles to hunt horses and burros.<sup>57</sup>

However, the Wild Horse Annie Act failed to protect the wild horses and

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<sup>53</sup> SYMANSKI, *supra* note 50, at 65. *See also* Pitt, *supra* note 15, at 517 n.75 (noting that before the Act, ranchers often managed horse populations in cooperation with horse advocacy groups).

<sup>54</sup> UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT, OUR PUBLIC LANDS 3 (1980) [hereinafter OUR PUBLIC LANDS].

<sup>55</sup> Pitt, *supra* note 15, at 506.

<sup>56</sup> Pub. L. No. 86-234, 18 U.S.C. § 47 (1959). The Act is named after Velma B. Johnston, also known as Wild Horse Annie, who led the Wild Horse Organized Assistance and dedicated her life to protecting free-roaming horses. *See* Velma B. Johnston, *The First to Save a Memory*, 50 TEX. L. REV. 1056 (1972), for Ms. Johnston's account of her experiences with common wild-horse-gathering practices and her efforts to protect the wild horse.

<sup>57</sup> *Id.* The Act's actual prohibition is for "pollution" of watering holes for the purpose of trapping, killing, wounding, or maiming.

burros because hunters simply resorted to non-motorized means of capture.<sup>58</sup> And state livestock boards continued to remove animals interfering with commercial grazing. In response, Congress reformed public rangelands management with the Wild Free-Roaming Horses and Burros Act (WFRHBA).<sup>59</sup> The Act gave sweeping protections to all unclaimed and unbranded horses and burros on public lands, prohibiting their capture, branding, harassment and killing.<sup>60</sup> It “essentially reversed BLM’s grassland management policy,”<sup>61</sup> declaring wild burros and horses to be “an integral part of the natural system of the public lands.”<sup>62</sup> The BLM thus began to shift its attention from managing grazing for the long-term benefit of ranching to “protection of specific rangeland resources,”<sup>63</sup> such as horses and burros.

This revolution in rangeland management hurt livestock ranchers who grazed cattle and sheep on public lands. Federal protection of wild horses and burros resulted in more competition with livestock for scarce resources. The Act

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<sup>58</sup> Pitt, at 506. *See also* Johnston, *supra* note 55, at 1057-9. Johnston suggests that the Wild Horse Annie Act was only half-heartedly enforced in the West, in part due to the influence of livestock interests. *Id.* at 1059.

<sup>59</sup> Pub. L. No. 92-195, 85 Stat. 649 (1971) (codified as amended at 16 U.S.C. §§ 1331-1340).

<sup>60</sup> *Id.*

<sup>61</sup> Pitt, *supra* note 15, at 515 (citing OUR PUBLIC LANDS, *supra* note 24).

<sup>62</sup> 16 U.S.C. § 1331. In fact, however, the horses and burros do considerable damage to the rangeland ecosystems:

By passage of [the Wild Horses and Burros Act], Congress declared that it felt it had the power to override the results of 500,000 years of separate evolution of New World and Old World equid lineages, and furthermore invalidated the extinction of North American equids near the end of the Pleistocene. Congress may have given legal status to these noxious herbivores, but Congress sees the natural world through a different visual filter than serious ecologists.

Bruce E. Coblenz, Letter to the Editor, 13 NATURAL AREAS J. 3 (1993).

<sup>63</sup> FACT SHEET ON THE BLM’S MANAGEMENT OF LIVESTOCK GRAZING, *supra* note 22.

indirectly required ranchers to subsidize horse and burro access to water with extra fuel to run well pumps, and repair of horse- and burro-caused damage, thus increasing the operating costs of an already marginally profitable industry.<sup>64</sup> Ranchers correctly sensed that the 1971 law signaled a loss of control over public rangeland.

Even though statutory protections for horses and burros imposed costs on ranching, the legislative history displays a callousness toward these economic harms.<sup>65</sup> Support for the legislation and the plight of the wild horse dominated the hearings, with representatives taking considerable time to congratulate each other for engaging so worthy a cause.<sup>66</sup> Congressman after congressman made the case against the “savage destruction”<sup>67</sup> of the “living symbols of historic significance and pioneer spirit of the West,”<sup>68</sup> each time generating responses of congratulation and thanks from other representatives. When the first witness to testify introduced a letter from a nine-year-old Michigan girl stating that “[e]very time the men come to kill the horses for pet food, I think you kill many children’s

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<sup>64</sup> SYMANSKI, *supra* note 20, at 137-39. The operator of one western ranch estimated the Act resulted in a \$50,000 per year operating costs increase. *Id.*

<sup>65</sup> See generally *House Hearings*, *supra* note 52; *Protection of Wild Horses and Burros on Public Lands: Hearing on S. 862, S. 1116, S. 1090, and S. 1119 Before the S. Subcomm. on Public Lands of the S. Comm. on Int. and Insular Affairs*, 92d Congress 23-24 (1971) (statements of Sen. Church acknowledging the “many heartfelt letters the committee has received from schoolchildren throughout the Nation urging preservation of wild horses and burros”). See also Pitt, *supra* note 15, at 513.

<sup>66</sup> *House Hearings*, *supra* note 52, at 10-18 (statements of Representatives Johnson, Foley, Roncalio, Williams, Steiger and Baring).

<sup>67</sup> *Id.* at 14.

<sup>68</sup> *Id.* at 17 (statement of Rep. Gude (Md.)).

hearts,”<sup>69</sup> committee members congratulated and thanked him too for his efforts.<sup>70</sup>

When ranching interests did get their chance to testify, they were on the defensive. Much time was devoted to refuting accusations that ranchers were engaging in the wholesale slaughter of horses.<sup>71</sup> Karl Weikel, who testified on behalf of the American National Cattlemen’s Association and the American National Wool Growers Association, began by explaining that “the issue has been clouded by controversy, accusations, counteraccusations and recriminations based mostly upon misunderstanding of, and impatience with, past mistakes, abuses, misuses and poor management decisions resulting from mistaken policy and too little factual information.”<sup>72</sup> He then expressly refuted the claim that “western livestock interests sought to extinguish wild horses and burros”<sup>73</sup> and went on to state a more nuanced position, with a concern for management that balanced protection for equids with the legitimate interests of ranchers. But his explanations fell flat, a fact made evident at the conclusion of Mr. Weikel’s remarks when Representative Johnson asked whether ranching interests actually “believe in protecting the wild horse.”<sup>74</sup>

Making matters worse, grazing interests appeared disorganized and

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<sup>69</sup> *Id.* at 19 (statement of Gregory Gude, son of Rep. Gude). Also see *id.* at 137 (testimony of Hope Ryden), for another child’s letter expressing support for the plight of the wild horse.

<sup>70</sup> *Id.* at 19-20 (statements of Reps. Steiger, Saylor, Kastenmeier, Dellenback, and Aspinall).

<sup>71</sup> *Id.* at 117-18.

<sup>72</sup> *Id.* at 117.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 128.

disjointed on approaches to the proposed legislation. The Wyoming Wool Growers Association argued in support of establishing horse refuges,<sup>75</sup> while the National Cattlemen's Association argued adamantly against refuges.<sup>76</sup> The testimony of one witness, who described the viciousness of the "wild jackass," suggests that ranching interests were at a loss for dealing with the media frenzy that surrounded the push for horse protection.<sup>77</sup>

The public had already made up its mind, and legislators had clearly taken note. In one observer's description, the legislators saw the rancher as "a profiteer, intent on using the public domain to satisfy his own greed, secretly shooting and maiming horses, fencing horses away from water, and generally being an all around bad guy."<sup>78</sup> The insignificance of ranching concerns was underscored by the fact that the joint testimony of the National Cattlemen's Association and the National Wool Growers Association was followed by the testimony of a fourth grader.<sup>79</sup> Unable to find relief in the legislative process, the primary users of the public rangelands turned to other avenues, explored in the subsequent sections of this article.

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<sup>75</sup> *Id.* at 131-33 (statement of Robert P. Bledsoe, Executive Secretary, Wyoming Wool Growers Association).

<sup>76</sup> *Id.* at 123.

<sup>77</sup> *House Hearings, supra* note 52, at 117, 123 (testimony of Karl Weikel representing the American National Cattlemen's Assoc.). Mr. Weikel's objections were not limited to the vicious nature of the wild burro, as he went on to explain that "It will be most difficult in the Southwest to convince some of our Indian and Spanish people that they can't turn their horses out when they want to." *Id.* at 121.

<sup>78</sup> Pitt, *supra* note 15, at 513.

<sup>79</sup> *House Hearings, supra* note 52, at 142-43.

The ranchers had few friends in Congress who were willing to stand up to the sentiment of the WFRHBA supporters. The Senate version of the WFRHBA passed without dissent on June 29, 1971.<sup>80</sup> A House bill with only minor differences unanimously passed on October 4, 1971.<sup>81</sup> Congress reconciled and enacted the law later that year, and President Nixon signed the WFRHBA on December 15, 1971.<sup>82</sup>

As an ecological matter, the WFRHBA is nonsense.<sup>83</sup> Wild horses and burros “alter the ecosystems by consuming native plants, competing with native mammals such as the Desert Bighorn Sheep, fouling springs, and contributing to erosion by wearing trails on the steep desert hillsides.”<sup>84</sup> Nevertheless, the WFRHBA declares that wild equids are “an integral part of the natural system of the public lands.”<sup>85</sup> The WFRHBA charges the Secretary of the Interior with protecting wild horses and burros, but at the same time commands the Secretary to manage wild equids “in a manner that is designed to achieve and maintain a *thriving natural ecological balance* on the public lands.”<sup>86</sup> The idea that

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<sup>80</sup> 117 CONG. REC. 22671 (1971) (S. 1116)

<sup>81</sup> 117 CONG. REC. 34782 (1971) (H.R. 9890).

<sup>82</sup> Pub. L. No. 92-195, 85 Stat. 649, 651 (1971). *See also* H.R. REP. NO. 92-681 (1971) (Conf. Rep.), reprinted in 1971 U.S.C.C.A.N. 2159; ENVTL. POL’Y DIVISION, CONG. RES. SERVICE, LIBR. CONG., 92ND CONG., REPORT ON PUBLIC LAND POLICY: ACTIVITIES IN THE 92D CONGRESS 1-2 (Comm. Print 1972) (prepared by Elmer W. Shaw).

<sup>83</sup> Michael L. Wolfe, *The Wild Horse and Burro Issue*, 7 ENVTL. REV. 179, 183 (1982).

<sup>84</sup> *Id.* *See also* Gilluly, *supra* note 157, at 219-20 (noting that horses compete with mule deer for food and that restoring desert big horn sheep populations would require “drastic reductions” in horse populations).

<sup>85</sup> 16 U.S.C. § 1331 (1971).

<sup>86</sup> *Id.* at § 1333 (emphasis added).

protecting an invasive species, which causes harm to delicate desert ecosystems, could be done in such a way as to obtain “thriving natural ecological balance” is absurd.<sup>87</sup> This general tone of protectionism, rather than balanced management,<sup>88</sup> is the likely reason the WFRHBA received virtually no support from environmental groups.<sup>89</sup>

Due in part to these flaws, implementation of the Act has been taxing. In 1980, BLM estimated the yearly cost would reach \$40 million.<sup>90</sup> Three decades later, the annual price tag for implementation remained essentially unchanged.<sup>91</sup> On average, about half of the WFRHBA’s implementation costs arise from the adoption program, which has been such a failure that more horses are now in BLM holding pens than in the wild.<sup>92</sup> Conditions in the pens can also be

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<sup>87</sup> *Accord Wolfe*, *supra* note 83, at 186 (stating that “there is no logic in assigning the maintenance of populations of these non-native and feral animals any higher ethical or socio-political priority than that accorded to indigenous wildlife species.”)

<sup>88</sup> *Id.*

<sup>89</sup> The Sierra Club did submit one page of written testimony in support of horse protections. *House Hearings*, *supra* note 52, at 198-99. Even in light of the Act’s shortcomings, environmental groups were wise not to oppose the Act in the *Kleppe* litigation because the Court’s broad endorsement of Congress’ Property Clause power provided a strong foundation for protecting environmental interests in federal lands.

<sup>90</sup> *Id.* at 183-84.

<sup>91</sup> UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT, FACTSHEET ON CHALLENGES FACING THE BLM IN ITS MANAGEMENT OF WILD HORSES AND BURROS, [http://www.blm.gov/wo/st/en/prog/wild\\_horse\\_and\\_burro/new\\_factsheet.html](http://www.blm.gov/wo/st/en/prog/wild_horse_and_burro/new_factsheet.html) (last visited April 1, 2009).

<sup>92</sup> UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON NATURAL RESOURCES, HOUSE OF REPRESENTATIVES, BUREAU OF LAND MANAGEMENT: EFFECTIVE LONG-TERM OPTIONS NEED TO MANAGE UNADOPTABLE WILD HORSES 7-8 (Oct. 2008). Rep. Sam Steiger (R-AZ) predicted this consequence in 1971. Discussing the adoption program, he stated: “If we talk about gathering and selling them at auction, we are kidding ourselves because these animals normally don’t make very good pets unless you want one for your mother-in-law with whom you don’t have a particularly good relationship.” *House Hearings*, *supra* note 52, at 22. *See also* Phil Taylor, *Wild Horses: BLM Announces ‘New*

unhealthy for the animals, breeding disease due to overcrowding.<sup>93</sup> Even with over 30,000 animals in BLM corrals and pastures, the number of wild horses and burros on the rangeland is substantially more than the carrying capacity for these animals, and the herd continues to grow.<sup>94</sup> The result is overgrazing, soil erosion, and the destruction of mule deer, elk, and antelope habitat, not to mention the habitat of the equids.<sup>95</sup> Amendments to the WFRHBA in 1978, part of the Public Rangelands Improvement Act,<sup>96</sup> were intended to reign in administrative costs and to provide more authority for the BLM to combat overpopulation, but many of the original problems remain.<sup>97</sup> In addition to direct costs, indirect expenses of

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*Direction' for Horse and Burro Program*, 10 Land Letter (Environment and Energy Publishing) No. 9 (June 10, 2010). (stating that around 70 percent of the annual budget for wild horses and burros is spent on animals in BLM corrals and pastures) [hereinafter Taylor, *New Direction*].

<sup>93</sup> *Eligible Mustangs: A Classifieds Roundup*, HIGH COUNTRY NEWS, Apr. 12, 2010 (describing the BLM adoption program). See also Phil Taylor, *Wild Horses: BLM Facilities Reach Capacity as Herds Boom*, 10 Land Letter (Environment and Energy Publishing) No. 9 (May 14, 2009) (describing animal rights' activists displeasure with many aspects of the BLM corral program) [hereinafter, Taylor, *Herds Boom*].

<sup>94</sup> See Lyndsey Layton & Juliet Eilperin, *Salazar Presents Ambitious Plan to Manage Wild Horses*, WASH. POST, Oct. 8, 2009. See also Taylor, *New Direction*, *supra* note 90 (stating that the BLM estimates that herd numbers could grow to 325,000 by 2021 without countermeasures); Taylor, *Herds Boom*, *supra* note 91. The BLM on at least one occasion indicated the need to euthanize animals due to overpopulation and the excessive costs of holding the animals. See Layton & Eilperin, *supra* note 92.

<sup>95</sup> See, e.g., Taylor, *Herds Boom*, *supra* note 91.

<sup>96</sup> 43 U.S.C. §§ 1901-08. In its 1978 statement of national policy, Congress reaffirmed the policy of protection, but also addressed the need to “facilitat[e] the removal and disposal of excess wild free-roaming horses and burros which pose a threat to themselves and their habitat and to other rangeland values.” *Id.* at §1901(b)(4).

<sup>97</sup> Recent proposals by the Obama Administration to address ongoing problems in the administration of the WFRHBA include: providing additional funding, relocating herds from the West to Midwestern or Eastern lands, increasing use of fertility drugs, and promoting partnerships with private and nongovernmental entities. See e.g., Layton & Eilperin, *supra* note 92; *DoI Proposes New Preserves as Part of Wild Horse Plan*, 34 Public Land News No. 20 (Oct. 16, 2009); *Obama Administration Fashions Multi-Part Wild Horse Solution*, Public Land News Bulletin No. 9 (Oct. 13, 2009); April Reese, *Wild Horses: Eastward Ho! BLM Proposes New Sanctuaries in More Populated States*, 10 Land Letter (Environment and Energy Publishing) No. 9

the Act have come in the form of extensive litigation. Over forty cases challenging BLM's implementation of the Act have made it to the federal courts.<sup>98</sup>

### III. THE LITIGATION

Kelley Stephenson was a New Mexico livestock rancher. Pursuant to the Taylor Grazing Act, Stephenson held grazing rights to some 8,000 acres of public rangeland.<sup>99</sup> Although little information exists regarding his personal history, it is clear that, like many livestock ranchers, the public rangelands played an important role in supporting his operation. Stephenson's grazing allotment included an invaluable desert water source known by a name that rings with history as the Taylor Well.<sup>100</sup> In the arid western climate, wells are one of the most important assets of a livestock operation. Wells are not naturally occurring bodies of water, but rather holes dug deep into the ground, from which ground water is pumped into a large trough that often resembles a plastic children's swimming pool. Gas

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(Oct. 15, 2009).

<sup>98</sup> Kristen H. Glover, *Managing Wild Horses on Public Lands: Congressional Action and Agency Response*, 79 N.C. L. REV. 1108, 1109 (2001). *See, e.g.*, *American Horse Protection Ass'n v. Watt*, 694 F.2d 1310 (D.C. Cir. 1982); *Dahl v. Clark*, 600 F. Supp. 585 (D. Nev. 1984); *and Animal Protection Inst. v. Hodel*, 671 F. Supp. 695 (D. Nev. 1987). *See also* Richard Symanski, *Dances with Horses: Lessons from the Environmental Fringe*, 10 CONSERVATION BIOLOGY 708, 708, 712 (1996) (describing one Wild Horse and Free-Roaming Burro Act case litigated by the Rutgers Law School Animal Rights Law Clinic as "spurious" and "perversely counterproductive").

<sup>99</sup> *Kleppe v. New Mexico*, 426 U.S. 529, 533 (1976).

<sup>100</sup> *Id.* It was the Taylor Grazing Act under which Stephenson acquired his permit to use the allotment.

or diesel generators usually run the pumps, which ranchers visit and refuel on a regular basis. Because of the importance of a well to a livestock operation, as well as the time and labor required to develop and maintain such a resource, ranchers guard them zealously.

On the first day of February 1974, Stephenson discovered several unbranded and unclaimed burros wandering on his private land and on the rangelands his cattle were authorized to graze.<sup>101</sup> Stephenson requested the BLM remove the burros because they were eating the feed he put out for his livestock and harassing his animals.<sup>102</sup> Stephenson may also have been concerned that the burros were competing with his livestock for access to water at the Taylor Well. Regardless, BLM made it clear no removal would occur.<sup>103</sup> So, Stephenson turned to state law for relief. He found it in the New Mexico Estray Law, which provided the New Mexico Livestock Board with the authority to round up and auction

[a]ny bovine animal, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown in the section where found, or which shall be fifty (50) miles or more from the limits of its usual range or pasture, or that is branded with a brand which is not on record in the office of the cattle sanitary board of New Mexico.<sup>104</sup>

The New Mexico Livestock Board is part of the oldest law enforcement agency in

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<sup>101</sup> *New Mexico v. Morton*, 406 F. Supp. 1237 (D.N.M. 1975).

<sup>102</sup> *Id.* at 1238.

<sup>103</sup> *Kleppe*, *supra* note 99, at x.

<sup>104</sup> N.M. STAT. ANN. § 47-14-1 (1966).

the state.<sup>105</sup> It originally consisted of two separate agencies—the Cattle Sanitary Board, founded in 1887, and the Sheep Sanitary Board, founded in 1889.<sup>106</sup> The two agencies merged in 1967 to form the New Mexico Livestock Board.<sup>107</sup> After passage of and pursuant to the WFRHBA, the Livestock Board entered into a cooperative agreement with the Secretaries of Interior and Agriculture to implement the Act. Apparently displeased with the results, the Livestock Board terminated the agreement in November 1973.<sup>108</sup>

On February 18, 1974, seventeen days after Stephenson’s complaint to the BLM, the Board rounded up and removed nineteen unbranded and unclaimed burros pursuant to the New Mexico Estray Law.<sup>109</sup> Each burro was seized from federal lands.<sup>110</sup> That same day, in accordance with usual practice, the Board sold the burros at public auction.<sup>111</sup> After the sale, the BLM asserted jurisdiction under the WFRHBA and demanded that the Board recover the animals and return them to the public lands.<sup>112</sup> The fight was on.

A. *New Mexico v. Morton*

In response to BLM’s demand for the return of the seized burros, the State

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<sup>105</sup> NEW MEXICO LIVESTOCK BOARD, HOME PAGE, <http://www.nmlbonline.com> (last visited March 24, 2009).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Kleppe*, *supra* note 62, at 532-3.

<sup>109</sup> *Id.* at 533-4.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 534.

<sup>112</sup> *Id.*

of New Mexico, the New Mexico Livestock Board and its director, as well as the purchaser of three of the auctioned burros, filed suit in the U.S. District Court in Albuquerque.<sup>113</sup> The plaintiffs sought injunctive and declaratory relief from BLM's demands, arguing that the WFRHBA went beyond Congress's constitutional authority.<sup>114</sup>

Representing the plaintiffs was George J. Hopkins, who just seventeen days earlier represented New Mexico in another case against the federal government, with some success.<sup>115</sup> However, that appears to have been his only prior appearance in a federal court. He was an associate in one of New Mexico's most prominent and largest law firms, Modrall, Sperling, Roehl, Harris & Sisk.<sup>116</sup> Dick Modrall, one of the firm's founding partners, was a "cowboy/ranch foreman turned lawyer"<sup>117</sup> who was no doubt sympathetic to the plaintiffs' cause. Representing the federal government, on the other hand, was a Harvard educated, seasoned federal litigator by the name of Victor R. Ortega. A native of New Mexico, Ortega had served as the U.S. Attorney for the District of New Mexico

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<sup>113</sup> *Morton*, *supra* note 101.

<sup>114</sup> *Id.*

<sup>115</sup> *New Mexico v. Callaway*, 389 F. Supp. 821 (D.N.M. 1975). The case challenged refusal of the commanding general of White Sands Missile Range to allow state agents to enter the range to search for an hidden treasure that "long-lasting legend" said was located somewhere on a mountain within the Range. As legend had it, the treasure consisted of "gold bars, jewels, and valuable artifacts." *Id.* at 823.

<sup>116</sup> Modrall, Sperling, Roehl, Harris & Sisk was the second largest firm in Albuquerque, and the state, in 1975. III MARTINDALE HUBBELL LAW DIRECTORY (LAWYERS MARYLAND – NEW YORK) 2725B-2812B (1975).

<sup>117</sup> MODRALL SPERLING, OUR STORY, [http://www.modrall.com/firm/our\\_story](http://www.modrall.com/firm/our_story) (last visited February 4, 2011).

since 1969, representing the federal government in over one hundred cases.<sup>118</sup>

To hear the case, a three-judge panel convened in the U.S. District Court for the District of New Mexico. This odd judicial arrangement was a relic of old federal civil procedure, which provided that a permanent injunction restraining the enforcement of an Act of Congress on grounds of unconstitutionality should not be granted unless heard and determined by a three-judge district court.<sup>119</sup> The panel consisted of Tenth Circuit Judge Oliver Seth, Chief District Judge Harry Vearle Payne, and District Judge Edwin L. Mechem. The three judges had a combined thirty-five years of experience on the bench.<sup>120</sup> Mechem and Seth, who served as Chief Judge of the Tenth Circuit from 1977 to 1984, were both New Mexico natives, and both had worked for the federal government prior to joining the bench.<sup>121</sup> Judge Payne was born in a Mormon colony in Chihuahua, Mexico (just south of New Mexico) and did not go to law school, but rather read law.<sup>122</sup>

The three-judge panel turned out to be a godsend for the State, dealing it a resounding victory. It was clear that Congress could legislate “all needful rules

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<sup>118</sup> A November 16, 2009 search of Westlaw for cases in which Victor R. Ortega represented the United States yielded 120 cases. *See also* Lawyers.com, <http://www.lawyers.com/New-Mexico/Santa-Fe/Victor-R.-Ortega-1139049-a.html> (last visited February 4, 2011).

<sup>119</sup> 28 U.S.C. § 2282 (repealed 1976).

<sup>120</sup> FEDERAL JUDICIAL CENTER, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf> (last visited February 4, 2011).

<sup>121</sup> *Id.* Seth served as an Army Major in World War II and Mechem as an FBI agent.

<sup>122</sup> *Id.* “Reading law” was a means by which those who did not go to law school could be admitted to the bar. It involves mostly self-teaching, but also guidance by an experience attorney or judge.

and regulations” concerning public real estate under the Property Clause.<sup>123</sup> But the court took issue with the idea that wild horses and burros could “become ‘property’ of the United States simply by being physically present on the ‘territory’ or land of the United States.”<sup>124</sup> The court’s analysis began with the proposition that “the common law, dating back to the Roman law, has been that wild animals are owned by the state in its sovereign capacity, in trust for the benefit of the people.”<sup>125</sup> Reasoning from three cases that upheld the power of the federal government to kill deer that were damaging federal lands, the court concluded that the Property Clause allowed the federal government to enact regulations only to protect the public lands from damage.<sup>126</sup> Because Congress provided neither any “finding nor any evidence to indicate that wild horses and burros are damaging the public lands,”<sup>127</sup> the panel overturned the WFRHBA as beyond the power granted to Congress in the Property Clause.<sup>128</sup>

However, the District Court opinion left considerable room for argument on appeal. Congress did, after all, view the feral equids as a valued cultural and

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<sup>123</sup> U.S. CONST. art IV, sect. 3.

<sup>124</sup> *Morton*, *supra* note 101, at 1238.

<sup>125</sup> *Id.*

<sup>126</sup> *Hunt v. United States*, 278 U.S. 96 (1928); *New Mexico State Game Comm’n v. Udall*, 410 F.2d 1197 (10th Cir. 1969); *Chalk v. United States*, 114 F.2d 207 (4th Cir. 1940), *cert. denied*, 312 U.S. 679 (1941).

<sup>127</sup> *Morton*, *supra* note 101, at 1239. Of course, the feral equids do damage rangeland, but Congress made no such finding because the statute sought to protect them.

<sup>128</sup> *Id.* at 1249.

natural resource whose removal from public lands constituted a harm.<sup>129</sup> As born Westerners (of Mexico and the United States), all three judges were likely familiar with ranching and life on the range. Thus they may have had difficulty seeing the findings as Congress intended. From their western perspective, the WFRHBA promoted, rather than prohibited, damage to the rangelands, a view that exposed the conflict between the ranching situation on the ground and Congress's findings that wild horses are an "integral part of the natural system of the public lands."<sup>130</sup> The cultural gulf between the panel and the Supreme Court, which would reverse, helps to explain why the panel made such an important ruling on the constitutionality of a federal statute in only a two-page memorandum opinion.

*B. Kleppe v. New Mexico*

The United States appealed the decision invalidating the WFRHBA directly to the U.S. Supreme Court, which noted probable jurisdiction in 1975.<sup>131</sup> Then, as now, federal law permitted appeal of a three-judge district court decision directly to the Supreme Court.<sup>132</sup> The stage was set for a dramatic showdown in Washington.

1. The Appeal

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<sup>129</sup> 16 U.S.C. § 1331.

<sup>130</sup> 16 U.S.C. § 1331.

<sup>131</sup> *Secretary of the Interior v. New Mexico*, 423 U.S. 818 (1975).

<sup>132</sup> 28 U.S.C. §1253.

While the case was on appeal, President Nixon resigned. Not long afterward, President Ford nominated then-Secretary of the Interior Rogers Morton, the named defendant in the case and former chairman of the Republican National Committee, to serve as Commerce Secretary. Thomas S. Kleppe, a Republican congressman from North Dakota, replaced Morton as Secretary of the Interior. Kleppe was not known as a champion of wildlife protection—he entered office approving oil drilling off the Southern California coast and left office promoting the same on Alaska’s North Slope.<sup>133</sup> Nevertheless, federal prerogatives were at stake in the case, and neither the transition in power nor Kleppe’s tepid concern for environmental causes impeded the litigation.

Representing the United States before the Supreme Court was Deputy Solicitor General and adjunct professor of law at Georgetown Arthur Raymond Randolph, Jr. He graduated at the top of his class from the University of Pennsylvania Law School, and is now a judge on the U.S. Court of Appeals for the District of Columbia Circuit.<sup>134</sup> Apparently New Mexico was impressed with Randolph’s performance, for he served the State as special assistant attorney general from 1985 to 1990. Given its success in the District Court, New Mexico stuck with Modrall Sperling to advocate for its interests before the high court. For

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<sup>133</sup> Matt Schudel, *Thomas Kleppe, 87; Interior Secretary During Mid-1970s*, WASH. POST., March 4, 2007, at C08, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/03/AR2007030301196.html>. To Secretary Kleppe’s credit, several of his decisions, such as banning the use of lead shot in waterfowl hunting, were environmentally noteworthy. *Id.*

<sup>134</sup> BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, *supra* note 120.

this task, the firm called on veteran litigator George T. Harris, Jr., a former President of the New Mexico Bar Association,<sup>135</sup> who had twice before unsuccessfully represented New Mexico as a special assistant attorney general in petitions for certiorari to the Supreme Court.<sup>136</sup>

## 2. The Briefs

The case had by this time gained considerable attention. Much more was at stake in the case than the handful of burros seized by the State at Stephenson's request. State abandoned horse and estray laws, which existed in almost every western state,<sup>137</sup> would be preempted by conflicting provisions of the WFRHBA. Even more important to the states and livestock boards across the West was that a victory would restore the Taylor Act status quo in which livestock ranchers had the upper hand in the competition with feral equids for scarce rangeland resources.

A total of twenty-three briefs were filed with the Supreme Court. In support of the federal government the American Horse Protection Association,<sup>138</sup> the International Association of Game, Fish, and Conservation Commissioners,<sup>139</sup>

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<sup>135</sup> NEW MEXICO BAR ASSOCIATION, PAST PRESIDENTS, <http://www.nmbar.org/AboutSBNM/Governance/pastpresidents.html> (last visited March 31, 2009).

<sup>136</sup> See *New Mexico State Game Comm'n v. Hickel*, 396 U.S. 961 (1969) and *New Mexico State Game Comm'n v. U.S. Court of Appeals for Tenth Circuit*, 396 U.S. 953 (1969).

<sup>137</sup> See *supra* note 22.

<sup>138</sup> Brief of Amicus Curiae American Horse Protection Association, *Kleppe v. New Mexico*, 426 U.S. 529 (1976), 1975 WL 173616 (May 30, 1975).

<sup>139</sup> Brief of Amicus Curiae International Association of Game, Fish, and Conservation

the Humane Society,<sup>140</sup> an author and wild horse conservationist named Hope Ryden,<sup>141</sup> and Wild Horse Organized Assistance, Inc.<sup>142</sup> filed amicus briefs. They argued, among other things, that the holding of the court below jeopardized a number of other recently passed environmental statutes, including the Endangered Species Act,<sup>143</sup> the Fur Seal Act,<sup>144</sup> the Marine Mammal Protection Act<sup>145</sup> and the Wild and Scenic Rivers Act.<sup>146</sup> As important to the federal government was the trial court's narrow interpretation of the property clause, which might seriously undermine the ability of federal agencies to manage the public lands. Routine public land management, such as the manipulation of elk populations in the National Elk Refuge, would be difficult to justify on harm-avoidance grounds that comport with the trial court's ruling.<sup>147</sup> Moreover, the boundary between avoiding harm and producing benefits is notoriously muddled, and has vexed takings law

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Commissioners, *Kleppe v. New Mexico*, 426 U.S. 529 (1976), 1975 WL 173617 (Aug. 13, 1975).

<sup>140</sup> Brief of Amicus Curiae Humane Society, *Kleppe v. New Mexico*, 426 U.S. 529 (1976), 1975 WL 173622 (Nov. 19, 1975).

<sup>141</sup> Brief of Amicus Curiae Hope Ryden, *Kleppe v. New Mexico*, 426 U.S. 529 (1976), 1975 WL 173621 (Nov. 17, 1975). Ms. Ryden also testified at length in the hearings that led to the passage of the WFRHBA. *See, e.g., House Hearings, supra* note 52, at 134-42.

<sup>142</sup> Brief of Amicus Curiae Wild Horse Organized Assistance, Inc., *Kleppe v. New Mexico*, 426 U.S. 529 (1976), 1975 WL 173624 (Nov. 20, 1975).

<sup>143</sup> 16 U.S.C. §§ 1531-1544 (1973). [CITE TO BRIEF WITH PARENTHETICAL (CITING 16 U.S.C. ETC.)]

<sup>144</sup> 16 U.S.C §§ 1151-1187 (1966). [CITE TO BRIEF WITH PARENTHETICAL (CITING 16 U.S.C. ETC.)]

<sup>145</sup> 16 U.S.C. §§ 1361-1405 (1972). [CITE TO BRIEF WITH PARENTHETICAL (CITING 16 U.S.C. ETC.)]

<sup>146</sup> 16 U.S.C. §§ 1271-1287 (1968). [CITE TO BRIEF WITH PARENTHETICAL (CITING 16 U.S.C. ETC.)]

<sup>147</sup> For a discussion of the elk management controversy in the refuge, and its conflict between the state of Wyoming and the United States, see Robert L. Fischman and Angela King, *Savings Clauses and Trends in Natural Resources Federalism*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 129, 131-141 (2007).

for decades.<sup>148</sup> Applying it to police congressional compliance with the Property Clause would invite no end of litigious mischief.

Among the amici supporting the State of New Mexico were the Nevada State Board of Agriculture,<sup>149</sup> the Nevada Central Committee of Grazing Boards,<sup>150</sup> the Pacific Legal Foundation,<sup>151</sup> the State of Idaho<sup>152</sup> and the Wyoming Livestock Board.<sup>153</sup> The States took a shotgun approach to the case, attacking the WFRHBA on every conceivable front, while at the same time defending against the argument that the holding below would threaten other recently passed environmental statutes. New Mexico argued that (1) neither the Commerce Clause nor the Property Clause provided Congress with the power to enact the WFRHBA; (2) damage wild horses and burros cause to private property effects an unconstitutional taking of property; (3) the Act infringes on New Mexico's police power; and (4) the findings upon which Congress based the act—that wild horses and burros are “an integral part of the natural system” and that wild horse and burro populations are in decline—lacked factual support.<sup>154</sup>

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<sup>148</sup> Cite literature, e.g., Carol Rose & Joseph L. Sax.

<sup>149</sup> Brief of Amicus Curiae Nevada State Board of Agriculture, *Kleppe v. New Mexico*, 426 U.S. 529 (1976), 1975 WL 173627 (Jan. 2, 1975).

<sup>150</sup> Brief of Amicus Curiae Nevada Central Committee of Grazing Boards, *Kleppe v. New Mexico*, 426 U.S. 529 (1976), 1975 WL 173619 (Aug. 18, 1975).

<sup>151</sup> Brief of Amicus Curiae Pacific Legal Foundation, *Kleppe v. New Mexico*, 426 U.S. 529 (1976), 1975 WL 173626 (Aug. 14, 1975).

<sup>152</sup> Brief of Amicus Curiae State of Idaho, *Kleppe v. New Mexico*, 426 U.S. 529 (1976), 1974 WL 175952.

<sup>153</sup> Brief of Amicus Curiae Wyoming Livestock Board, *Kleppe v. New Mexico*, 426 U.S. 529 (1976), 1976 WL 181209 (Feb. 17, 1976).

<sup>154</sup> Answer Brief for the State of New Mexico, *Kleppe v. New Mexico*, 426 U.S. 529 (1976), 1976

The Pacific Legal Foundation, founded just two years earlier, made essentially the same points as the State, while also attempting to limit the potential reach of an affirmance. The Foundation argued at length that the holding of the court below did not in any way jeopardize the constitutionality of other environmental statutes. The Foundation would later play an important role in the political movements spawned in reaction to the environmental legislation of the 1970s, especially in defending private property owners harmed by regulation. Idaho, on the other hand, took a more extreme position and attacked the idea of protecting the horses and burros as “absurd.”<sup>155</sup> Idaho’s Attorney General, Warren Felton, offered the following alternative to the Act:

Rather than preserve degenerate estrays, it is better to look backward to that which once was, and cease thinking of perpetuating that which does not exist. Texas has the idea. Build a statue to the horse that used to be, make it life size, include a stallion, some mares, and a few colts. Let this bronze symbol stand in a public place so that generations that are to come may see the type of horse that contributed the base stock to the Western range horse industry. And on this statue carve a caption taken from a letter to *Life* protesting the destruction of the wild horse herds in recent years: ‘Son, that is what was once known as the Western pony.’<sup>156</sup>

Certainly this position was inconsistent with the broad public sentiment that led Congress to pass the Act,<sup>157</sup> and it can perhaps be best explained as evidence of

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WL 181207 (Jan. 19, 1976).

<sup>155</sup> Brief of Amicus Curiae State of Idaho, *supra* note 152, at 5.

<sup>156</sup> *Id.* at 8.

<sup>157</sup> One author captured this sentiment by describing the wild horse as follows: “The most

just how frustrated western states had become in trying to deal with the increasing dominance of federal control of the public rangelands. In this regard, these arguments foreshadowed a looming political rebellion. The Wyoming Livestock Board, on the other hand, offered no novel position and merely adopted the position of the State of New Mexico and the Nevada State Board of Agriculture.<sup>158</sup>

The case was of particular interest to the Nevada State Board of Agriculture because it had been making the same argument as the State of New Mexico—that the WFRHBA is unconstitutional and that wild and free-roaming equids belong to the states—in a separate controversy.<sup>159</sup> Furthermore, Nevada’s ability to control horses on the public lands was of special import because the federal government owns more than eighty percent of the land within the state, the largest proportion outside of Alaska.<sup>160</sup> Nevada thus saw the Act as interfering with its police powers, explaining that “Nevada should be able to control estrays, diseased animals, fish and game and promote range management within the boundaries of Nevada. Should these obvious rights under the State’s police

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beautiful, the most spirited and the most inspiring creature ever to print foot on the grasses of America.” Richard H. Gilluly, *The Mustang Controversy*, 99 SCI. NEWS 219, 220 (March 27, 1971) (quoting author J. Frank Dobie).

<sup>158</sup> NEED PIN CITE to brief

<sup>159</sup> SYMANSKI, *supra* note 20, at 129 (Nevada’s State Agricultural Director impounded eighty wild horses rounded up by BLM, claiming that the Act was unconstitutional and that the horses belonged to the state). This controversy eventually came before the courts in *American Horse Protection Ass’n v. Frizzell*, 403 F. Supp. 1206 (1975), but the State did not raise the issues of state ownership and the constitutionality of the Act.

<sup>160</sup> *See infra* note 209.

powers be stripped, state sovereignty is necessarily questioned.”<sup>161</sup> Robert List, Nevada’s Attorney General, hence argued that if the Act were upheld, Wyoming, Nevada, and New Mexico “will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence.”<sup>162</sup> Again, here, the states’ arguments suggested something of greater political consequence than the mere management of wild horses. The equal footing argument would remain a complaint of Nevada’s for many years.<sup>163</sup>

### 3. The Argument

Oral arguments took place on March 23, 1976, and Deputy Solicitor Randolph performed brilliantly. From the outset, members of the court challenged Randolph to define the limits of Congress’s Property Clause power, questioning whether Congress could protect wild equids on private land.<sup>164</sup> Randolph explained that protecting horses and burros on private land was not at issue in the case because New Mexico had seized the burros on public, not private, land.<sup>165</sup> Justice Stevens was not easily persuaded, noting that the trial court opinion began by stating that “[t]he controversy involved here began when a New Mexico

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<sup>161</sup> Brief of Amicus Curiae Nevada State Board of Agriculture, *supra* note 149, at 12.

<sup>162</sup> *Id.* at 13 (emphasis in original) (citing *Ward v. Race Horse*, 163 U.S. 504 (1896) (White, J.)).

<sup>163</sup> See text at *infra* notes 229-236.

<sup>164</sup> The Oyez Project, *Kleppe v. New Mexico*, 426 U.S. 529 (1976)

available at [http://oyez.org/cases/1970-1979/1975/1975\\_74\\_1888](http://oyez.org/cases/1970-1979/1975/1975_74_1888) (last visited Nov. 21, 2009).

<sup>165</sup> *Id.*

rancher...discovered several unbranded and unclaimed burros wandering on his *private land*, and also on public land.”<sup>166</sup> Randolph held his ground, arguing that regardless of the language of the district court opinion, Congress’s power to protect wild horses and burros on private land was not at issue.<sup>167</sup>

Randolph analogized the case to *Light v. United States*,<sup>168</sup> one of the seminal Supreme Court decisions establishing federal resource management power over public lands.<sup>169</sup> He argued that, if Congress could restrict access to the public lands, then so too could Congress prohibit harm to animals living on the public lands.<sup>170</sup> He also likened the WFRHBA to the Sixth Century Justinian right of a landowner to prevent others from killing animals on his land.<sup>171</sup> Randolph noted that the WFRHBA passed both houses of Congress unanimously and the governor of Nevada, the state with the largest population of wild equids, wrote

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<sup>166</sup> *Id.* (emphasis added). See also Morton, *supra* note 101, at 1237.

<sup>167</sup> The Oyez Project, *supra* note 164. One vexing problem with the *Kleppe* story is explaining why New Mexico chose the *Stephenson* case instead of waiting for the federal government to use its WFRHBA authority to protect animals at the time they were roaming on private land. Such facts would have made a better challenge to the Property Clause authority of the United States than the *Stephenson* circumstances, where the Livestock Board rounded up the animals on BLM land. However, the federal enforcement authorities were loath to preempt state estray laws on private land, so no opportunity would likely arise for the state to have chosen the more favorable fact pattern.

Similarly, *Stephenson* could have sought mandamus to force the BLM to act with dispatch to remove wild horses on his private lands. While that tactic experienced success in the courts, *e.g.* *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), it does not raise the grand constitutional issues that rally movements.

John Leshy’s insight on these issues helped us sort through these problems.

<sup>168</sup> 220 U.S. 523 (1911). See also the companion case to *Light*, *United States v. Grimaud*, 220 U.S. 506 (1911).

<sup>169</sup> The Oyez Project, *supra* note 164.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

letters to both the Senate and the House expressing support for the Act.<sup>172</sup>

George T. Harris was clearly outmatched. He conceded that the burros at issue were not seized on private land, which opened the door to an onslaught of challenges.<sup>173</sup> Time and again, the justices questioned how New Mexico could have standing to bring arguments about Congress's power to protect wild equids on private land, given Harris's concession that the burros at issue were not seized on private land.<sup>174</sup> Harris was without response, stating at one point: "I'm sorry, I'm not following here."<sup>175</sup>

#### 4. The Decision

On June 17, 1976, in one of two unanimous opinions written by Justice Marshall and issued that day,<sup>176</sup> the Supreme Court handed the western states a crushing defeat. Summarily dismissing the states' arguments, the court reached back to a long line of cases endorsing broad federal resource management to state that "[t]he power over the public land thus entrusted to Congress is without limitations."<sup>177</sup> Signaling that Randolph had persuaded the bench that only

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<sup>172</sup> Near the end of the argument the bench signaled its view that the issues at stake were minimal. One justice asked Randolph whether he had to draw straws for this case. Randolph responded, "Yes, and I lost," to which the justices responded with laughter. *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See also *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976).

<sup>177</sup> *Kleppe*, *supra* note 99, at 539 (citing *United States v. San Francisco*, 310 U.S. 16, 29 (1940)). As early as *United States v. Gratiot*, 39 U.S. 14 Peters) 526 (1840), the Court interpreted the Property Clause power to vest "without limitation". See also Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001).

Congress's power over public lands was at issue, Justice Marshall noted "we do not think it appropriate...to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands or the extent to which such regulation is attempted by the Act."<sup>178</sup>

In response to the states' claims that the WFRHBA intruded upon sovereign police powers, the court stated that the Act "does not establish exclusive federal jurisdiction over the public lands in New Mexico; it merely overrides the New Mexico Estray Law insofar as it attempts to regulate federally protected animals."<sup>179</sup> Thus, *Kleppe* slammed shut the door on challenges to federal control of the public rangelands.<sup>180</sup> The decision undoubtedly "sharpened the ranching community's attention to the finer points of constitutional law,"<sup>181</sup> while leaving Nevada to wonder what to make of its equal-footing claim.

Although *Kleppe* was unanimous, the papers of Justice Marshall suggest that there was some debate among the justices. The trove of Marshall materials contains a cryptic note from Chief Justice Burger regarding *Kleppe v. New*

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<sup>178</sup> *Kleppe*, *supra* note 99, at 546., at 546. Many commentators in the years after *Kleppe* attempted to address this question and others regarding the scope of the Property Clause. *See, e.g.*, Shepard, *supra* note 16, (arguing that limitations on the Property Clause should come from the political process and not the courts); Jennifer Pruett Loehr, *Expansive Reading of Property Clause Upheld*, 23 NAT. RESOURCES J. 197 (1983) (discussing cases decided in the years following *Kleppe*), Plumb, *supra* note 16, (predicting the "erosion of states' control over hunting and fishing within their borders[.]" and the "expansion of federal control in areas others than wildlife regulation." *Id.* at 191;

<sup>179</sup> *Id.* at 545.

<sup>180</sup> George Cameron Coggins & Robert L. Glicksman, *Power, Procedure, and Policy in Public Lands and Resources Law*, 10 NAT. RES. & ENV'T 3, 4 (Summer 1995).

<sup>181</sup> Sally Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945, 971 (1982).

Mexico, dated a few days before the Court issued its judgment:

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 [White] and Bill Rehnquist want to put wild burros on a new form of “welfare” I will submit. In short, I join you.<sup>182</sup>

#### IV. THE SAGEBRUSH REBELLION

Federal ownership of Western lands powerfully shapes the regional economy and society. Along with aridity, it is perhaps the defining characteristic of the West.<sup>183</sup> Though federal ownership is a source of pride, it also “has always been a politically attractive whipping boy for western politicians.”<sup>184</sup> Federal proprietary control and relatively unproductive rangelands prompted the *Kleppe* controversy; it should be no surprise that the Supreme Court decision did not quell the “disaffection with national government”<sup>185</sup> that permeated western states. Indeed, it helped propel a political response that grew in importance up to and through the election of self-identified “sagebrush rebel,” Ronald Reagan.<sup>186</sup>

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<sup>182</sup> Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 *Envtl. L. Rep.* (Envtl. Law Inst.) 10606, 106171 (1993).

<sup>183</sup> Wilkinson, *supra* note 25, at 955 (citing WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* 33 (1969)).

<sup>184</sup> GEORGE CAMERON COGGINS, CHARLES F. WILKINSON, JOHN D. LESHY & ROBERT L. FISCHMAN, *FEDERAL PUBLIC LAND AND RESOURCE LAW* 76 (2007).

<sup>185</sup> *Id.* See also John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 *U.C. DAVIS L. REV.* 317, 343 (1980-81).

<sup>186</sup> John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 *U.C. DAVIS L. REV.* 317, 354-55, n. 116 (1980-81).

*A. The Federal Land Policy and Management Act*

Even as the litigation over the WFRHBA wound on, Congress considered a score of bills to reduce overgrazing and bring a more systematic approach to management of the unreserved public lands, beginning in 1971.<sup>187</sup> Finally, on October 21, 1976, seven months after the court issued the opinion in *Kleppe*, Congress passed the Federal Land Policy and Management Act (FLPMA).<sup>188</sup> After decades of administrative drift, FLPMA provided the BLM with organic legislation, a comprehensive legislative charter<sup>189</sup> for the largest public land system in the United States. Although FLPMA retained much of the Taylor Grazing Act and so stopped short of a thorough overhaul of the law of livestock grazing,<sup>190</sup> it dramatically shifted the center of gravity in land management on public lands. FLPMA brought comprehensive, pluralistic planning to the BLM.<sup>191</sup> It imposed the multiple-use, sustained-yield rubric, which had been the guiding legislative mandate of the national forests since 1960,<sup>192</sup> on the public

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<sup>187</sup> Houck, *The Water, the Trees, and the Land*, *supra* note 12 at 2304.

<sup>188</sup> 43 U.S.C. § 1701 (1976).

<sup>189</sup> On the various meanings of organic legislation see Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 *ECOLOGY L.Q.* 457, 501-510 (2002).

<sup>190</sup> COGGINS, ET AL., *supra* note 184, at 799.

<sup>191</sup> 43 U.S.C. §§ 1712. Oliver Houck notes that *NRDC v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir.), paved the way for long-range planning on BLM lands by imposing NEPA environmental impact analysis on the grazing districts. Oliver Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 *TULANE L. REV.* 2279, PINCITE (1996).

<sup>192</sup> Multiple-Use, Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-31.

rangelands.<sup>193</sup> This shift in legislative policy meant that grazing no longer claimed dominant status on the rangelands.<sup>194</sup> Indeed, FLPMA placed new environmental restrictions on BLM authority, including limits on grazing that caused unnecessary and undue degradation.<sup>195</sup> Now ranchers would have to compete not only with wild horses and burros, but also with anyone else who wanted to use the public lands. In addition to providing the BLM with expansive rangeland management authority, including the ability to designate and regulate areas of critical environmental concern,<sup>196</sup> FLPMA explicitly affirmed that “the public lands [will] be retained in Federal ownership.”<sup>197</sup> Frustrations boiled over again, and the combination of *Kleppe* and FLPMA prompted the naming of the political movement to limit federal management that reduced the influence of ranchers and other traditional users of the public lands: the “Sagebrush Rebellion.”<sup>198</sup>

### *B. FLPMA’s Aftermath*

Some commentators date the start of the Sagebrush Rebellion to as late as

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<sup>193</sup> 43 U.S.C. §§ 1701(a)(7); 1702(c). In a certain sense, the WFRHBA had already brought multiple-use management to the public rangelands by raising the priority of horses, an aesthetic land use, to at least the same level as ranching, the former dominant use. See *House Hearings, supra* note 22 at 103 (testimony of Michael J. Pontrelli, Asst. Prof. of Biology, Univ. of Nev., Reno) (arguing against livestock dominant use and in favor of multiple use management to protect horses).

<sup>194</sup> In practice, ranchers remained successful in dominating grazing use decisions on BLM lands. Joseph Feller, *Back to the Present: The Supreme Court Refuses to Move Public Range Law Backward, But Will the BLM Move Public Range Management Forward?*, 31 *Envtl. L. Rep. (Envtl. L. Inst.)* 10021 (2001); Joseph Feller, *What Is Wrong With the BLM’s Management of Livestock Grazing on the Public Lands?*, 30 *IDAHO L. REV.* 555 (1994).

<sup>195</sup> 43 U.S.C. § 1732(b).

<sup>196</sup> 43 U.S.C. § 1701(a)(11) (1976).

<sup>197</sup> 43 U.S.C. § 1701(a)(1) (1976).

<sup>198</sup> Dale D. Goble, *Introduction to Public Lands and Agricultural Pollution Symposium Edition*, 30 *IDAHO L. REV.* 433, 437 (1994).

1979.<sup>199</sup> Most mark the passage of FLPMA in 1976 as the triggering event.<sup>200</sup> This story of *Kleppe* supports an earlier origin: the enactment of the 1971 WFRHBA. Of course, dating the start of any political movement entails some arbitrary line drawing. Professor Goble describes antecedents to the Sagebrush Rebellion that date back to Tennessee's 1799 claim to the public domain within its borders.<sup>201</sup> In 1955, the western commentator, Bernard DeVoto, identified interest groups supporting a version of "home rule which means basically that we want the federal help without federal regulation."<sup>202</sup> The significance of viewing the Sagebrush Rebellion as an earlier movement is to more accurately place it as a modern efflorescence of a perennial public-land state complaint. The Sagebrush Rebellion is a recent chapter written out of frustration with the legislation of the 1970s.<sup>203</sup> The 1971 WFRHBA was the first congressional enactment reforming public land law. *Kleppe* was the first in a line of lawsuits lashing back at the modern framework of allocating scarce public natural resources.

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<sup>199</sup> See, e.g., Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847, 848 (1982); A Costandina Titus, *The Nevada "Sagebrush Rebellion" Act: A Question of Consitutionality*, 23 ARIZ. L. REV. 263, 263-4 (1981) (dating the "Sagebrush Rebellion" to the formation of the Western Coalition in 1978). Ed Quillen, *Ronald Reagan: The Accidental Environmentalist*, 43 HIGH COUNTRY NEWS, Jan. 24, 2011, at 25.

<sup>200</sup> John D. Leshy, *Unraveling the Sagebrush Rebellion*, 14 U.C. Davis L. Rev. 317, 341 (1980-81); Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 Pac L.J. 693, 694 (1981); Find other cites—look for Wilkinson, Patricia Lim[m]erick, Sally Fairfax. Goble pairs the enactment of FLPMA with the *Kleppe* decision to date the rebellion to 1976. Goble, *supra* note 198 at 437.

<sup>201</sup> Goble, *id.* at 438.

<sup>202</sup> BERNARD DEVOTO, *THE EASY CHAIR* 254-55 (1995).

<sup>203</sup> R. MCGREGOR CAWLEY, *FEDERAL LANDS, WESTERN ANGER* 71-76 (1993). See also Richard D. Clayton, Note, *The Sagebrush Rebellion: Who Should Control the Public Lands*, 1980 UTAH L. REV. 505 (1980) (identifying western ineffectiveness in Congress and adverse federal regulation as two causes of the Sagebrush Rebellion).

Former Secretary of the Interior Bruce Babbitt, as prominent an opponent to the Sagebrush Rebellion as any the West has produced, cautioned that:

It is easy to dismiss the motives of the small group of stockmen and their political allies who have revived the rallying cry of states' rights for their own benefit. But the considerable support that the Sagebrush Rebellion has gained in the West reflects a deep-seated frustration with . . . federal regulation of public lands. Many westerners share growing dissatisfaction with the way federal lands are managed. . . . As the fastest growing region in the country, the West cannot afford to be unable to plan its future development.<sup>204</sup>

Congress responded to the legitimate western state claims of a special interest in public rangelands. It peppered FLPMA with several provisions inviting states to influence federal management through the tools of cooperative federalism.<sup>205</sup> The BLM resource management plans, in particular, must be attentive to state and local management goals.<sup>206</sup> The legislation promotes consistency in planning between levels of government.<sup>207</sup> But the Sagebrush Rebellion had little patience for jumping through the hoops to qualify for FLPMA consideration: it chose to push what we call “un-cooperative federalism.”

Recall that New Mexico had not been alone its fight with the federal

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<sup>204</sup> Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847, 853 (1982).

<sup>205</sup> Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 200 (2005); Robert L. Fischman and Angela King, *Savings Clauses and Trends in Natural Resources Federalism*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 129, 147, 152-153 & 162 (2007).

<sup>206</sup> 43 U.S.C. § 1712.

<sup>207</sup> *Id.* See *infra* notes 240-248 and accompanying text on how cooperative federalism works in FLPMA.

government. In its brief to the Supreme Court, New Mexico had urged the Court to consider briefs filed by other western states, including Nevada, Idaho and Wyoming. Nevada had expressed particular interest in the issue, with its Board of Agriculture filing three separate amicus briefs.<sup>208</sup> Like its fellow amici in the *Kleppe* litigation, Nevada contains within its borders substantial amounts of federally owned land.<sup>209</sup> In all, 54.1 percent of federally owned lands are located in western states.<sup>210</sup>

From the perspective of these states, federal legislation like FLPMA and the WFRBHA were burdens unfairly imposed by Washington outsiders who knew little about life on the range.<sup>211</sup> The general sentiment was that “the policy arena was distinctly biased in favor of environmental values.”<sup>212</sup> Such sentiments arose for a variety of reasons, including the fact that BLM’s only effective tool for managing horse and burro populations in accordance with the law was to reduce livestock grazing allotments.<sup>213</sup> But what fundamentally stoked the rebellion was

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<sup>208</sup> CITE BRIEFS

<sup>209</sup> The federal government owns 84.5 percent of Nevada, 69.1 percent of Alaska, 57.5 percent of Utah, 53.1 percent of Oregon, 50.2 percent of Idaho, 48.1 percent of Arizona, 42.3 percent of Wyoming and 41.8 percent of New Mexico. UNITED STATES HOUSE OF REPRESENTATIVES REPUBLICAN STUDY COMMITTEE, FEDERAL LAND AND BUILDINGS OWNERSHIP (2005), [http://www.house.gov/hensarling/rsc/doc/Federal\\_Land\\_Ownership\\_05012005.pdf](http://www.house.gov/hensarling/rsc/doc/Federal_Land_Ownership_05012005.pdf) (last visited March 28, 2009).

<sup>210</sup> *Id.*

<sup>211</sup> See generally SYMANSKI, *supra* note 20.

<sup>212</sup> CAWLEY, *supra* note 203 at 69.

<sup>213</sup> *Id.* at 51 (“Because grazing forage is a scarce resource, the allocation of AUMs is a zero-sum game in which providing for one group of animals means reducing forage for another group.”). See also Pitt, *supra* note 15, at 513. Somewhat surprisingly, one federal official testified to Congress that protecting wild horses would *not* require reductions in livestock grazing permits.

the ranchers' loss of control over federal lands. Until the WFRBHA, "overt competition for use of specific areas of public lands" was rare, and local ranchers held sway over rangelands.<sup>214</sup> And as the comments of one Nevada jurist reflect, the ends of federal policies sometimes appeared dubious from a western perspective: "Congress bought into politically correct, ecologically buffoonish arguments and tried to create a national symbol out of the inbred great grandson of somebody's plow horse."<sup>215</sup> Thus many westerners concluded federal environmental legislation was nothing more than "a ploy of an upper-class elite that wanted to preserve its pristine playground at the expense of those who need to use the nation's resources for survival."<sup>216</sup>

### *C. Nevada's Assembly Bill 413*

Frustrated by Congress and rebuffed by the courts, Nevada tried a new approach to reassert the traditional, pre-WFRHBA control over the public rangelands. In 1977, the Nevada Legislature created the Select Committee on Public Lands to pursue public land policy reform and to rally other western states in that effort.<sup>217</sup> The six Nevada lawmakers appointed to the Committee pushed

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*House Hearings, supra* note 52, at 69 (testimony of Edward P. Cliff, Chief, Forest Service).

<sup>214</sup> Leshy, *supra* note 186, at 345.

<sup>215</sup> See Hon. David R. Gamble, *Max Allred, Desperado*, NEV. LAWYER 25 (March 1998) (describing the Wild Free-Roaming Horses and Burros Act).

<sup>216</sup> WILLIAM E. PEMBERTON, EXIT WITH HONOR 119 (1998) (quoting one sagebrush rebel describing wild horse and burro protections as follows: "They want food for the soul. *We* need food for the body.") (emphasis in original).

<sup>217</sup> UNIVERSITY OF NEVADA, RENO MATHEWSON-IGT KNOWLEDGE CENTER SPECIAL COLLECTIONS, A GUIDE TO THE SAGEBRUSH REBELLION COLLECTION, No. 85-04,

forward Assembly Bill 413, now also known as the Sagebrush Rebellion Bill.<sup>218</sup> The Bill passed the sixty-member Nevada legislature in 1979, calling for the State to take control of roughly 48 million acres of federally owned, BLM managed land located within its borders. The law declared “all public lands in Nevada and all minerals not previously appropriated are the property of the State of Nevada and subject to its jurisdiction and control.”<sup>219</sup> It also granted to the state land office the authority “to convey, lease, license or permit the use of public lands to the same extent...[as] the Federal Government.”<sup>220</sup> In other words, the Bill authorized the state land office to dispose of federal lands.<sup>221</sup> According to the authors of AB 413, “the Sagebrush Rebellion was fueled by the perception that the federal government was both ignorant and unsympathetic to the impact of its policies on the West.”<sup>222</sup>

Seeking support for its position, Nevada hosted a conference of western states likely to be sympathetic to its cause. The conference was an overwhelming success. Not only did Nevada receive the support of the Western Council of State Governments and the Western Interstate Region of the National Association of Counties, but the conference also led to the formation of the Western Coalition on

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<http://www.knowledgecenter.unr.edu/specoll/mss/85-04.html> (last visited March 31, 2009).

<sup>218</sup> NEV. REV. STAT. §§ 321.563-.599 (1979). *See generally* Titus, *supra* note 197.

<sup>219</sup> *Id.* at § 321.5973(1).

<sup>220</sup> *Id.* at § 321.598(12).

<sup>221</sup> *Id.* at § 321.598(1).

<sup>222</sup> UNITED STATES NATIONAL PARK SERVICE, A CLASSIC WESTERN QUARREL, [http://www.nps.gov/history/history/online\\_books/colm/adhi1-preface.htm](http://www.nps.gov/history/history/online_books/colm/adhi1-preface.htm) (last visited March 31, 2009) (quoting CAWLEY, *supra* note 203, at 96).

Public Lands,<sup>223</sup> a primary proponent of the “wise use” movement.<sup>224</sup> The “wise use” slogan would outlast the Sagebrush Rebellion as a rallying point for ranchers and other Western commodity interests. More importantly, seven western states—Alaska, Arizona, Idaho, New Mexico, Oregon, Utah and Wyoming—endorsed the Rebellion Bill and returned home to pass their own versions of AB 413.

Arizona, New Mexico, and Utah enacted bills similar to AB 413 that called for state ownership of BLM lands.<sup>225</sup> The Arizona legislature even overrode Governor Bruce Babbitt’s veto.<sup>226</sup> While Nevada pioneered legislative attempts to wrest control of public lands from the BLM, Wyoming took the approach one step further and laid claim to not only BLM lands but also to all Forest Service lands within its borders.<sup>227</sup> Colorado, Idaho, and Alaska took the more tempered and less confrontational route of passing legislation calling for feasibility studies of transferring federally owned lands to state ownership.<sup>228</sup>

#### *D. Another Federal Court Challenge*

Legislative declarations like AB 413 were merely symbolic, for they could not control federal management decisions. Lacking other legal remedies, the

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<sup>223</sup> A GUIDE TO THE SAGEBRUSH REBELLION COLLECTION, *supra* note 217.

<sup>224</sup> PBS Online Newshour, *Wise Move?* (Feb. 19, 1996), *available at* [http://www.pbs.org/newshour/bb/environment/wise\\_use\\_2-19.html](http://www.pbs.org/newshour/bb/environment/wise_use_2-19.html) (last visited Dec. 17, 2009).

<sup>225</sup> ARIZ. REV. STAT. ANN. §§ 37-901 to -909 (Supp. 1981-1982); N.M. STAT. ANN. §§ 19-5-1 to -10 (Supp. 1982); UTAH CODE ANN. §§ 65-11-1 to -9 (Supp. 1981); *see also* CAWLEY, *supra* note 203, at 2.

<sup>226</sup> CAWLEY, *supra* note 203, at 2.

<sup>227</sup> WYO STAT. § 36-12-109 (Supp. 1980) (claiming ownership to all federal lands within Wyoming except for land controlled by the U.S. Dept. of Defense, national parks, national monuments, wildlife refuges, wilderness areas, and land held in trust for Indians).

<sup>228</sup> CAWLEY, *supra* note 203, at 2.

Nevada State Board of Agriculture took the issue of western rangelands control back to court, this time as an attack on the constitutionality of FLPMA.<sup>229</sup> The ambitious new State Attorney General, Richard H. Bryan, took on the cause as a stepping stone to higher office.<sup>230</sup> Bryan made a second attempt at persuading the bench with the arguments the State raised in the *Kleppe* litigation. Again arguing for state control of western rangelands, Nevada asserted “she and all of the public land states had an expectancy upon admission into the Union that the unappropriated, unreserved and vacant lands within their borders would be disposed of by patents to private individuals or by grants to the States.”<sup>231</sup> As in *Kleppe*, Nevada argued that federal control of lands within western states’ borders prevented those states from standing on an equal footing with other states, as required by the Constitution.<sup>232</sup>

This argument found no more success with the U.S. district court in Nevada than it did in the Supreme Court. Citing *Kleppe*, Judge Reed reminded Nevada and every other western state that the Property Clause “entrusts Congress

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<sup>229</sup> Nevada *ex rel.* Nevada State Board of Agriculture v. United States, 512 F. Supp. 166 (D. Nev. 1981), *aff’d* 699 F.2d 486 (9th Cir. 1983).

<sup>230</sup> Bryan was elected Nevada governor following his term as attorney general and then enjoyed two full terms in the U.S. Senate. Biographical Directory of the U.S. Congress: 1774 – Present, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000993>

<sup>231</sup> Nevada *ex rel.* Nevada State Board of Agriculture v. United States, 512 F. Supp. at 170 (citing Nevada’s brief). See also, Eugene R. Gaetke, *Refuting the “Classic” Property Clause Theory*, 63 N.C. L. REV. 617, 621 fn. 23 (1985) (describing as “a fundamental tenet of the Sagebrush Rebellion” the argument that, on admission of the state, the federal government must transfer federal lands to the state).

<sup>232</sup> *Id.* For a thorough exploration of the equal footing argument see John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317, 319-329 (1980-81).

with power over the public land without limitations; it is not for the courts to say how that trust shall be administered, but for Congress to determine.”<sup>233</sup> Judge Reed went on to explain that an otherwise valid federal regulation does not violate the equal footing doctrine “merely because its impact may differ between various states because of geographic or economic reasons.”<sup>234</sup> The doctrine does not cover economic matters, the court reasoned, because “there never has been equality among the states in that sense.”<sup>235</sup> The Ninth Circuit had no trouble affirming the decision, thus putting an end to western states’ legal attempts to wrest control of the public rangelands from the federal government.<sup>236</sup> The equal footing issue made a brief encore in Nevada’s subsequent litigation to stop the federal government from developing a repository for nuclear wastes at Yucca Mountain.<sup>237</sup> But, by the time Nevada ranchers challenged federal ownership of rangelands under the equal footing doctrine in the 1990s, the state sided with the United States in defending continued federal control.<sup>238</sup>

#### V. *KLEPPE’S* ROLE AS A POLITICAL TOOL

Despite losses in the courts, the Sagebrush Rebellion (continuing in its

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<sup>233</sup> *Id.* at 172.

<sup>234</sup> *Id.* at 171 (citing *Island Airlines, Inc. v. C.A.B.*, 363 F.2d 120 (9th Cir. 1966)).

<sup>235</sup> *Id.* (citing *United States v. Texas*, 339 U.S. 707 (1950)).

<sup>236</sup> *State of Nevada, ex rel. Nevada State Bd. of Agric. v. United States*, 699 F.2d 486 (9th Cir. 1983).

<sup>237</sup> *See State of Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990) (rejecting a Property Clause challenge to the statute authorizing the waste facility); *Nuclear Energy Institute v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004) (rejecting both the Property Clause and equal footing challenges).

<sup>238</sup> *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997). *See also United States v. Nye County*, 920 F. Supp. 1108 (D. Nev. 1996).

more recent guise as the “states’ rights” or “wise use movement”) has proven resilient to changing politics and the dramatic demographic shifts in western states. What accounts for the staying power of a movement resting on such a weak legal foundation and based largely on an industry with shrinking economic importance?

Many have regarded the Sagebrush Rebellion as a bizarre and misguided movement. As one author asked, “why would the commodity interests—ranchers, loggers, et al.—want to *own* federal lands that already offered such a bounty of subsidies?”<sup>239</sup> The reality is that ranchers did not really want to own the federal lands. Instead they sought to stifle the effects of the 1970s federal legislation increasing environmental restrictions on and competition for the use of the public lands. Laws like the WFRHBA pitted ranchers against the federal government by giving horses what amounted to unrestricted access to scarce rangeland water and forage upon which ranchers depended. Then FLPMA exacerbated the tensions, even though it left the status quo of the Taylor Grazing Act mostly intact and provided special solicitude for state interests and plans.<sup>240</sup>

The FLPMA required the BLM, for the first time, not only to coordinate with and “assure that consideration is given to” relevant state-authorized plans, but also to “provide meaningful involvement of State and local government

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<sup>239</sup> Donald Snow, *The Pristine Silence of Leaving It All Alone*, in *A WOLF IN THE GARDEN*, *supra* note 38, at 28 (citing, for example, “absurdly cheap grazing fees”) (emphasis in original).

<sup>240</sup> See Fischman & King, *supra* note 147.

officials.”<sup>241</sup> This is a version of cooperative federalism that is characterized by state favoritism in federal process.<sup>242</sup> It encourages federal agencies to account for state concerns, but often requires little more than that the BLM “pay attention.”<sup>243</sup> Ultimately, the agency may adopt its own ideas about what is best for federal land management.<sup>244</sup> The BLM’s regulations, though, go further than FLPMA requires in structuring cooperative federalism.<sup>245</sup> The regulations actually require every BLM plan to be consistent with state and local plans “so long as” the non-federal plans themselves are “consistent with the purposes, policies and programs of Federal laws and regulations.”<sup>246</sup> This standard invites state and local planning to circumscribe BLM discretion in applying land use statutes and rules. The BLM regulations also establish a “consistency review” procedure for determining when the BLM will accept the recommendations of a governor on a plan.<sup>247</sup> It is more accommodating of state interests than any other example of state favoritism in

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<sup>241</sup> 43 U.S.C. 1712(c)(9). John Leshy cites this provision in stating that “it can be argued that the FLPMA gives state and local governments a much greater say in federal land management than previously. Leshy, *supra* note 186 at 348.

<sup>242</sup> Fischman, *Cooperative Federalism and Natural Resources Law*, *supra* note 205 at 200.

<sup>243</sup> *Richardson v. Bureau of Land Mgmt.*, 459 F. Supp. 2d 1102, 1119-22 (D.N.M. 2006) (upholding BLM’s oil and gas development plan for New Mexico’s Otero Mesa notwithstanding the objections of the governor and inconsistencies with certain state plans). *See* Fischman & King, *supra* note 147 at 162-63 (discussing the Otero Mesa dispute in the context of cooperative federalism).

<sup>244</sup> *Id.*

<sup>245</sup> 43 C.F.R. § 1610.3-1 & 3-2. *See* Fischman & King, *supra* note 147 at 159-60.

<sup>246</sup> 43 C.F.R. § 1610.3-2(a).

<sup>247</sup> The consistency procedure requires the BLM state director to submit each proposed BLM plan to the relevant governor for identification of any known inconsistencies. The governor then has 60 days to identify inconsistencies and provide recommendations for remedying the BLM plan. If the BLM state director does not accept the governor’s recommendation(s), then the governor may appeal to the national BLM director. 43 C.F.R. § 1610.3-2(e).

federal process.<sup>248</sup>

It is important to situate the Sagebrush Rebellion as an alternative political avenue to the cooperative federalism programs of public natural resources law. While most states put substantial energy into shaping public land policy through the channels created by Congress, the rebellion rejected the role of states as junior partners in resource management. The choice to engage in “un-cooperative federalism” did not prevent the very same states from quietly pursuing their interests through existing statutory avenues to influence public land management, of course. Thus, after Nevada enacted its Sagebrush Rebellion bill,<sup>249</sup> state officials “hurried to Washington to make sure that their claim of ownership would not result in the interruption of federal payments to the state which were based on continuing federal land ownership.”<sup>250</sup>

The Sagebrush Rebellion was an effort of a frustrated minority, accustomed to power, that had been beaten back not just by the power of the Property Clause but also by the environmental movement’s legislative success. Protests under its, and the related “wise use,” banner continue to directly challenge federal authority.<sup>251</sup> Rather than “a last gasp of a passing era,”<sup>252</sup> the

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<sup>248</sup> Fischman, *Cooperative Federalism and Natural Resources Law*, *supra* note 205 at 200.

<sup>249</sup> Assembly Bill 413, *see supra* notes 217-228 and accompanying text.

<sup>250</sup> COGGINS ET AL., *supra* note 17, at 77.

<sup>251</sup> *See supra* note 21.

<sup>252</sup> Leshy, *supra* note 186 at 349. at 349. For similar sentiments, see, e.g., Clayton, *supra* note 210, at 533 (asserting that “[r]ather than fight for ownership of the public lands, a battle they will surely lose, the Rebels should concentrate their efforts on attempting to achieve increased control

Sagebrush Rebellion signaled the continued vitality of “un-cooperative federalism” as a tool for political leverage.

For instance, Kane County, Utah has been engaged in an ongoing battle with the federal government over road claims on public lands in southern Utah. Like the *Kleppe* challenge to the WFRHBA, the county was spurred into action by what it saw as federal overreaching into a domain of traditional local control. On September 18, 1996, President Clinton designated 1.9 million acres in southern Utah, including part of Kane County, as the Grand Staircase-Escalante National Monument.<sup>253</sup> Almost immediately thereafter, Kane County commissioners approved the grading of what the county called “roads” in federal wilderness study areas and in the national monument.<sup>254</sup> The BLM called them “primitive trails.”<sup>255</sup> Crews employed by the county graded sixteen of these “roads” without getting approval from the BLM or even notifying the agency.<sup>256</sup> Kane county defiantly claimed ownership of the rights of way under an 1866 statute commonly

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over the public land management decision process[,]” and concluding that the Rebellion would result in “cooperative federalism seldom paralleled in the nation’s history.”);

<sup>253</sup> Proclamation No. 6920, 61 Fed. Reg. 50223 (Sept. 18, 1996). Utah reacted with animosity. *See, e.g., James Brooke, New Reserve Stirs Animosities*, NEW YORK TIMES, Oct. 13, 1996, available at <http://www.nytimes.com/1996/10/13/us/new-reserve-stirs-animosities-in-utah.html?scp=1&sq=grand+staircase-escalante&st=nyt>.

<sup>254</sup> *S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (SUWA)*, 425 F.3d 735, 742 (10th Cir. 2005); *See also*, Larry Warren, *Utah Counties Bulldoze the BLM, Park Service*, HIGH COUNTRY NEWS, Oct. 28, 1996.

<sup>255</sup> *SUWA*, 425 F.3d at 742. The county claimed title to over 60 roads on federal lands, and “at least 30 within or on the boundary of Grand Staircase-Escalante National Monument.” Eryn Gable, *PUBLIC LANDS: Court Rules Enviros Can’t Challenge Utah County’s Road Claims*, Land Letter (Environment & Energy Publishing), Jan. 13, 2011.

<sup>256</sup> Gable, *id.*; *SUWA*, 425 F.3d at 742.

called RS 2477.<sup>257</sup> But even if the county possessed the rights under RS 2477, it would need BLM's permission to conduct improvements on federal lands that go beyond mere maintenance of the paths' historical use.<sup>258</sup> Prompted by environmental groups, the BLM sought an injunction against the county, which commenced a protracted and multifaceted battle that remains mired in the courts.

In August 2005, Kane County upped the ante by enacting an ordinance opening some primitive trails on federal lands, including the national monument, to off-road vehicle (ORV) use, contravening BLM policy.<sup>259</sup> The BLM then attempted to close those same areas to such uses, but the county later took down the BLM signs and placed their own signs indicating the routes were "open."<sup>260</sup> Challenged in court by environmental groups, the county initially lost on the merits only to succeed in getting the case dismissed for lack of standing.<sup>261</sup> Representing Kane County in the dispute over roads in Grand Staircase-Escalante National Monument was none other than Mike Lee, the Utah eminent domain bill

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<sup>257</sup> Act of July 26, 1866, c. 262, § 8, 14 Stat. 251, 253, *codified* at 43 U.S.C. § 932, repealed by FLPMA in 1976. 43 U.S.C. §1701 *et seq.* While new RS 2477 rights could not be created after 1976, "valid" RS 2477 rights existing at the date of repeal continue in effect. *SUWA*, 425 F.3d at 742. The FLPMA provided no procedure to validate or record existing RS2477 rights. *Id.*

<sup>258</sup> *SUWA*, 425 F.3d at 745.

<sup>259</sup> *Wilderness Society v. Kane County*, 470 F.Supp.2d 1300, 1303 (D. Utah 2006). The court granted Plaintiffs' motion to amend their complaint in order to add the BLM and the Fish and Wildlife Service as defendants for a claim under the Endangered Species Act. *Id.* at 1309. The District Court again addressed the merits of the case in 2008. *See Wilderness Society v. Kane County*, 560 F.Supp.2d 1147 (D. Utah 2008) (holding that county ordinance allowing ORV use on federal land was preempted by federal law), *aff'd*, 581 F.3d 1198 (10th Cir. 2009), *rev'd on other grounds*, --- F.3d ----, 2011 WL 79487 (10th Cir. 2011) (holding that environmental groups lacked standing to challenge county claims to RS 2477 rights on federal public land).

<sup>260</sup> 560 F.Supp.2d at 1154-6.

<sup>261</sup> 2011 WL 79487, at 6-10.

supporter who rode to the Senate on the latest iteration of the “un-cooperative federalism” movement: the Tea Party.<sup>262</sup> Despite its tenuous legal foundation, the county’s strategy of “un-cooperative federalism” has reaped some practical dividends. In 2010, the Obama administration stipulated that five of the Kane County claims had perfected rights under RS 2477, including Skutumpah Road, which cuts through Grand Staircase-Escalante National Monument.<sup>263</sup>

Social scientists who have studied political movements’ use of confrontational litigation offer lessons applicable to the *Kleppe* story. One lesson is that the “Sagebrush Rebellion” may be a better term than “states rights” because it reflects the kind of coalition building necessary to achieve success in the executive and legislative branches when judicially enforceable rights are *not* available.<sup>264</sup> While United States culture may conceive of political ideals in terms of fights for rights in courts, failure in the judicial forum does not foreclose success in other arenas.<sup>265</sup> In the end, “states rights” in federal natural resources

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<sup>262</sup> Gable, *supra* note 255. For a description of Mike Lee’s role in promoting Utah’s 2010 eminent domain law see *supra* note 5 and accompanying text.

<sup>263</sup> The victory is a limited one, however, as the federal government likely retains the power to make reasonable regulations respecting rights-of-way on public land. See *Hale v. Norton*, 461 F.3d 1092 (9th Cir. 2006) (reaffirming the principle that rights-of-way through federal lands are subject to reasonable regulation by the United States); *Wilderness Society v. Kane County*, 581 F.3d 1198, 1229 fn. 4 (10th Cir. 2009) (Judge McConnell, dissenting) (conceding that even if the county established valid RS 2477 claims, the federal government retained “substantial regulatory authority” over the rights-of-way).

At least one other right of way, Bald Knoll Road, was previously acknowledged by the BLM. Christine Hoekenga, *The Road More Traveled*, HIGH COUNTRY NEWS, Oct. 1, 2007; Rachel Jackson, *Counties Cross the Yellow Line*, HIGH COUNTRY NEWS, July 20, 2001.

<sup>264</sup> EPP, *supra* note 8 at 13.

<sup>265</sup> *Id.* at 15-16.

law may be more of a political resource than a judicial doctrine.<sup>266</sup>

Another lesson emerges from Eve S. Weinbaum's study of community-based activism in Tennessee to fight plant closings, de-industrialization, and economic inequality. She tells a similar "story of failure" in a very different context from *Kleppe*.<sup>267</sup> The central characters in her story had far less access to power in state government than the ranchers in the Sagebrush Rebellion. Nonetheless, Weinbaum's research illustrates how disparate but "organized, aggressive, confrontational" social movements<sup>268</sup> can build institutions, "activist networks, and long-term coalitions" in losing battles, which "create conditions for later success."<sup>269</sup>

Failures—rather than resulting in humiliation and depression—can create the context for social change and pivotal political movements. Successful failures do not always transform the economy, or the social or political landscape, but they can accomplish crucial outcomes.<sup>270</sup>

The story of *Kleppe* fits Weinbaum's category of a "successful failure."

The converse to Weinbaum's term--one might call it a "failed success"--is also evident in the struggle over public rangeland management. An important

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<sup>266</sup> Another vehicle for states' rights constitutional claims is the Tenth Amendment, although this route is unlikely to see any more success than the states' previous arguments. See, e.g., Shepard, *supra* note 16, at 528-32, for an exploration of Tenth Amendment claims, cases after *Kleppe* which raised the Tenth Amendment as an issue, and the likelihood of this argument's success in the future.

<sup>267</sup> WEINBAUM, *supra* note 8, at 7.

<sup>268</sup> *Id.* at 10.

<sup>269</sup> *Id.* at 8.

<sup>270</sup> *Id.* at 267.

limitation of activism through courts is that winning a case does not necessarily ensure compliance.<sup>271</sup> An example of this is the litigation that Oliver Houck highlights as the pivotal case paving the way for enactment of FLMPA.<sup>272</sup> The environmentalist victory in NRDC v. Morton did require the BLM to conduct comprehensive environmental impact analyses to evaluate the relationship between range conditions and grazing.<sup>273</sup> But it did not ensure full compliance. Environmental impact analysis continues to lag far behind public rangeland decision-making, and has not made much of a dent in allotment stocking decisions.<sup>274</sup>

Unsurprisingly, the legal literature concentrates more on the outcomes of litigation than social science research, which views success or failure through a wider lens. The late Stuart Scheingold pioneered the use of political science to better understand the practical, on-the-ground changes wrought by disputes over rights. His analytic framework “decenters” law to shift focus from authoritative

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<sup>271</sup> SCHEINGOLD *supra* note 7 at 117.

<sup>272</sup> Oliver Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 TULANE L. REV. 2279, PINCITE (1996). *See supra* note 191.

<sup>273</sup> NRDC v. Morton, 388 F. Supp. 829 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir.). For a discussion of the case, *see supra* note 191.

<sup>274</sup> *See e.g.* Idaho Watersheds Project v. Hahn, 307 F.3d 815 (9th Cir. 2002); and Western Watersheds Project v. Bennett, 392 F. Supp.2d 1217 (D. Idaho 2005) (discussing BLM failure to conduct NEPA analysis on grazing permits and other problems with FLPMA administration). For the past decade Congress has responded to the BLM’s failure to keep up with NEPA compliance on grazing permit renewals by providing relief in the form of riders on the annual Interior Appropriations budget. The riders direct that expiring grazing permits be renewed under the same terms until the Secretary can complete the NEPA analysis. *See e.g.* 117 Stat. 1307 (2003). The Forest Service faces the same kind of problem with a backlog of environmental impact analyses for its grazing permits. Eryn Gable, *Thousands of Forest Service Allotments Await NEPA Analyses*, Land Letter, Aug. 2, 2007.

institutions, such as courts, to “the more fluid terrain” of intermediate institutions, such as agencies and civil society organizations.<sup>275</sup> The “decentered” view we present of *Kleppe* reveals substantial success in intermediate institutions, such as the BLM, which has largely insulated ranchers from their worst fears and environmentalists best hopes of public land law reform. Scheingold’s conclusions about the politics of rights nicely summarize the meaning of *Kleppe*, the rise of the Sagebrush Rebellion, and public rangeland reform. Judicial acceptance of rights or other legal arguments does not

mean that the goal will be embraced more generally nor that the social changes implied will be effected. If there is opposition elsewhere in the system, the judicial decision is more likely to engender than to resolve political conflict. In that conflict, a right is best treated as a resource of uncertain worth, but essentially like other political resources: money, numbers, status, and so forth.<sup>276</sup>

Similarly, New Mexico’s failure in *Kleppe* did not doom state resistance to federal public land reform or dampen ranchers’ objections to incorporating environmental values in natural resource allocation. Instead, it sparked the Sagebrush Rebellion and a host of spin-off movements that succeeded with money, status in agency deliberations, and political allies as often as they failed in courts.

## VI. CONCLUSION

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<sup>275</sup> SCHEINGOLD *supra* note 7 at xxi-xxii.

<sup>276</sup> SCHEINGOLD *supra* note 7 at 7.

With its legal arguments shredded, one might imagine the Sagebrush Rebellion died a simple death. But it lived on, fueled by the very litigation losses that seem to mark its failure. *Kleppe* was the first great court battle of the rebellion. In many ways it served as the template for subsequent legal tactics that helped build political support for the ranching interests and other private property concerns often reflected in western state ideology.

It would be hard to imagine how the basic narrative of the WFRHBA's enactment and the *Kleppe* decision could be worse for ranchers. They had almost no voice in shaping the legislation and lost badly in the Supreme Court. More broadly, the Sagebrush Rebellion, which the WFRHBA and *Kleppe* helped spur, enjoyed no major judicial victories. Yet, as Utah prepares to spend millions more on futile litigation,<sup>277</sup> the Sagebrush Rebellion continues to enjoy success in setting the terms of political debate, and electing officials who will advance the rhetoric of state control. By framing the issues as ones of states' rights and local culture, the sagebrush rebels offered an alternative narrative to downplay ecological concerns of overgrazing. Congress inadvertently paved the way with the WFRHBA, which did not rest on ecological grounds and distracted reformers from the problems of livestock overgrazing. The sagebrush rebels may have peddled legal theories based on a "mendacious myth" about the constitution and

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<sup>277</sup> See *supra* notes 1-5 and accompanying text.

federal power.<sup>278</sup> But, myths exert great power over the way people understand the world and its conflicts. So, despite all the failures, the rebellion and its modern progeny successfully resisted major reforms of grazing management aimed at restoring the ecological condition of the public range.

The story of *Kleppe* shows how legislative frustration and court losses sustain popular movements. In this respect, the sagebrush rebels and their kin in the wise use, states' rights, and property rights movements share important characteristics with the traditionally liberal causes of civil rights and economic justice. At the dawn of the modern era of public land law, the perennial complaints of public land states moved into courtrooms, mimicking the tactics of the very environmentalists they abhorred. Both groups gained political leverage as a result.

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<sup>278</sup> Scott Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. (1993-94).