

In the
Supreme Court of the United States

Thomas S. Kleppe, Secretary of)
the Interior,)

Appellant,)

v.)

New Mexico, et al.,)

Appellees.)

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No. 74-1488

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THOMAS S. KLEPPE, Secretary of :
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Appellant, :
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v. : No. 74-1488
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NEW MEXICO, et al., :
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Appellees. :
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Washington, D. C.,

Tuesday, March 23, 1976.

The above-entitled matter came on for argument at
2:14 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

A. RAYMOND RANDOLPH, JR., ESQ., Deputy Solicitor
General, Department of Justice, Washington, D. C.
20530; on behalf of the Appellant.

GEORGE T. HARRIS, JR., ESQ., Special Assistant
Attorney General of New Mexico, Post Office Box
2068, Albuquerque, New Mexico 87103; on behalf of
the Appellees.

C O N T E N T S

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George T. Harris, Jr., Esq., for the Appellees	33

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 74-1488, Secretary of Interior against New Mexico.

Mr. Randolph, you may proceed whenever you're ready.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,

ON BEHALF OF THE APPELLANT

MR. RANDOLPH: Thank you.

Mr. Chief Justice, and may it please the Court:

This case is on direct appeal from the judgment of a three-judge district court for the District of New Mexico, declaring the Wild Free-Roaming Horse and Burros Act of 1971 unconstitutional, and enjoining the Secretary of Interior from enforcing that Act.

The issue in the case is whether Congress had authority under the Constitution to pass that federal legislation.

The suit was begun in this case by the State of New Mexico, its Livestock Board and Director and one private individual in March of 1974. The complaint alleged facts relating to a particular incident involving 19 burros, which I will deal with shortly.

More generally the complaint charged that the federal Act was interfering with the New Mexico Livestock Board's administration of their Estray Law -- "estrays" meaning a stray domestic animal. That, as a result of that interference,

the State of New Mexico was being deprived of constitutional rights, and the number were enumerated, including the Tenth Amendment, that Congress had no authority to pass this piece of federal legislation because, the complaint alleged, the animals in question, the wild horses and burros, were not damaging or molesting, I think the term that's used in the complaint, the federal land; and also because the particular burros in question were not migratory.

The Act, I should give a short description of, deals with, as the title indicates, Wild Free-Roaming Horses and Burros found on federal land. The statute defines these animals as all unclaimed and unbranded horses and burros on the public lands of the United States. The statute further defines public lands to mean only those federal lands administered by the Bureau of Land Management of the Department of Interior, and the Forest Service of the Department of Agriculture.

That's not an insubstantial quantity of acreage; about 300 million acres is encompassed within the administration of those two federal agencies.

However, --

QUESTION: Do they all have wild burros on them?

MR. RANDOLPH: However, the Forest Service only has about five percent of all the wild burros, comprised on these two areas of land; 95 percent is controlled by the --

of the burros and wild horses are on BLM land.

QUESTION: Are on what?

QUESTION: Bureau of Land Management.

MR. RANDOLPH: BLM, yes.

The Act directs the Secretaries to manage and protect --

QUESTION: How about the private land?

MR. RANDOLPH: There is nothing in the record to indicate, so far as I'm aware, how many burros are on private land, or how many horses. I suppose one would have to, first of all, take a population count. This only deals with wild --

QUESTION: Can you shoot them on private land?

MR. RANDOLPH: Sorry?

QUESTION: Can you shoot them on private land?

MR. RANDOLPH: Well, I suppose if they are your burros, and they --

QUESTION: No, no, I mean stray burros.

QUESTION: He's asking if the law covers private land, and it does, I think.

MR. RANDOLPH: It does. For a wild horse or a wild burro, which is defined as an unclaimed or unbranded wild horse or burro on public land. If that animal strays onto private land, the Act provides that the owner of the private land may call either the BLM or an agent of the Secretary of Agriculture and ask that the animal be removed, in which case

the particular federal officer must remove the animal.

Section 4 of the Act provides, though, however, in no case, shall the individual kill the animal that strays onto the land.

QUESTION: Well now, what does this mean in practical effect? A private landowner sees a wild burro on his land, who has been, in his opinion, damaging his own crops and his own stock and depriving his own stock of food and all these other things that are alleged in the amicus briefs, and just decides to pick up his rifle and shoot him. And there's no proof that that burro has ever been on public land, --

MR. RANDOLPH: It's not really a federal criminal offense.

QUESTION: -- but, on the other hand, if it can be proved that that burro had ever set foot on public land, then what?

MR. RANDOLPH: Well, the Act provides that -- it deals with the wild horses and burros that are an integral part of the federal public lands.

QUESTION: Yes, but these are transitory, these are not -- these are not flora, these are fauna.

MR. RANDOLPH: I realize that. I don't think that that means that simply because an animal sets foot on federal public land --

QUESTION: Well, what does it mean?

MR. RANDOLPH: -- that he becomes an integral part of

it.

But, before I get too deeply into this, let me just make one point. That issue is not involved in this case. These burros that were taken in this litigation, that are involved in this litigation, were, first of all, all found on federal land when they were seized. The complaint filed by the State of New Mexico, by the State Livestock Board and by the private individual, does not make any allegations relating to the question of whether these burros were on private land or not on private land. It doesn't make a point of that.

But, so far as the evidence shows, the burros were totally on public land. There's a statement on page 4 of the Appellees' brief that says the record indicates that these burros spent a majority of time on private land. The reference in the brief is to, I believe, App. page 46 and 48. There's no support for that statement in the record.

QUESTION: Do you think there's some support for the statement that they interfere with the lessee's property on public land?

MR. RANDOLPH: Well, that's -- there's an allegation in the complaint that they damage -- they do not damage the public land.

QUESTION: Now, that isn't what I asked you. How about my question?

MR. RANDOLPH: The lessee's property? The lessee of public land, I suppose.

QUESTION: Yes. The lessee's property, supplemental feeding that he brings onto the public land.

QUESTION: Grazing rights; his cattle land.

MR. RANDOLPH: Well, as far as this case is concerned, maybe I ought to give a factual statement on it.

QUESTION: Well, let's just say that wherever you are grazing cattle on the public land, you carry salt onto the land, you frequently carry on supplemental feeding onto the land, and you find out that some wild burros are eating up your supplemental feeding.

Now, is there some evidence to that effect in this record or not?

MR. RANDOLPH: There's evidence that these burros were eating protein blocks. Well, let me say that that is not, Mr. Justice White, a usual practice for all the grazing within the Taylor Grazing Act. I think the Bureau of Land Management, at least, has informed me that supplemental feeding is something that's frowned upon usually; the use of --

QUESTION: How about salt?

MR. RANDOLPH: As well as salt. The reason for that is because the --

QUESTION: Well, there's always salt.

MR. RANDOLPH: -- because the burros and horses then

tend to browse more than they otherwise would, which is damaging public land in a way that they would otherwise not. Whether that's active or not, I don't know.

But in this particular case, the burros that were involved here were seized from one Mr. Kelley Stephenson's ranch in New Mexico, in the south central part of New Mexico. And the case arose as follows:

While Mr. Stephenson, a New Mexico cattle rancher, was visiting BLM offices and dropped by to talk to a number of BLM officials, he was told by them that they had seen 25 burros around an area called Taylor Well. Now, Taylor Well is on federal land. Taylor Well is a joint watering spot for this particular rancher and another rancher.

Mr. Stephenson, the rancher in question here, had a six-month permit to graze about 40 head of cattle as a winter pasture in this particular area.

That was the first, apparently, Mr. Stephenson knew of the burros around Taylor Well. As a matter of fact, he said he was surprised, because, although he had been in the area for 29 years and had seen burros in the foothills to the east, he had never seen them around this particular well.

At that point, as far as Mr. Stephenson knew, the burros and the cows were getting along, there was no harm, whether they were eating his protein blocks or not, the Bureau of Land Management certainly didn't know; at least, all

they had was a photograph of the burros standing around the well.

Now, Mr. Stephenson returned to his ranch and confirmed the presence of the burros. But, rather than calling up the Bureau of Land Management, after he allegedly, as the complaint says, found that the burros were molesting the cows, other than doing that he called the New Mexico Livestock Board.

Now, Mr. Justice White, you mentioned the problem of the burros perhaps interfering with the cows. There is a provision in the regulations that the Bureau of Land Management has promulgated under the Wild Horses and Burros Act, --

QUESTION: I didn't say anything about interfering with the cows. I asked you were they eating up some property in the pastures of the lessee.

MR. RANDOLPH: As to interfering with the property, the cows are the rancher's property.

QUESTION: And there's evidence that they were in this record.

MR. RANDOLPH: They were eating protein blocks.

QUESTION: Yes. Whether that's usual or not, they were eating up his protein blocks.

MR. RANDOLPH: Yes, they were eating his protein blocks.

But if they were in -- but the allegations in the complaint are that they were molesting his cattle, not that -- I don't know whether the complaint even talks about protein blocks or salt blocks or whatever; the complaint says that they were molesting his cattle.

The regulations of --

QUESTION: Well, I suppose if they're taking food away from the cattle, that's molesting them, isn't it?

MR. RANDOLPH: I would not characterize that as molesting, Your Honor. It seems to me that that would be direct physical contact, which is, I think, what he was claiming, and pushing them aside and so on and so forth.

In any event, --

QUESTION: If evidence of eating the protein blocks came in without objection, presumably the complaint is deemed amended, is it not?

MR. RANDOLPH: I don't question the relevance of that. I'm saying that the argument and the contention was not based on that particular fact. And I don't think the case rests on it in one way or another. I don't think the constitutionality of this Act rests on whether these burros were eating protein blocks or not.

QUESTION: Or whether they were found on private property?

MR. RANDOLPH: In this case they were found on public

land --

QUESTION: I know, but you -- apparently you would think it would make no difference, whether they were found on private property or not.

MR. RANDOLPH: The constitutionality of one provision of this Act, which is not in question here, may turn on that question; but that is not an issue that the district court dealt with in any way.

In any event, there is a regulation, as I was going to say, from the Bureau of Land Management that provides that problem animals shall be removed from an area if they interfere with wild life, or they interfere with livestock, or they interfere with individuals. But rather than asking the Bureau of Land Management, after the rancher returned, the rancher called the New Mexico Livestock Board, which is composed of seven individuals who, according to State statute, must adequately represent the livestock industry in the State. And also must be engaged in the livestock business.

QUESTION: Isn't there an allegation that he first asked the federal authorities to please remove these?

MR. RANDOLPH: There's an allegation -- the testimony is as follows on that question: I asked the Bureau of Land Management official what they do if the cows and donkeys don't get along. He said, and I think I'm quoting this almost exactly, "if the cows interfere with the burros,

the cows have to go." And that's in the Appendix.

The New Mexico Livestock --

QUESTION: Well, in fact, under the law, the private landowner could have requested -- or if the private landowner had requested the federal authorities to remove the burros, it was up -- it was incumbent upon the federal authorities to do so, wasn't it?

MR. RANDOLPH: That's right.

But he's -- Mr. Stephenson is not a private landowner as far as this land is concerned. The closet piece of Mr. Stephenson's land --

QUESTION: He's a what, a lessee under the Taylor Act?

MR. RANDOLPH: Yes. He's a permittee under the Taylor Act, having a six-month grazing permit using this area for 40 head of cattle for winter pasture.

QUESTION: Unh-hunh.

MR. RANDOLPH: On the map that's included in the Appendix, the closet piece of property to the area where the burros were seized, that is in private ownership, Mr. Stephenson's ownership, is two and a half miles away, from the Taylor Well. The quadrants on that map are each one square mile. It's in the Appendix.

The New Mexico Livestock Board, as I said, administers what they call the State Estray Law. Now, this law provides that any horse or burro running at large on the public or

private land of the State, in the State is considered an estray, a stray domestic animal. Apparently, obviously, the New Mexico Livestock Board construes public land as including not only State land but also federal land.

And the Act provides, the New Mexico Act provides that a person having knowledge of estrays may, upon getting the authorization from the Livestock Board, simply round them up, so long as he ships them to the nearest railroad depot for turning over to an official of the New Mexico Livestock board.

Another way that estrays can be impounded is by the Livestock Board itself, and that's what happened in this case.

Now, I should point out to the Court something that I discovered only in preparation for this case, and that is that the New Mexico Estray Law was amended after the decision in this case. The definition of what is an estray was changed from, instead of any horse, burro or mule, et cetera, running at large on public or private lands, it was changed to any livestock or buffalo found running at large on public or private lands.

We don't think that changes the outcome or the case at all, obviously.

QUESTION: What does New Mexico do with them after it picks them up?

MR. RANDOLPH: After they get them, they are supposed

to disposed of according to the directions of the Livestock Board. In this case the 19 burros were seized and impounded and then taken by truck to Roswell -- I hope I pronounced that correctly -- New Mexico, and sold at a public auction. The proceeds of the sale, the amount of the sale is not shown in the record. The proceeds of the sale are paid to the New Mexico Livestock Board.

One of the appellees in this case, Appellee Foster, purchased three of the burros. The record does not show who purchased the other 16.

QUESTION: Purchased for what purpose?

MR. RANDOLPH: Well, the record doesn't show what the other 16 were purchased for, and I'm --

QUESTION: Well, what I'm trying to get at is, do they dispose of them, kill them, something?

MR. RANDOLPH: Oh, well, they could be used for dogfood, they could be used for fertilizer, they could be used as pets, they could be used for donkey basketball teams.

QUESTION: And the purpose of the Federal Act is to preserve them as a species?

MR. RANDOLPH: That's right.

And, as a result of that, because of their protection, the United States, through the United States Attorney's Office, when it found out about the burros, demanded their return from the New Mexico Livestock Board. They did not

discover this until after the sale had taken place, which was one week in February of 1974, after the burros were rounded up.

When the United States demanded return of the burros, this suit followed.

Now, our principal argument in this case is that the Act is a valid exercise of Congress' power under the property clause of the Constitution. That provides that Congress shall have power to make all needful rules and regulations respecting the territory or other property belonging to the United States.

Congress didn't legislate, however, on the basis that these animals roaming the federal lands were owned by the United States. The Senate Report specifically says that these animals are owned by no one individual, they are owned by the people of the United States at large. And we don't make that claim in this case.

Rather, our claim is, and our argument, that the regulation, the regulatory authority over these animals is derived from Congress' power to make needful rules, as the Constitution says, respecting the federal public land.

QUESTION: Well, you're not urging that the Senate Committee's view is correct as a matter of law, are you, that the burros anywhere in New Mexico are owned "by the people at large"?

MR. RANDOLPH: We don't press that contention one way or the other, Mr. Justice Rehnquist. We say, regardless,

Congress legislates in a great many ways and legislates with respect to a great many things they don't own. We say that -- that the federal government doesn't own. We say that it doesn't matter whether these burros are owned if they're on federal public land or a part of it, then Congress can legislate. That's hardly a new startling proposition.

One of the cases that --

QUESTION: Well, suppose the rancher shoots them on his own private land, after he hasn't been able to chase them off, where is the jurisdiction under the Public Lands Act then? Clarify that for me.

MR. RANDOLPH: Well, we think it's from the necessary and proper clause. There are areas, and I suppose the Stephenson ranch is one indication, where -- which comprises about 8,000 acres of federal land, that he has no rights to except the permits to graze there. And interspersed there are 2,000 acres of private land and State land.

We think Congress, in order to preserve these animals on the public domain could protect them the moment -- from being shot the moment they stepped off into a parcel that was not part of the public domain. Of course, the animal -- the farmer or the rancher can protect against that, I suppose, by fencing his property, if he wishes them not to cross.

QUESTION: Do you think the question on private land

is any different with respect to these burros than it is with respect to deer and elk, insofar as the State purports to tell the landowner, "Don't shoot elk out of season" or "don't shoot deer out of season, even if you find them on your own land"?

MR. RANDOLPH: The -- well, with respect to -- the State does that with respect to State land. The State does that with respect to federal land as well. We think it's a different question, because we're deriving not -- the federal government is deriving its power from the fact of ownership of the public land, whereas the State, in the cases like Perez and others, is dealing with kind of a general police power to provide for the welfare of its citizens.

QUESTION: Well, I know, but if the question is whether or not a landowner is free to shoot game on his own land, the --

MR. RANDOLPH: Well, I was going to speak to that right directly, Mr. Justice White, which is -- deals with the power of an individual over his land, and I was going to say that the authority that's being suggested here by Congress, that's being forth in the Wild Horses and Burros Act, is hardly a new, startling proposition. One of the cases that's been cited by the Appellees is Geer vs. Connecticut. And if you read Geer, the Court points out that as far back as the Sixth Century in ancient Rome in the Institutes of Justinian,

it was recognized that a landowner has the right to prevent others from killing game on his land. And that's what Congress has, as far as the part of the Act that is at issue here, provided.

QUESTION: Those are so-called feral animals, though. Is it claimed that these are feral animals?

MR. RANDOLPH: Yes, they are feral -- a feral is --

QUESTION: These are just horses and donkeys that have run off from some rancher's property, isn't it?

MR. RANDOLPH: A feral animal usually refers to an animals --

QUESTION: A feral animal is a wild animal, and indigenous wild, undomesticated animal.

MR. RANDOLPH: Usually one that had been domesticated is a feral animal.

QUESTION: Not -- I don't think so. Not as I remember my Latin.

MR. RANDOLPH: Well --

QUESTION: Feral means wild.

MR. RANDOLPH: It means wild, but it usually is used to refer to one that had prior -- previously been domesticated.

But, aside from that, we think the proposition that Congress can control these animals on the federal land is hardly open to doubt. Congress could -- and this Court has recognized in a case called Light vs. United States that it

could prevent anyone from coming onto the public land at all. It could build a fence around all 300 million acres of the public domain. It could charge anybody coming on there with trespassing. It has that authority.

We think it also could provide a gatekeeper, who says, If you come onto the public land, you shall not kill the animals that are there.

If Congress can do that, I think that's clear from the prior decisions of this Court, we think it has the lesser power to say that if you come on, don't destroy the animals that are using the public domain and have used it for hundreds of years, don't destroy them, don't molest them, don't harass them, don't try to capture them and take them away. That's all this Act does.

The district court's opinion states that Congress couldn't protect the wild horses and the wild burros because they were damaging the federal public lands, is the way the district court put it.

We find this a rather strange proposition. It would mean that if they are damaging the federal public land, then Congress could protect them, or if they were benefitting the federal public land, I suppose then Congress could destroy them. That, we submit, really doesn't make very much sense, and certainly the Framers of the Constitution didn't intend, we think, the property clause to be read that way.

Now, I notice that in the -- as I pointed out -- the complaint of the Appellee suggested that Congress couldn't legislate because these animals do not damage the federal land; now they argue in their brief that Congress's legislation is unconstitutional because these animals do in fact damage the public land.

The statute that is in question here was enacted by Congress, we think, in the great tradition of the property clause. Congress found that these animals were components of the federal land, and that's a fact that couldn't be disputed. The animals, at least these equine animals, were found on the North American Continent as long as millions of years ago. They disappeared 10,000 years ago, and were re-introduced, in studies that were before Congress showed, by Spanish conquistadors in the early Sixteenth Century.

They have been roaming the Western Plains ever since, but one thing that we don't argue and Congress didn't labor under the illusion that they were protecting an endangered species. As a matter of fact, the evidence shows that these wild horses and burros are not really separate species from domestic animals at all. There's some contrary evidence before Congress. I don't think that the Committee Reports credited that.

QUESTION: I suppose the -- I suppose under the property clause the United States could condition a Taylor

Grazing Lease on the lessees not shooting burros or seizing burros on public land.

MR. RANDOLPH: Yes, we think so.

Or any other animal, for that matter. Or stray cats, for that matter, I suppose, if they came onto the federal land.

I think Congress -- Congress said in the Taylor Grazing Act: Here, use our land to graze cattle. We want our land to be used by cattle.

All they said in this Act is: And we also want our land to be used by horses and burros. And anyone that interferes with --

QUESTION: Maybe that reduces the rent for the grazing land, does it? As a matter of economics?

MR. RANDOLPH: Well, that would only -- that would only be true if the burros were taking up, or the horses were taking up and grazing in an area that the cattle would otherwise graze in.

But the proportions of that -- we're talking -- the latest count is 40,000 horses and, I believe, 10,000 burros in a report to Congress on the federal public land. Over 300 million acres. So we're not --

QUESTION: But they're not spread equally -- you brought that up before, they aren't spread equally over the 300 million, they're concentrated in certain spot, aren't they?

MR. RANDOLPH: Most of them are in Nevada. Most of the horses are in Nevada. But in the State of New Mexico, the census was a total of approximately 104 burros on the federal public land, and 64 of them were claimed by individuals. The claims are still being processed. They claimed that they owned them and they had just been set out. If their claims are accepted, they will have to pay a trespass fee, but they will let the animals back.

Congress also found that, as I said, these weren't special species, that most probably they had escaped or been turned out within the last century, or even during the Depression, when farmers and ranchers pulled up stakes and left for the cities.

QUESTION: What's the estimated life of a burro?

MR. RANDOLPH: About -- they can live as long as sixty years. They live very, very long. There's a place in England, I think, that has an old, an old-aged burro home or something. But I don't know.

[Laughter.]

MR. RANDOLPH: And one of the things that Congress was startled about was that no studies have been done on that, on the burros and on their lifespan.

QUESTION: So that a burro that had been turned out in the Depression as a mere infant would now be about 40 or 45?

MR. RANDOLPH: Could be alive today, that's right.

QUESTION: Okay.

[Laughter.]

QUESTION: I think you drew straws for this case.

MR. RANDOLPH: Sorry?

QUESTION: You must have drawn straws for this case.

[Laughter.]

MR. RANDOLPH: And I lost!

QUESTION: Mr. Randolph, I may have missed it, but have you discussed your theory of how the government has the power to exercise jurisdiction over the burros while they are on private land? I thought you said earlier in your argument that they weren't even on private land, but you --

MR. RANDOLPH: These burros weren't. These burros were not found on private land. The only -- there are two pieces of testimony in this record: one is the rancher said -- was shown a map of his area, and said they were all over that area. Well, part of that land is interspersed with private land.

The other thing he says is that cattle are free to roam all over the area. That's the only evidence in this record.

But I'd like to get just one --

QUESTION: Well, are you going to tell -- or is it completely irrelevant, the question of their getting on private lands?

Do you contend the United States --

MR. RANDOLPH: For purposes of this case, it is.

QUESTION: I see. You don't argue that the United States has the power to regulate the burros when they're on private land, then?

MR. RANDOLPH: We don't think that's an issue in this case. Nobody has claimed it, nobody has briefed it, nobody has argued it, it's not been in the district court, it wasn't in part of the complaint. The facts underlying the case don't show that. If it ever came up, then I think it may be a proper issue to claim that.

QUESTION: Well, it is part of the -- it's only the provisions of the statute do purport to control what people can do to burros and wild horses on private land.

MR. RANDOLPH: That's right.

QUESTION: But you say those provisions aren't now before us, and all we have now is the basic power of Congress to enact this legislation generally, hunh?

MR. RANDOLPH: And as far as that's concerned, I said this was legislation, we think, in the great tradition of the Congress, because the bill originated --

QUESTION: Of the property clause?

MR. RANDOLPH: Or of the property clause. The bills originated from committees in Congress that are composed of -- nearly all are representatives of Western States. This is

unusual legislation. It passed unanimously.

The notion that it upsets a great tradition of the State is rather surprising, I think. If there's a tradition of controlling these animals, it's the tradition of the Indian tribes and the United States Cavalry Remount Service controlling the animals, not traditional State control.

The Governor of Nevada -- I find in the amicus brief filed by the State of Nevada here -- the Governor of Nevada wrote a letter to both Houses of Congress supporting this particular piece of legislation. The --

QUESTION: If we were dealing with elk and deer and buffalo, would there be an question about the power of the federal government to protect them from being shot on either public or private land?

MR. RANDOLPH: I think not. Well, on private land, I think there is. I think it has to be related to the public land. If they lived all their lives on --

QUESTION: I'm not talking about what Congress did but what their power would be.

Now, most States have game laws which limit the time when you can shoot pheasants and ducks and a lot of other things. And that doesn't mean you can shoot the pheasants if they come on your farm, does it?

MR. RANDOLPH: I don't think so; I'm not sure, depending upon the State.

QUESTION: Now, no State would have jurisdiction -- or would a State have jurisdiction to have its game laws reach the public lands of the United States?

MR. RANDOLPH: They do.

QUESTION: They do?

MR. RANDOLPH: They do. Traditionally the federal public land, the game in the federal public land is controlled by State game laws, while the habitat is managed by the federal government. That is only because of the federal government's letting the usual customary traditional laws --

QUESTION: But that isn't because of any lack of power of Congress to --

MR. RANDOLPH: Not at all. The federal government could and in fact has, with respect to wildlife refuges, with respect to bird sanctuaries, said that the State game laws shall not apply, that these animals shall not be killed at any time.

The ~~antelope~~ deer in the area we're talking about here, in the federal land in New Mexico, the quail, can still only be shot, I would suppose, if someone gets a State hunting license and goes out there.

QUESTION: Mr. Randolph, in the first or second sentence of the three-judge court opinion, they say these burros were wandering on private land. Do you say that finding is clearly erroneous?

MR. RANDOLPH: No, the -- what I was responding to is the contention that they spend the majority of their time on private land, and also the contention that this particular rancher saw these burros on private land. I don't think there's anything in the record -- they may have wandered --

QUESTION: Well, then, let me just be sure I understand it. Are you saying that finding is clearly erroneous?

MR. RANDOLPH: No.

QUESTION: So then we must assume that these 19 burros were on private land, and that's what precipitated the --

MR. RANDOLPH: Oh, no, no. I'm sorry, I misunderstood you. They were -- it's not disputed in this record that these burros were on public land when they were seized; they were on public land when they were discovered.

QUESTION: But they had been on private lands when the man made his complaint?

MR. RANDOLPH: They may have been on private land.

QUESTION: Well, the court so found. And do you contest that finding? That's what I --

MR. RANDOLPH: No, I don't dispute that.

QUESTION: So that we must assume, for purposes of decision, that they had been on private land?

MR. RANDOLPH: At some time. But how long, what

amount of time, --

QUESTION: But my question is, while they were on his private land, do you contend that the United States had jurisdiction over them?

MR. RANDOLPH: We would contend that he could not shoot them while they -- if they walked across his property.

QUESTION: Because of the federal statute.

MR. RANDOLPH: That's right. But that's not in issue, we think. They were found on federal public land, they were discovered on federal public land. How much time they spent on a piece of private property --

QUESTION: And they were taken from public land.

MR. RANDOLPH: And they were taken from federal public land by State agents, who came along without any permission from the Bureau of Land Management.

QUESTION: You're familiar with the -- you have in mind the statement to which Justice Stevens is referring, the first sentence of the second paragraph of the opinion in this case?

MR. RANDOLPH: Yes.

QUESTION: "The controversy involved here began when a New Mexico rancher, Kelley Stephenson, discovered several unbranded and unclaimed burros wandering on his private land." And you concede that's correct?

MR. RANDOLPH: If that -- I thought it said "and

public lands".

QUESTION: No. I know. That's -- and then, comma, "and also on public land". But he was referring to the clause that comes before the comma.

MR. RANDOLPH: If there was a period after that, I would say that's clearly erroneous, and not supported by the record. He found these burros -- he discovered these burros when he visited the Bureau of Land Management office, where they showed him a picture of them around the Taylor Well area.

QUESTION: "Discovered several of them wandering on his private land" is what it says, and that's the clause to which Mr. Justice Stevens is referring.

QUESTION: But of course that's still -- isn't that still consistent with your idea that by the time he complained and the New Mexico people actually came to get them, they were then on public land?

MR. RANDOLPH: Yes. How much time they spent on any private land within his -- that was owned by him or anybody else, I suppose, is not -- is not shown by the record. For all I know, that statement that they were found on -- did it refer to "his private land"?

QUESTION: Yes. Yes.

QUESTION: Is it clear that they could not have been some other burros?

MR. RANDOLPH: No. I don't think there's any way,

really, to tell the difference between one or the other, at least there's nothing --

QUESTION: There are more than 19 burros in that part of New Mexico, I would assume.

QUESTION: And they are all unbranded, by definition.

MR. RANDOLPH: According to -- surprisingly enough, according to the Bureau of Land Management, on the federal lands in New Mexico there's a total of about 100 burros, wild burros; that's all. And out of them, 64 are claimed by private individuals as having owned them, even though they may be unbranded. There are very few in New Mexico.

QUESTION: Isn't there something in the record to the effect that there are two million in the country, or --

MR. RANDOLPH: There were two million horses at one time within the Western Plains of the United States. Their number has dwindled, Congress found, down to about 20,000 by 1971.

QUESTION: Mr. Randolph, is there anything in the lease Mr. Stephenson had that touches on this subject, that mentions burros at all? Mr. Stephenson's lease to --

MR. RANDOLPH: His particular permit is not in the record.

QUESTION: What's that?

MR. RANDOLPH: It's not in the record. Now, I have asked the Bureau of Land Management. The only thing, so far

as I'm aware, is there are regulations now in the works that would say that if a rancher leasing Taylor Grazing Act land from the government to graze violates the Wild Horses Act, that his lease can be canceled.

So far as I'm aware now, that's not written into his permit.

QUESTION: Mr. Randolph, just so I'm perfectly clear, you are suggesting that when we decide this case, we need not tell a rancher who finds burros on his own private land whether he should follow the federal procedure, calling the federal people, or follow the State procedure, calling the State people? That's a question we save for some other case?

MR. RANDOLPH: That's right. If it ever comes up, and the only way that would come up is if a rancher -- I might say that that practice of having animals that go onto private land, wait until you get some official person to remove them is a traditional practice in the West. If you look at the New Mexico Estray Law, even a private landowner in New Mexico cannot say, if he sees a stray animal come onto his land, he can't take a gun out and shoot him. He's prohibited from doing that. He's got to call up the New Mexico Livestock Board and get their permission to come out and take it away. Which is precisely what the federal Act does.

QUESTION: Yes, but it makes a difference. He violates the federal law if he does that. And that we don't

tell him whether that's constitutional or not.

MR. RANDOLPH: That's right. I don't think that's an issue in this case.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Harris.

ORAL ARGUMENT OF GEORGE T. HARRIS, JR., ESQ.,

ON BEHALF OF THE APPELLEES

MR. HARRIS: Mr. Chief Justice, and may it please the Court:

We are in agreement with counsel as to the single question that we are faced with; and that's whether or not the subject Wild Horse Act exceeds the power of Congress under the property and commerce clauses; and we are in basic agreement, I think, with him on the factual recitation that he gave, with one or two minor exceptions, which I think I must first address.

The common misconception among people who haven't lived in the West or the Southwest and had to do with the ranching industry was expressed by counsel here this afternoon in argument, drawing the distinction, as he did, between the BLM land, public domain, and the fee land.

These burros, if Your Honors please, were found on Kelley Stephenson's ranch. He, for 19 years, has been a rancher in New Mexico, in this particular area, where he had, as you'll see from page 81 of the Appendix, on the plat, where

he had a relatively small ranch for that area, which consisted of these 8,000 acres of BLM land. But combined with that was about 3,000 acres of his own private fee land, and another thousand acres of State-leased land. That comprised his ranch.

And, as you'll see, it's bounded on --

QUESTION: When you say found on his ranch, that includes the Taylor Grazing land?

MR. HARRIS: That is correct, yes, sir.

QUESTION: That's the common way of referring to your ranch, is it?

MR. HARRIS: Yes, it is. And --

QUESTION: So when you say it was found on your ranch, you don't know whether it was found on Taylor Grazing land or on fee land?

MR. HARRIS: That is correct. Except that this record also contains the testimony of Kelley Stephenson, about these burros in general, from which I think you might well --

QUESTION: Is there some testimony that says whether they -- when he first found them they were -- did he ever find them on his fee land?

MR. HARRIS: No, I think -- he did not testify, nor is there any evidence in the record, as to these particular burros, that that was true. What he did say was that during the 19 years he had been there he had known some 8 or 10 of these wild animals --

QUESTION: Not these burros, he never knew --

MR. HARRIS: No, sir, he didn't --

QUESTION: -- no testimony whatsoever that these burros were ever found on his fee land?

MR. HARRIS: We will admit that, Your Honor. That is absolutely correct.

QUESTION: Well, then the district court is wrong in that sentence that Justice Stevens quoted to Mr. Randolph?

MR. HARRIS: I think not, Your Honor.

I do not admit that they were wrong, because of the statement I was about to make, about the testimony in the record from which I think the three-judge court might well have drawn a reasonable inference that these were the donkeys that had been seen in the past back up in the foothills on his fee land.

If you'll start -- I think it's at about 47 of the record, where he talks about having seen wild donkeys over to the east in the foothills on his fee land. He said that's mostly where they run, because that's the better land, and that's where they stay. On these particular ones, the first time they were seen was at the Taylor Well. That was spoken of. And that was, in fact, on BLM land, and they were seized by the Livestock Board there.

I think counsel has adequately set forth the facts in response to some questions propounded to him about his having

first made a complaint to the BLM people about the molestation of his cattle by these donkeys. And his unsuccessful attempt to do something about it through BLM, which necessitated his then going, of course, to the State authorities under our State Estray Laws for relief; which he got.

Because, in accordance with our State laws, they pick them up, and sold them at a public auction, as they have done, I suppose, since Statehood in New Mexico. A practice that's common throughout the Western States.

The point has already been made about the extension of this Act onto private land. It covers not only public land, it specifically covers private land in several particulars.

QUESTION: You don't suggest that this case raises that issue?

MR. HARRIS: Yes, I do, Your Honor.

QUESTION: Why is that?

MR. HARRIS: Well, I do it because this whole controversy arose out of more than just these 19 donkeys.

QUESTION: Well, I know, but what the issue -- what the complaint was about was -- this arose out of the fact that these 19 burros were taken from public land and sold.

MR. HARRIS: Yes, Your Honor, that's correct. But at page 66 of the Appendix, you will find a part of a series of correspondence between one of the plaintiffs in this

case, Mr. Lee Garner, who is the Director of the New Mexico Livestock Board, pointing up the real controversy that the State of New Mexico is having with the federal government, particularly the BLM, with respect to the Wild Horse Act. In the first, the very first paragraph he points out what the State's position is with respect to these animals that are found running either on private land or on public domain.

He claims ownership on behalf of the State of New Mexico of all of them. That is an issue in this case, notwithstanding what government counsel has to say about the narrow limited issues in the case.

QUESTION: Mr. Harris, just so I have it in mind, you brought a three-judge court complaint seeking a declaratory judgment that the whole statute is unconstitutional.

MR. HARRIS: That is correct.

QUESTION: And this question about the 16 animals and all the rest really goes to your standing to attack the entire statute, rather than --

MR. HARRIS: Yes, sir.

QUESTION: You're not appealing a condemnation order or anything like that.

MR. HARRIS: No, sir. I'm not concerned particularly with respect to this limited number of animals. I'm concerned with the Act itself. I'm still with my declaratory judgment. And that was the basis, I think, of the decision of the three-

judge federal court that struck it down.

It was on the basis that there was no power given by the Constitution to Congress under either the property or the commerce clauses to regulate, as they did here, completely and absolutely the control and, in effect, for all practical purposes, indeed the ownership of animals.

QUESTION: And you premise this, I gather, from that first paragraph you referred us to, at page 66, that the State has ownership of these animals, and whether they are on federal land or on private land or on State land --

MR. HARRIS: Indeed, Your Honor.

QUESTION: -- the federal government has no power of regulation?

MR. HARRIS: That is indeed our contention. It has been throughout, and was, in effect, the holding of the three-judge federal court in this.

QUESTION: Mr. Harris, if you will turn to your complaint in the Appendix at page 7, where you have paragraphs 6, 7, 8, all refer to what happened to Kelley Stephenson on or about the 20th day of January 1974 with these particular burros.

MR. HARRIS: Yes, Your Honor.

QUESTION: I would think that you really don't have standing to challenge the whole sweep of the Act unless you can point to factual situations such as this where there

has been an actual conflict or where someone has actually been harmed.

MR. HARRIS: Well, of course, I think the record does disclose an actual conflict between the State government and the federal government in this area, including the letter I just made reference to of Mr. Garner's. As to who has the jurisdiction and the right to regulate and control these wild animals. The State contends that it does.

Now, it's true that these allegations in those particular paragraphs are limited to that factual setting, but that was simply background material to point up what the controversy was which we think is justiciable, concerning which we sought a declaratory judgment on the constitutionality of the entire Act.

QUESTION: But doesn't the United States say that whoever owns the burros, and that one of their answers anyway is whoever owns the burros, the United States can certainly keep people from taking the burros from the public property?

MR. HARRIS: The United States contends that, and we deny that they --

QUESTION: I know you deny it, --

MR. HARRIS: Yes, sir, they do contend that.

QUESTION: -- but if we agree with the United States on that issue, would we need to go any further?

Let's assume we agree with the United States that

whoever owns the burros, the United States may prevent their being taken from the public land?

MR. HARRIS: Yes, sir.

QUESTION: Now, is that -- would the case be over, then?

MR. HARRIS: No, sir, I think not.

QUESTION: Why not?

MR. HARRIS: Well, because I think you must -- well, of course, perhaps it would be what you must look at to determine that question is whether or not there was a constitutional authority --

QUESTION: Well, you come back and say, Well, that may be so, but the Act also covers burros on private land.

MR. HARRIS: Yes, sir, it extends to that.

QUESTION: And you want that adjudicated, too.

MR. HARRIS: We do, Your Honor. That's a part of the case.

QUESTION: As Justice Stevens says, it's in the case. Or it suggests or asks.

MR. HARRIS: Now, let me point out --

QUESTION: Before you leave that, Mr. Harris, let me ask you one more question. I suppose it isn't enough for the State of New Mexico or for its Livestock Board simply to want to have something adjudicated, you -- in order to get a declaratory judgment as to the full sweep of a federal statute,

you've got to show that it has a direct and an immediate impact on you in some way, or at least on some of your clients, you can't just say that "we disagree with the theory on which this statute is enacted".

MR. HARRIS: Yes, sir.

And we think we have shown that here, if Your Honor please. In that, under State law, we went in, under our Estray Laws, and we took possession of these animals while they were on the public domain; animals that we admitted were unbranded and unclaimed, and therefore fit the definition under Section 2 of this Act as wild burros.

And we sold them in violation of the specific penalty provision, Mr. Lee Garner did, the Director of the Livestock Board, thereby subjecting himself to a \$2,000 fine -- \$2,000 and imprisonment for violation of Section 8 of the Act.

We think that that does make a justiciable controversy with respect to the Act's validity.

QUESTION: Well, you can certainly get an adjudication on what law governs that factual situation. My question is whether you can go beyond that and say, "And now there are a lot of other provisions of the law that aren't relevant to what Lee Garner did, or these 19 burros, but we want them decided, too".

MR. HARRIS: I'm sorry, I'm not sure I follow this, Your Honor.

QUESTION: Well, the taking -- for instance, the taking of burros on private land, or that are claimed by the United States Government, that it may regulate who may take and who may take and who may not take burros from concededly fee land, not lease land, not public land, but fee land. That really isn't raised by what happened to Kelley Stephenson.

MR. HARRIS: Well, we think that it is, in the sense that the three-judge federal court had before it evidence from which -- and I mentioned this a moment ago -- I think they could reasonably have inferred that these animals were at one time on his fee land, and may have gotten over onto public domain at the time they were noticed, at the time they were picked up that's where they were.

Now, that brings me to the point I was going to make about how this Act has been extended to cover private land by looking at the difference between the definition in the Act itself, as to what is a wild horse or a wild burro, and the regulations which have been promulgated by the Secretaries under it.

The definition of the Act is in Section 2(b): "all unbranded and unclaimed horses and burros on public lands of the United States".

But the definition contained in 4710.05 of the Secretary's regulations promulgated under that go a great deal

further. They say that it means all unbranded and unclaimed horses and burros and their offspring that have used public lands on or after December 15, 1971, or -- and this is an important phrase -- or that do use these lands as all or part of their habitat.

And I'm saying to you that these animals, upon this record, fit within that last category. Now, they are animals that were on his ranch, presumably on his fee land, that came onto the federal land, that could well have gone back to his fee land.

QUESTION: But the government didn't have to rely on that regulation.

MR. HARRIS: That is correct; yes.

QUESTION: And in this case.

MR. HARRIS: That is true, yes, sir.

Now, the --

QUESTION: Well, I suppose, Mr. Harris, that your premise, as I understood it, that the State owned these animals, that the State is the owner of these animals, --

MR. HARRIS: That is true, yes, sir.

QUESTION: -- and your premise is that that being true, the federal government has absolutely no power whatsoever under the commerce clause or the property clause --

MR. HARRIS: True.

QUESTION: -- to enact this statute, as applied to

animals owned by the State.

MR. HARRIS: Yes, sir.

QUESTION: And so it wouldn't matter whether the issue was -- whether factually it's true here that they were on private land, or public land, or only on one or the other, --

MR. HARRIS: That is true.

QUESTION: -- if that is true, you win the case.

MR. HARRIS: Yes, sir. And that is true, whether you're talking about horses or burros or elk or deer or whatever. That is our position.

QUESTION: Mr. Harris, in that connection, let's assume for the moment that the government fenced in, say, 10,000 acres of its own land with fences so high that the burros couldn't leap it or get out of it. Would the State have authority, in view of your view that the State owns these burros, to compel the government to take the fence down or at least to allow the burros to leave?

MR. HARRIS: Indeed. That is our position. We think that the State would certainly have that authority under the decided cases of this Court respecting ownership of game animals. I think that is true, yes, sir.

QUESTION: Do you have the same answer for deer?

MR. HARRIS: Yes, sir.

QUESTION: You think that really means that the State owns them, or that they are ownerless?

MR. HARRIS: To the extent --

QUESTION: Whether they aren't owned by anybody.

MR. HARRIS: To the extent that anyone can own game, the State does. That's what this Court held in Geer --

QUESTION: Well, do you mean something more than that the State has power to regulate the hunting or killing of them?

I take it you mean --

MR. HARRIS: I mean --

QUESTION: I take it you mean they actually own the animals themselves?

MR. HARRIS: They exercise all of the rights of ownership that we know of.

QUESTION: What's your authority for the fact that the State owns the animals rather than -- rather than just having the power to regulate the taking of them?

QUESTION: Geer v. Connecticut.

MR. HARRIS: Geer is the -- well, Geer wasn't the first case. Geer came down 80 years ago. Twenty years before that there was the Virginia case, that is --

QUESTION: Now, this is wild animals -- these are deer and elk?

MR. HARRIS: Yes, sir. Well, I think neither of them involved wild animals, Geer involved grouse, ruffed grouse and quail, and so forth. But that was, indeed, the holding of the Geer case.

QUESTION: And Toomer v. Witsell said that was a legal fiction.

MR. HARRIS: Yes, but they said this about it -- and I'm glad you brought it up -- because they say it's a legal fiction, expressive in legal shorthand, of the importance to its people that a State have the power to preserve and regulate the exploitation of an important resource.

QUESTION: Well, in that sense, the whole doctrine of parens patriae is legal fiction, too, isn't it?

MR. HARRIS: Yes, Your Honor.

QUESTION: And this is really an ownership like a parens patriae, it's an ownership for the benefit of all the people.

MR. HARRIS: Yes, sir, but it's the people of the State, in accordance with the decision in Geer, and Lacoste, which came along later. And in Toomer.

QUESTION: Well, Mr. Harris, you say that the State of New Mexico could take these donkeys off of the federal property and kill them?

MR. HARRIS: Yes, sir. Because I think the Act is unconstitutional and void, as violative of the Tenth Amendment, in that there is no power given to the Congress by our Constitution, either under the property clause or the commerce clause, to regulate animals which --

QUESTION: Well, would you have a right to go into

this man's private property and take his deer and shoot them?

MR. HARRIS: The State?

QUESTION: The State of New Mexico?

MR. HARRIS: Yes, sir. We indeed think that the State has that right.

QUESTION: Just go in and kill them?

QUESTION: Wild animals.

MR. HARRIS: Yes, sir; wild animals.

QUESTION: Well, what about wildlife in a national park?

MR. HARRIS: That's in a completely different category, because there you're dealing with a different categorization of federal land, you're dealing with lands that have, in effect, been withdrawn, either by Act of Congress or by cession from State --

QUESTION: Well, does the property clause read differently for that kind of land?

MR. HARRIS: Yes, sir. I think definitely the situation is different. There, in most instances, you have the consent of the State to the regulation by the federal government of the animals on the national parks. It's a completely different situation.

QUESTION: What about the Migratory Game Act, that's under what clause?

MR. HARRIS: The Migratory Game Act, if I can address

that for just a moment, involves, or did involve, basically the same argument that we've got here with our donkey case. Way back in 1914, I think was the first federal court decision on it, that came out of the State of Arkansas. U. S. v. Schafner,[?] which is cited in the briefs.

The involved a 1913 federal Act, called the Migratory Bird Act, and the federal court there, in Schavner,[?] struck it down as violative of the Constitution. And, incidentally, both the property clauses and the commerce clauses were relied upon by the government for their authority to pass that Migratory Bird Act.

That case was not appealed, that decision was not looked at by this Court.

A year later, in the State of Kansas, another federal district court did exactly the same thing. They said that the property clause and the commerc clause gives no authority to Congress to pass a Migratory Bird Act. And they did it on the basis of ownership of game.

Then in 1916, just a year after that, there was a treaty entered into between Great Britain and the United States involving the protection of migratory waterfowl between Canada and the United States and Mexico. That was a treaty. And following that, Congress passed another Act, called the Migratory Bird Treaty Act, which was the subject of a litigation in Missouri v. Holland in 1920, in which it was held that

the Congress did have authority to pass that, but it was the treaty-making authority which gave it to them, it wasn't the property clause which had been rejected in these two earlier federal court cases, nor was it the commerce clause, it was the treaty power.

That's not involved in our case. We don't have migratory fowl. As a matter of fact, the three-judge federal court so held. We're not talking a migratory situation with these animals. They tend to stay in one area, they don't migrate from State to State, and certainly not from country to country, as do the waterfowl.

I think those cases support our view in this case. I think the two earlier federal district court cases are exactly the theory that we are asserting to this Court in this case. That the property clause and the commerce clause do not give Congress authority to regulate in an area that has, since Statehood, since Nationhood, has belonged exclusively to the States; that is, the right to manage their game animals.

Now, I have not touched the commerce clause, nor was that discussed, I think, at length -- or at all, for that matter, by counsel for the government.

The commerce clause, as the lower court also found, and it's embodied in its opinion here, was not relied upon by Congress in this case. There is no congressional findings at all with reference to it. It isn't mentioned anywhere in

the Act. There isn't anything in this record -- and, incidentally, the federal government had the right to make a record and to put on evidence in this case, and they declined to do so. There is no evidence in this case, nor anywhere in this record, as to any burdens of any kind that would be imposed upon interstate commerce in this case with respect to these animals. That simply is not in the case. And the lower court so held, that the commerce clause was not involved.

As a matter of fact, the Act itself expressly bases its provisions upon the property clause by simply saying -- that this, I think, is a novel theory -- that these animals are a part of the land. That is the fallacy, the false premise upon which the whole argument of the government in this case is based. And it's asserted in a very short sentence on page 9 of the government's reply brief, where they say:

"These animals are part of the public domain."

They base their whole property clause argument upon the fact that these animals are part of the land.

Every case that they cite in their brief pertains to situations where either, No. 1, the case is concerned with a disposition or some control of the lands itself, or something that is related directly to it and a part of it. The Ashwander case, the T.V. Authority case, concerned government dams and electrical energy.

They either fell in that category of cases in their

brief, or they fell in the category of protecting the government's land against damage. And no one has any quarrel with that. Certainly the government has the right to do so.

But all their cases are directed to that proposition. They do not cite a case, nor have we found one, which stands for this new and novel proposition that wild animals are a part of the federal soil and therefore under our property clause we have the right to the exclusive regulation and the management and the ownership of them.

We think that the federal court was right in its ruling. Any reversal of that is going to have, I think, a catastrophic effect with respect to all 50 of the States as to their game regulation provisions, and certainly to the Western States, where, as here, Nevada, who is represented here at the counsel table today, there is some 86 percent of the lands within its State boundaries that belongs to the federal government, and in my State where more than a third of it does, or Alaska, where 90-plus percent of it does.

It's going to have a staggering effect upon not only the game management in all those States, but a tremendous economic impact upon the cattle and the ranching industries in all those States, and particularly the Western States, where, as here, the suggestion was made by counsel, all they've got to do is put a little drift fence across the middle of their ranch and protect their fee lands from these donkeys.

And that just isn't a practical solution to the problem.

There being no constitutional authority to Congress under either of these clauses, we think that the lower court's judgment must be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Harris.

Thank you, Mr. Randolph.

The case is submitted.

[Whereupon, at 3:15 o'clock, p.m., the case in the above-entitled matter was submitted.]

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