

THE STORY OF *KLEPPE V. NEW MEXICO*: THE SAGEBRUSH REBELLION AS UN-COOPERATIVE FEDERALISM

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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's 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.

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INTRODUCTION

On March 26, 2010, the governor of Utah made national news by signing a new statute giving the state eminent domain authority over almost all federal lands in Utah.¹ 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,² which seems clearly unconstitutional under the U.S. Constitution's Property and Supremacy Clauses.³ Some of the bill's proponents urged the state to exercise its new eminent domain power over the Grand Staircase-Escalante National Monument, which was established by President Clinton in defiance of Utah's elected representatives and is still

1. H.B. 143, 58th Leg., Gen. Sess., 2010 Utah 1258 (codified at UTAH CODE ANN. § 78B-6-503.5 (West 2010)).

2. H.B. 323, 2010 Legis. Gen. Counsel, Gen. Sess. (Utah 2010) (\$1 million per year for three years), available at <http://le.utah.gov/~2010/bills/hbillint/hb0323.pdf>; Scott Streater, *Utah Eminent Domain Law More Than a 'Message Bill,'* LAND LETTER, Apr. 1, 2010, <http://www.eenews.net/public/Landletter/2010/04/01/1>.

3. U.S. CONST. art. IV, § 3, cl. 2; U.S. CONST. art. VI, cl. 2.

a sore point among many residents.⁴ 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.⁵ Three months later, Lee shocked the Washington political establishment by defeating three-term incumbent Bob Bennett for the Republican nomination in Utah's Senate race.⁶ Lee won the seat the following November.⁷ By early 2011, six additional western state legislatures considered similar laws.⁸ In March, the Montana legislature joined the "legal challenge of federal land rights" by passing an eminent domain bill authorizing the state to acquire nationally owned lands.⁹

Why would Utah throw millions of dollars down the drain of futile litigation?¹⁰ 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

4. *Utah Enacts States Rights Challenge to Federal Lands*, PUB. LAND NEWS, Apr. 2, 2010, at 5.

5. Phil Taylor, *U.S. Not 'Sovereign' Over Federal Lands, Utah GOP Senate Candidate Says*, LAND LETTER, July 1, 2010, <http://www.eenews.net/public/Landletter/2010/07/01/1>.

6. Jeff Zeleny, *Nikki Haley Is Winner in South Carolina Runoff*, N.Y. TIMES, June 23, 2010, <http://www.nytimes.com/2010/06/23/us/politics/23elect.html?scp=1&sq=Nikki%20Haley%20Is%20Winner%20in%20South%20Carolina%20Runoff&st=cse>.

7. *New Faces in Congress*, N.Y. TIMES, Nov. 4, 2010, at 5.

8. Kirk Johnson, *Rallying for States' Rights, G.O.P. Legislators Tell Washington to Go Away*, N.Y. TIMES, Feb. 27, 2011, http://topics.nytimes.com/top/reference/timestopics/people/j/kirk_johnson/index.html?offset=50&s=newest (follow "States' Rights a Priority for G.O.P.-Led Legislatures" hyperlink).

9. Stephen Dockery, *Montana House Backs Bill Giving Montana Authority Over Federal Land*, RAVALLI REPUBLIC, Mar. 31, 2011, http://ravallirepublic.com/news/state-and-regional/article_59555386-1da0-533e-aa56-d96dfd7217e2.html (quoting bill supporter Montana Rep. Jonathan McNiven). On April 8, 2011, the legislature transmitted the bill to the governor, who has not yet acted on the statute, but he has indicated that he would veto anti-federal bills. *Detailed Bill Information: SB 254*, MONT. LEGISLATURE, [http://laws.leg.mt.gov/law_s11/law0203w\\$.startup](http://laws.leg.mt.gov/law_s11/law0203w$.startup) (find "Bill Type and Number" SB 254) (last visited Oct. 2, 2011); Johnson, *supra* note 8. ("The governor, who is from a family of ranchers, said he had just registered a cattle brand that spelled out the word 'veto.'").

10. Utah is just now gearing up for litigation, having expended funds appropriated by the 2010 law to prepare a notice of intent to file suit. The suit claims rights-of-way in the Garfield County portion of the Grand Staircase-Escalante National Monument. E-mail from John Hurst, Senior Policy Advisor, Utah Pub. Lands Policy Coordination Office, to Jeremiah Williamson (June 9, 2011, 4:48 PM) (on file with author).

natural resources. The political movement feeding on this frustration, compounded by judicial setbacks, goes by many names today. But the original label is the “Sagebrush Rebellion.”¹¹

The Sagebrush Rebellion was born of similarly hopeless litigation which increased traditional commodity users’ anger about their perceived loss of control over federal land management. The story of *Kleppe v. New Mexico*¹² illustrates how litigation itself, even when it yields no judicial relief, can serve as a powerful organizing tool for political movements.¹³ Social science scholarship richly documents this phenomenon in the context of the civil rights and economic justice movements.¹⁴ 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 and Montana (like New Mexico and Nevada before them) can be sustained by “successful failures.”¹⁵

This Article aims to understand a landmark Supreme Court decision as a crucial early spark of the rebellion by exploring the case’s context and political significance. Such an approach explains why a state would embark 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.¹⁶ 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

11. See generally John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).

12. 426 U.S. 529 (1976).

13. See MICHAEL W. McCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 278–80 (1994) (discussing how movement-building outcomes can be more important than direct policy results or the creation of new rights); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE 8 (Univ. of Mich. 2d ed. 2004) (1974) (same).

14. 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. See *infra* Part IV.

15. WEINBAUM, *supra* note 14, at 267.

16. U.S. CONST. art. IV, § 3., cl. 2.

influence public land management,¹⁷ the *Kleppe* litigation's legacy of "un-cooperative federalism" remains a common and effective response.¹⁸

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.¹⁹ Storytelling reveals the complex motivations and background facts of parties and disputes.²⁰ It counteracts the tendency of theory to gloss over particulars that reveal important aspects of legal developments.²¹ There is no collection of natural resource or federal public land stories, and they are almost entirely absent from the Environmental Law Stories anthology.²² If there were such a collection, surely

17. Cooperative federalism is an arrangement of power under which a national government induces coordination from subordinate jurisdictions. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 200 (2005); see also *infra* notes 268–71, 318–24 and accompanying text (discussing cooperative federalism).

18. We employ the term "un-cooperative federalism" to contrast the legacy of *Kleppe* with the common statutory approaches to cooperative federalism. See, e.g., Kirk Johnson, *States' Rights Is Rallying Cry for Lawmakers*, N.Y. TIMES, Mar. 16, 2010, www.nytimes.com/2010/003/17/us/17states.html (discussing the continued popularity of "un-cooperative federalism"); see also Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (developing a framework for understanding different kinds of un-cooperative federalism); *infra* notes 322–26 and accompanying text. Along the continuum from polite conversation toward restrained disagreement, to "fighting words," our example of un-cooperative federalism is on the far end of, and possibly beyond, civil disobedience. Bulman-Pozen & Gerken, *supra*, at 1271; see also *infra* notes 324–28 and accompanying text.

19. See generally ADMINISTRATIVE LAW STORIES (Peter L. Strauss ed., 2006); CONSTITUTIONAL LAW STORIES (Michael C. Dorf ed., Found. Press 2009) (2004); ENVIRONMENTAL LAW STORIES (Richard J. Lazarus & Oliver A. Houck eds., 2005).

20. See JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 1–6, 14–21 (Univ. of Cal. Press 2002) (1976) (stories unmask the participants in legal disputes and illuminate underlying humanity). See generally JAMES BOYD WHITE, THE LEGAL IMAGINATION (Univ. of Chi. Press 1985) (1973) (seminal work on the role of narrative in understanding the meaning of law).

21. Paul Gewirtz, *Narrative and Rhetoric in the Law*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 2, 6 (Peter Brooks & Paul Gewirtz eds., 1996). Perhaps more relevant to the *Kleppe* story is its "healthy disruption and challenge to [legal doctrine, economic analysis, or philosophic theory]." Martha Minow, *Stories in Law*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra*, at 24, 36. But see JOHN COPELAND NAGLE, LAW'S ENVIRONMENT: HOW THE LAW SHAPES THE PLACES WE LIVE 251 (2010) ("[S]torytelling, like the Sun in the sky, obscures as much as it reveals.") (quoting Timothy Ferris).

22. See generally ENVIRONMENTAL LAW STORIES, *supra* note 19. However, Oliver Houck has told the stories of several natural resources cases, including foreign ones. See 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*

Kleppe would warrant treatment as a critical buttress of modern natural resources law.²³ All of the major natural resources casebooks feature *Kleppe v. New Mexico* as a principal case.²⁴ But the story of *Kleppe* teaches more about public land lawmaking than the Court's expounding on the Constitution's Property Clause.

Kleppe dramatizes the changing relationship between live-stock ranchers and the public rangelands. It describes how 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 (WFRHBA)²⁵—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 western United States (the West). Further legislation passed in the wake of

Landscape, 70 TUL. L. REV. 2279, 2291–99 (1996) (recounting the United States' land law story of *West Virginia Division of the Izzak Walton League v. Butz*, 522 F.2d 945 (4th Cir. 1975)); *id.* at 2300–08 (recounting the story of *Natural Resources Defense Council v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1976)); Oliver Houck, *Unfinished Stories*, 73 U. COLO. L. REV. 867, 909–21 (2002) (recounting the United States' land law story of *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

23. 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 D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495 (1986) (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, 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, 823–25, 834–39 (1980); Linda Williams, Note, *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 (1976).

24. *See* GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 163 (6th ed. 2007); 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); JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 148 (2d ed. 2009).

25. Wild Free-Roaming Horses and Burros Act, Pub. L. No. 92-195, 85 Stat. 649 (1971) (codified as amended at 16 U.S.C. §§ 1331–40 (2006)).

Kleppe intensified this political unrest into the full-blown Sagebrush Rebellion. Though the *Kleppe* litigation failed to undermine Congress's 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.²⁶ The 1971 Wild Free-Roaming Horses and Burros Act²⁷ was not a part of that agenda, but it turned out to be the opening salvo in a decade-long battle over public land lawmaking. The 1971 law signaled the diminution of ranchers' 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.²⁸ 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 of the 1970s and the subsequent "wise use" wars over public lands.²⁹ The Article proceeds in four parts.

Part I 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 aimed at soil conservation imposed new regulations on public land graziers, that purpose served the long-term interest of ranchers. In contrast, the 1971 Wild Free-Roaming Horses and Burros Act displaced ranching as the de facto priority use of public rangelands and helped trigger the Sagebrush Rebellion.

Part II focuses on the lawsuit challenging the 1971 statute and describes the stakeholders, arguments, and ultimate resolution by the U.S. Supreme Court. Delivered by a unanimous Court, *Kleppe v. New Mexico* now stands as the leading case interpreting the Constitution's Property Clause as

26. PUB. LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND (1970).

27. Pub. L. No. 92-195, 85 Stat. 649.

28. SCHEINGOLD, *supra* note 13, at 3–9.

29. See ROBERT B. KEITER, KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA'S PUBLIC LANDS (2003) (discussing "wise use" wars that succeeded the Sagebrush Rebellion); WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS (Charles Davis ed., 2d ed. 2001); Florance Williams, *Sagebrush Rebellion II*, HIGH COUNTRY NEWS, Feb. 24, 1992, at 1. Even today, a Utah group opposing federal management of roads on public lands calls itself the Sagebrush Coalition. Jen Jackson, *The Revolution Will Be Motorized*, HIGH COUNTRY NEWS, June 14, 2011, <http://www.hcn.org/hcn/wotr/the-revolution-will-be-motorized>.

a very broad grant of power to Congress. Though New Mexico failed to persuade even a single Justice, its litigation promoted greater political momentum in the West to resist public natural resources law reform.

Part III 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 III also examines the federal legislation and an ill-fated attempt by Nevada to control public rangelands.

Part IV explores the ways in which social science scholarship helps explain how 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 (such as Senator Mike Lee) and profoundly influenced implementation of the public land statutes.

I. PUBLIC RANGELAND LAW

The federal government today manages nearly 330 million acres of public rangelands mostly scattered across sixteen western states.³⁰ The Bureau of Land Management (BLM) oversees roughly 160 million acres of these lands, divided into more than 21,000 allotments authorized for grazing under nearly 18,000 permits.³¹ The Forest Service manages grazing on an additional ninety-six million acres of public land.³² The size of this part of the public estate has changed little since the 1930s. Before then, disposal dominated federal public land

30. *About Rangelands*, U. S. FOREST SERVICE, <http://www.fs.fed.us/rangelands/whoweare/index.shtml> (last visited May 4, 2011).

31. *Fact Sheet on the BLM's Management of Livestock Grazing*, BUREAU OF LAND MGMT., <http://www.blm.gov/wo/st/en/prog/grazing.html> (last updated Sept. 27, 2011).

32. *About Rangelands*, *supra* note 30.

policy.³³ The United States divested itself of considerable acreage through statehood and homestead acts, railroad grants, and other devices.³⁴ 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.”³⁵ However, the federal government retained a substantial amount of dry, rocky land that was not suitable for agriculture and valuable only as pasturage.³⁶ These relatively infertile western lands constitute the majority of the public rangelands.³⁷

A. Rangeland Conflict and the Taylor Grazing Act

Competition for scarce resources—forage and water—prompted disputes on the public rangelands.³⁸ In the early years of grazing on public rangelands, beginning in the 1880s, “adjudication of range rights . . . was mostly by sword and pistol.”³⁹ 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.⁴⁰ These fights over resources often pitted graziers against each other (large versus small operations, or cattle versus sheep ranchers) or against homesteaders.⁴¹ In 1885, Congress reacted to the conflicts by passing the Unlawful Enclosures Act,⁴² which limited one tool that ranchers had used to exclude others: fences. This was but the first of many federal restrictions to come.

33. Disposal involves the transfer of property out of federal ownership. MARION CLAWSON & BURNELL HELD, *THE FEDERAL LANDS: THEIR USE AND MANAGEMENT* 5–7, 17, 22–27 (1957).

34. COGGINS ET AL., *supra* note 24, at 89–117.

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

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

37. DEBRA L. DONAHUE, *THE WESTERN RANGE REVISITED* 13 (1999).

38. *See generally* Foss, *supra* note 36.

39. M.W. Talbot & F.P. Cronemiller, *Some of the Beginnings of Range Management*, 14 J. RANGE MGMT. 95, 95–96 (1961).

40. *Id.*

41. DONAHUE, *supra* note 37, at 20–21.

42. 43 U.S.C. § 1061 (2006); *see also* *Leo Sheep Co. v. United States*, 440 U.S. 668, 684 (1979).

Once the range wars quieted, Congress mostly ignored the rangelands for the next fifty years. Founding Forest Service Chief, Gifford Pinchot, exercised his broad (but vague) legislative authority to impose permit requirements on graziers using national forest rangelands.⁴³ The backlash from ranchers was fierce.⁴⁴ But passive neglect characterized federal management over most public rangelands, especially outside of the national forests. Thus, the classic “tragedy of the commons” unfolded, resulting in overgrazing of public lands.⁴⁵

The slow recognition of range degradation resulting from government mismanagement laid the groundwork for reform.⁴⁶ By the early 1900s, overgrazing already had noticeably reduced the capacity of the public range to support livestock.⁴⁷ Still, it took the great dust storms of the mid-1930s to prompt congressional enactment of the Taylor Grazing Act of 1934 and its 1936 amendments.⁴⁸ 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.⁴⁹ The Act expressed the then-dominant view that livestock grazing was “the highest use of the public lands pending its final disposal.”⁵⁰ The disposal language meant that “the federal government considered public lands as temporary holdings to be claimed, privatized, and homesteaded as the nation

43. See *United States v. Grimaud*, 220 U.S. 506 (1911) (upholding grazing permits and fees notwithstanding that there is no mention of them in the legislation authorizing national forest management).

44. Houck, *The Water, the Trees, and the Land*, *supra* note 22, at 2302–03.

45. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244 (1968) (using overgrazing as illustration of “tragedy of the commons” where no user of common resources can exclude others).

46. Talbot & Cronemiller, *supra* note 39, at 97.

47. *Id.*

48. Taylor Grazing Act, ch. 865, 48 stat. 1269 (1934) (codified as amended at 43 U.S.C. § 315 (2006)); see also E. LOUISE PEFFER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES 1900–50*, at 214–24 (1951) (describing history of the Act).

49. See 43 U.S.C. § 315 (2006).

50. *Id.* 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 142 million acres. Act of June 26, 1936, Pub. L. No. 827, ch. 842, 49 Stat. 1976. Eighteen years later, Congress removed the acreage limitation altogether. Act of May 28, 1954, Pub. L. No. 375, ch. 243, 68 Stat. 151.

matured.”⁵¹ 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.⁵²

In practice, the Taylor Grazing Act operated for the benefit of ranchers.⁵³ The Interior Department delegated most important decisions to local grazing districts and boards. Grazing advisory boards composed exclusively of ranchers worked with “stockmen” district administrators to manage rangelands and determine proper grazing intensities.⁵⁴ “To Western stockmen, these may have been public lands, but they were *their* public lands.”⁵⁵ Despite the reforms of the 1970s, which implemented environmental regulations and comprehensive federal resource planning regimes, the Taylor Grazing Act remains the basic legal framework for allocating range resources.⁵⁶

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. Horses and burros compete directly with livestock for water and forage.⁵⁷ Compounding this conflict, horses and burros lack limits on population growth because they have no natural predators on the rangelands.⁵⁸ The wild horses and burros that inhabit North America are not native species, but are the descendants of strays and abandoned animals.⁵⁹ The

51. 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. McGreggor Cawley eds., 1996) (discussing pre-1964 Interior Department policy).

52. PUB. LAND LAW REVIEW COMM'N, *supra* note 26, at 43.

53. See Richard H. Braun, *Emerging Limits on Federal Land Management Discretion: Livestock, Riparian Ecosystems and Clean Water Law*, 17 ENVTL. L. 43, 52–58 (1986); George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 100 (1982).

54. Houck, *The Water, the Trees, and the Land*, *supra* note 22, at 2303.

55. *Id.* at 2301.

56. See *infra* text accompanying notes 315–23.

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

58. *Id.* at 505.

59. *Id.* at 505–06.

oldest lineage traces its roots to the Spanish conquistadors⁶⁰ but today it accounts for only a small fraction of the horses and burros inhabiting the public lands.⁶¹ 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 survive in a harsh land.⁶²

The American market demands little horsemeat, and wild horses interfered with the more profitable use of public rangelands, namely livestock grazing. Therefore, although many ranchers tolerated wild horses for both aesthetic and commercial reasons, others viewed the horses as feral pests.⁶³ As a result, federal agents frequently removed wild horses and burros from the public range.⁶⁴ Federal agents, however, were not the only people taking wild burros and horses from the public lands. In fact, virtually every western state legislature provided state agencies with the authority to remove abandoned, stray, or unbranded burros and horses.⁶⁵ 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 natural predators necessitated population culling.⁶⁶

When the demand for pet food made horse hunting a profitable venture, the broad language of state estray laws

60. *Id.*

61. *Id.*

62. *Id.*

63. RICHARD SYMANSKI, *WILD HORSES AND SACRED COWS* 131 (1985). Besides horsemeat, the other major commercial use of wild horses was slaughter for the production of glue. *See, e.g., Hatahley v. United States*, 351 U.S. 173, 176 (1956).

64. *See, e.g., Hatahley*, 351 U.S. at 176 (involving federal officers removing free-roaming horses pursuant to Utah's abandoned horse statute). Though some "removed" animals would be shot on site, others would be sold for horsemeat or glue feedstock. *Id.*

65. *See, e.g.,* ARIZ. REV. STAT. § 3-1336 (1952); CAL. FOOD & AGRIC. CODE § 16521 (West 1933); COLO. REV. STAT. § 35-44-101 (1969); IDAHO CODE ANN. § 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 ANN. § 4-25-1 (West 1953); WYO. STAT. ANN. § 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 Pub. Lands of the H. Comm. on Interior and Insular Affairs*, 92d Cong. 147-50 (1971) [hereinafter *House Hearings*] (statement of Dean Prosser, President, International Livestock Brand Conference).

66. SYMANSKI, *supra* note 63, at 65; *see also* Pitt, *supra* note 57, at 517 n.75 (noting that before the Act, ranchers often managed horse populations in cooperation with horse advocacy groups).

facilitated a new business.⁶⁷ 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.⁶⁸

Such atrocities gained national media attention during the 1950s, resulting in the passage of the Wild Horse Annie Act,⁶⁹ which prohibited both the poisoning of watering holes and the use of motorized vehicles to hunt horses and burros.⁷⁰

However, the Wild Horse Annie Act failed to protect the wild horses and burros because hunters simply resorted to non-motorized means of capture.⁷¹ Moreover, state livestock boards continued to remove animals interfering with commercial grazing.⁷² In response, Congress reformed public rangelands management with the WFRHBA.⁷³ This Act gave sweeping protections to all unclaimed and unbranded horses and burros on public lands, prohibiting their capture, branding, harassment, and killing.⁷⁴ It “essentially reversed BLM’s

67. BUREAU OF LAND MGMT., DEP’T OF INTERIOR, OUR PUBLIC LANDS 3 (1980) [hereinafter *OUR PUBLIC LANDS*].

68. Pitt, *supra* note 57, at 506.

69. Pub. L. No. 86-234, 73 Stat. 470 (1959) (codified as amended at 18 U.S.C. § 47 (2006)). 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 Fight to Save a Memory*, 50 TEX. L. REV. 1055 (1972), for Ms. Johnston’s account of her experiences with common wild-horse-gathering practices and her efforts to protect the wild horse.

70. 18 U.S.C. § 47 (2006). The Act’s actual prohibition is for “pollution” of watering holes for the purpose of trapping, killing, wounding, or maiming. *Id.*

71. Pitt, *supra* note 57, at 506–07; see also Johnston, *supra* note 69, at 1057–59 (suggesting that the Wild Horse Annie Act was only half-heartedly enforced in the West, in part due to the influence of livestock interests).

72. SYMANSKI, *supra* note 63, at 129.

73. Wild Free-Roaming Horses and Burros Act, Pub. L. No. 92-195, 85 Stat. 649 (1971) (codified as amended at 16 U.S.C. §§ 1331–1340 (2006)).

74. *Id.*

grassland management policy,”⁷⁵ declaring wild burros and horses to be “an integral part of the natural system of the public lands.”⁷⁶ However, the horses and burros do considerable damage to the rangeland ecosystems:

By passage of [the WFRHBA] the U.S. 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.⁷⁷

The WFRHBA directed the BLM to shift its attention from managing grazing for the long-term benefit of ranching to “protection of specific rangeland resources,” including horses and burros.⁷⁸

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 forage and water.⁷⁹ The Act indirectly required ranchers to subsidize horse and burro access to water with extra fuel to run well pumps and repair horse and burro-caused damage, thus increasing the operating costs of an already marginally profitable industry.⁸⁰ Ranchers correctly sensed that the 1971 law signaled a loss of control over public rangelands.

Even though statutory protections for horses and burros imposed costs on ranching, the legislative history displays indifference toward these economic harms.⁸¹ Support for the

75. Pitt, *supra* note 57, at 515.

76. 16 U.S.C. § 1331 (2006).

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

78. Today, the WFRHBA joins a host of other statutes that direct BLM to embrace such rangeland resources as riparian areas, threatened and endangered species, sensitive plant species, and cultural or historical objects. *Fact Sheet on the BLM's Management of Livestock Grazing*, *supra* note 31. Focusing on these objectives may impair ranching interests.

79. See SYMANSKI, *supra* note 63, at 137–39.

80. *Id.* at 137–38. The operator of one ranch estimated that the damage from wild horses resulted in a \$50,000 per year increase in operating costs. *Id.* at 137.

81. See Pitt, *supra* note 57, at 513. See generally *House Hearings*, *supra* note 65; *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 Pub. Lands of the S. Comm. on Interior and Insular Affairs*, 92d Cong. 23–24 (1971) (statements of Sen.

legislation and the plight of the wild horse dominated the congressional hearings, with representatives taking considerable time to pat themselves on the back for engaging in so worthy a cause.⁸² Congressman after congressman made the case against the “savage destruction”⁸³ of the “living symbols of the historic significance and pioneer spirit of the West,”⁸⁴ each time generating responses of congratulation and thanks from other representatives.⁸⁵ 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 hearts,”⁸⁶ committee members commended and thanked him for his efforts.⁸⁷

When ranchers 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.⁸⁸ 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.”⁸⁹ He then expressly refuted the claim that “western livestock interests sought to extinguish wild horses and burros”⁹⁰ 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

Church acknowledging the “many heartfelt letters the committee has received from schoolchildren throughout the Nation urging the preservation of wild horses and burros”).

82. *House Hearings*, *supra* note 65, at 10–16 (statements of Reps. Johnson, Foley, Roncalio, Williams, Steiger, and Baring).

83. *Id.* at 14 (statement of Rep. Williams).

84. *Id.* at 17 (statement of Rep. Gude).

85. *See, e.g., id.* at 16 (statements of Reps. Dellenback, Baring, and Williams).

86. *Id.* at 19 (statement of Gregory Gude, son of Rep. Gude); see also *id.* at 137 (testimony of Hope Ryden), for another child’s letter expressing support for the plight of the wild horse.

87. *Id.* at 19–20 (statements of Reps. Steiger, Saylor, and Dellenback).

88. *See, e.g., id.* at 117–18 (statement of Karl Weikel, American National Cattlemen’s Association).

89. *Id.* at 117.

90. *Id.*

Representative Johnson asked whether ranching interests actually “believe in protecting the wild horse.”⁹¹

Making matters worse, grazing interests appeared disorganized and disjointed on approaches to the proposed legislation. The Wyoming Wool Growers Association argued in support of establishing horse refuges,⁹² while the National Cattlemen’s Association argued adamantly against refuges.⁹³ The testimony of one witness, who described the viciousness of the “wild jackass,” suggested that ranching interests were at a loss for dealing with the media frenzy that surrounded the push for horse protection.⁹⁴

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.”⁹⁵ As if to marginalize rancher concerns, the House Subcommittee on Public Lands scheduled the testimony of a fourth grader to follow the joint testimony of the National Cattlemen’s Association and the National Wool Growers Association.⁹⁶ Unable to find relief in the legislative process, the primary users of the public rangelands turned to other avenues which are explored in the subsequent parts of this Article.

The ranchers had few friends in Congress who were willing to stand up to the sentiment of the WFRHBA supporters. This is particularly striking given the prominent role that otherwise rancher-friendly western members of Congress played in drafting the statute. The Senate version of the WFRHBA passed without dissent on June 29, 1971.⁹⁷ A House bill with only minor differences unanimously passed on October 4, 1971.⁹⁸ Congress reconciled and enacted the law later that

91. *Id.* at 128 (question of Rep. Johnson).

92. *Id.* at 131–33 (statement of Robert P. Bledsoe, Executive Secretary, Wyoming Wool Growers Association).

93. *Id.* at 123 (testimony of Karl Weikel).

94. *Id.* at 117, 123. Mr. Weikel’s objections were not limited to the vicious nature of the wild burro, as he went on to explain that “[i]t 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.

95. Pitt, *supra* note 57, at 513.

96. *House Hearings, supra* note 65, at 142–43.

97. 117 CONG. REC. 22,671 (1971).

98. *Id.* at 34,782.

year, and President Nixon signed the WFRHBA on December 15, 1971.⁹⁹

The new law could not change the fact that 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.”¹⁰⁰ Nevertheless, the WFRHBA declares that wild equids are “an integral part of the natural system of the public lands.”¹⁰¹ 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.”¹⁰² The idea that 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.¹⁰³ This general tone of protectionism, rather than balanced management,¹⁰⁴ likely is the reason the WFRHBA received virtually no support from environmental groups.¹⁰⁵

Due in part to these flaws, the BLM has struggled to implement the Act. In 1980, BLM estimated the yearly cost to administer the Act would reach \$40 million.¹⁰⁶ Three decades later, the annual price tag continues to rise.¹⁰⁷ The WFRHBA

99. Wild Free-Roaming Horses and Burros Act, Pub. L. No. 92-195, 85 Stat. 649, 651 (1971); *see also* H.R. REP. NO. 92-681 (1971) (Conf. Rep.); ENVTL. POLICY DIV., CONG. RESEARCH SERV., 74-795, REPORT ON PUBLIC LAND POLICY: ACTIVITIES IN THE 92D CONGRESS 1-2 (1972).

100. Michael L. Wolfe, *The Wild Horse and Burro Issue, 1982*, 7 ENVTL. REV. 179, 183 (1983); *see also* Richard H. Gilluly, *The Mustang Controversy*, 99 SCI. NEWS 219, 220 (1971) (noting that horses compete with mule deer for food and that restoring desert big horn sheep populations would require “drastic reductions” in horse populations).

101. 16 U.S.C. § 1331 (2006).

102. *Id.* § 1333 (emphasis added).

103. *See* Wolfe, *supra* note 100, 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”).

104. *See* Wolfe, *supra* note 100, at 183.

105. The Sierra Club did submit one page of written testimony in support of horse protections. *House Hearings, supra* note 65, 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’s Property Clause power provided a strong foundation for protecting environmental interests in federal lands.

106. *House Hearings, supra* note 65, at 183-84.

107. *Fact Sheet on the BLM’s Management of Livestock Grazing, supra* note 31. The fiscal year 2010 operating appropriations for the program were \$64 million,

seeks to promote adoption of excess wild horses as an alternative to slaughter. On average, about half of the WFRHBA's implementation costs arise from the adoption program, which has been such a failure that almost as many horses now dwell in BLM holding pens as live in the wild.¹⁰⁸ Conditions in the pens can be unhealthy for the animals, breeding disease due to overcrowding.¹⁰⁹ The federal government estimates that the public rangelands support over 35,000 wild horses, which is about 10,000 horses in excess of carrying capacity.¹¹⁰ Even with over 30,000 animals in BLM corrals and pastures, the number of wild horses and burros on the rangeland continues to grow.¹¹¹ The result is overgrazing, soil erosion, and the destruction of mule deer, elk, and antelope habitat.¹¹² Amendments to the WFRHBA in 1978, part of the Public Rangelands Improvement Act,¹¹³ were intended to rein

and the President's fiscal year 2011 budget asks for \$76 million. *BLM Looking for Wild Horse Sanctuaries*, PUB. LAND NEWS, Apr. 8, 2011, at 14.

108. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-77, BUREAU OF LAND MANAGEMENT: EFFECTIVE LONG-TERM OPTIONS NEEDED TO MANAGE UNADOPTABLE WILD HORSES 7-8 (2008). Representative 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 65, at 22; *see also* Phil Taylor, *BLM Announces 'New Direction' for Horse and Burro Program*, LAND LETTER, June 10, 2010 [hereinafter, Taylor, *New Direction*], http://plc.cylosoftdemo.com/CMDocs/PublicLandsCouncil/WILD_HORSES_E&E.pdf (stating that around seventy percent of the annual budget for wild horses and burros is spent on animals in BLM corrals and pastures).

109. Nick Neely, *Eligible Mustangs*, HIGH COUNTRY NEWS, Apr. 12, 2010, <http://www.hcn.org/issues/42.6/eligible-mustangs> (describing the BLM adoption program); *see also* Phil Taylor, *BLM Facilities Reach Capacity as Herds Boom*, LAND LETTER, May 14, 2009, <http://www.eenews.net/Landletter/2009/05/14/7/> [hereinafter, Taylor, *Herds Boom*] (describing animal rights activists' displeasure with many aspects of the BLM corral program).

110. *BLM looking for Wild Horse Sanctuaries*, *supra* note 107, at 14.

111. *See* Lyndsey Layton & Juliet Eilperin, *Salazar Presents Ambitious Plan to Manage Wild Horses; Preserves in Midwest and East, Sterilizations Proposed as Population Grows Beyond Control in West*, WASH. POST, Oct. 8, 2009, at A3; Taylor, *Herds Boom*, *supra* note 109; Taylor, *New Direction*, *supra* note 108 (stating that the BLM estimates that herd numbers could grow to 325,000 by year 2021 without countermeasures). The BLM, on at least one occasion, indicated the need to euthanize animals due to overpopulation and the excessive costs of holding the animals. Taylor, *Herds Boom*, *supra* note 109.

112. *See, e.g.*, Taylor, *Herds Boom*, *supra* note 109.

113. 43 U.S.C. §§ 1901-1908 (2006). 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

in administrative costs and to provide more authority for the BLM to combat overpopulation, but many of the original problems remain.¹¹⁴ In addition to direct costs, indirect expenses of 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.¹¹⁵

II. THE LITIGATION

Kelley Stephenson was a New Mexico livestock rancher.¹¹⁶ Pursuant to the Taylor Grazing Act, Stephenson held grazing rights to some 8,000 acres of public rangeland.¹¹⁷ 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 as the Taylor Well.¹¹⁸ 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 or diesel generators usually run the pumps, which ranchers visit and

burros which pose a threat to themselves and their habitat and to other rangeland values." *Id.* § 1901(b)(4).

114. Recent proposals by the Obama Administration to address ongoing problems with the administration of the WFRHBA include: providing additional funding, relocating herds from the West to midwestern or eastern lands, and increasing the use of infertility drugs and promoting partnerships with private and nongovernmental entities. *See, e.g.,* Layton & Eilperin, *supra* note 111; April Reese, *Eastward Ho! BLM Proposes New Sanctuaries in More Populated States*, LAND LETTER, Oct. 15, 2009; *DoI Proposes New Preserves as Part of Wild Horse Plan*, PUB. LAND NEWS, Oct. 16, 2009, at 1; *Obama Administration Fashions Multi-Part Wild Horse Solution*, PUB. LAND NEWS, Oct. 13, 2009.

115. 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.,* Am. Horse Prot. Ass'n v. Watt, 694 F.2d 1310 (D.C. Cir. 1982); *Dahl v. Clark*, 600 F. Supp. 585 (D. Nev. 1984); *Animal Prot. 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 certain aspects of one Wild Free-Roaming Horses and Burros case litigated by the Rutgers Law School Animal Rights Law Clinic as "spurious" and "perversely counterproductive").

116. *Kleppe v. New Mexico*, 426 U.S. 529, 533 (1976).

117. *Id.*

118. *Id.* Coincidentally, it was the Taylor Grazing Act under which Stephenson acquired his permit to use the allotment. *Id.*

refuel on a regular basis. Because of the importance of wells to a livestock operation, as well as the time and labor required to develop and maintain them, ranchers guard wells 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.¹¹⁹ Stephenson requested that the BLM remove the burros because they were eating the feed he put out for his livestock and harassing his animals.¹²⁰ Stephenson may also have been concerned that the burros were competing with his livestock for access to water at the Taylor Well.¹²¹ Regardless, BLM made it clear that no removal would occur.¹²² 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 Mexico¹²³

The New Mexico Livestock Board is part of the oldest law enforcement agency in the state.¹²⁴ It originally consisted of two separate agencies—the Cattle Sanitary Board, founded in 1887, and the Sheep Sanitary Board, founded in 1889.¹²⁵ The two agencies merged in 1967 to form the New Mexico Livestock Board.¹²⁶ After passage of and pursuant to the WFRHBA, the board entered into a cooperative agreement with the Secretaries of the Interior and Agriculture to implement the

119. *New Mexico v. Morton*, 406 F. Supp. 1237, 1237 (D.N.M. 1975).

120. *Id.* at 1238.

121. Oral Argument at 8:20, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), available at http://www.oyez.org/cases/1970-1979/1975/1975_74_1488 (last visited July 27, 2011). The government stated at oral argument that Stephenson learned of the burros while visiting the local BLM office, which had photos of the burros standing around the well. *Id.* at 8:00–9:08.

122. *Kleppe v. New Mexico*, 426 U.S. 529, 533 (1976).

123. N.M. STAT. ANN. § 47-14-1 (1966).

124. NEW MEXICO LIVESTOCK BOARD, <http://www.nmlbonline.com> (last visited June 25, 2011).

125. *Id.*

126. *Id.*

Act. Apparently displeased with the results, the board terminated the agreement in November 1973.¹²⁷

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.¹²⁸ Each burro was seized from federal land; none was taken from private land.¹²⁹ That same day, in accordance with usual practice, the Board sold the burros at public auction.¹³⁰ After the sale, the BLM asserted jurisdiction under the WFRHBA and "demanded that the [b]oard recover the animals and return them to the public lands."¹³¹ The fight was on.

A. New Mexico v. Morton

In response to the BLM's demand for the return of the seized burros, the State 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.¹³² The plaintiffs sought injunctive and declaratory relief from the BLM's demands, arguing that the WFRHBA went beyond Congress's constitutional authority.¹³³

Representing the plaintiffs was George J. Hopkins, who had represented New Mexico with some success just seventeen days earlier in another case against the federal government.¹³⁴ 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.¹³⁵ Dick Modrall, one of the firm's

127. See *Kleppe*, 426 U.S. at 532–33.

128. *Id.* at 533–34.

129. *Id.*

130. *Id.* at 534.

131. *Id.*

132. *New Mexico v. Morton*, 406 F. Supp. 1237 (D.N.M. 1975).

133. *Id.* at 1237–38.

134. *New Mexico ex rel. Norvell v. Callaway*, 389 F. Supp. 821 (D.N.M. 1975) (granting only part of the United States' desired motions to dismiss and for summary judgment). The case challenged refusal of the commanding general of White Sands Missile Range to allow state agents to enter the range to search for a hidden treasure that "long-lasting legend" said was located somewhere on a mountain within the Range. *Id.* at 822. As legend had it, the treasure consisted of "gold bars, jewels, and valuable artifacts." *Id.*

135. III MARTINDALE HUBBELL LAW DIRECTORY 2748B (1975). Modrall, Sperling, Roehl, Harris & Sisk was the second largest firm in Albuquerque, and the state, in 1975. *Id.* at 2725B–2812B.

foundering partners, was a “cowboy/ranch foreman turned lawyer”¹³⁶ who no doubt understood the frustrations of public land grazing. On the other side, representing the federal government, was a Harvard educated, seasoned federal litigator named Victor R. Ortega.¹³⁷ A native of New Mexico, Ortega had served as the U.S. Attorney for the District of New Mexico since 1969, representing the federal government in over one hundred ca-ses.¹³⁸

A three-judge panel convened in the U.S. District Court for the District of New Mexico to hear the case. 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.¹³⁹ The panel consisted of Tenth Circuit Judge Oliver Seth, Chief District Judge Harry Vearle Payne, and District Judge Edwin L. Mechem.¹⁴⁰ The three judges had a combined thirty-five years of experience on the bench.¹⁴¹ Seth, who served as Chief Judge of the Tenth Circuit from 1977 to 1984, and Mechem were both New Mexico natives, and both had worked for the federal government prior to joining the bench.¹⁴² 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.¹⁴³

136. *Our Story*, MODRALL SPERLING LAW FIRM, http://www.modrall.com/firm/our_story (last visited July 26, 2011).

137. *Morton*, 406 F. Supp. at 1237.

138. A November 16, 2009 search of Westlaw for cases in which Victor R. Ortega represented the United States yielded 120 cases. See *Victor R. Ortega*, LAWYERS.COM, <http://www.lawyers.com/New-Mexico/Santa-Fe/Victor-R.-Ortega-1139049-a.html> (last visited June 25, 2011).

139. 28 U.S.C. § 2282 (1970) (repealed 1976).

140. *Morton*, 406 F. Supp. at 1237.

141. *Biographical Directory of Federal Judges: Seth, Oliver*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2147&cid=999&ctype=na&instate=na> (last visited July 26, 2011); *Biographical Directory of Federal Judges: Payne, Harry Vearle*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1854&cid=999&ctype=na&instate=na>; *Biographical Directory of Federal Judges: Mechem, Edwin Leard*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1608&cid=999&ctype=na&instate=na>.

142. *Biographical Directory of Federal Judges: Seth, Oliver*, *supra* note 141 (Seth served as an Army Major in World War II); *Biographical Directory of Federal Judges: Mechem, Edwin Leard*, *supra*, note 141 (Mechem served as an FBI agent during World War II).

143. *Biographical Directory of Federal Judges: Payne, Harry Vearle*, *supra* note 141. “Reading law” was a means by which those who did not go to law school could

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 and Regulations” concerning public real estate under the Property Clause.¹⁴⁴ 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.”¹⁴⁵ 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.”¹⁴⁶ 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.¹⁴⁷ Because Congress had provided neither any “finding nor any evidence to indicate that wild horses and burros are damaging the public lands,”¹⁴⁸ the panel overturned the WFRHBA for exceeding the power granted to Congress in the Property Clause.¹⁴⁹

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 natural resource whose removal from public lands constituted a harm.¹⁵⁰ As born westerners (of Mexico and the United States), all three judges likely were familiar with ranching and life on the range. Thus, they may have had difficulty seeing the ecological findings as Congress intended.¹⁵¹ They likely understood the WFRHBA to promote, rather than prohibit, damage to the rangelands. This

be admitted to the bar. It involved mostly self-teaching but also guidance by an experienced attorney or judge. BLACK’S LAW DICTIONARY 1377 (9th ed. 2009).

144. U.S. CONST. art IV, § 3.

145. *Morton*, 406 F. Supp. at 1238.

146. *Id.*

147. *Morton*, 406 F. Supp. at 1239 (citing *Hunt v. United States*, 278 U.S. 96 (1928)); see also *N.M. 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).

148. *Morton*, 406 F. Supp. at 1239 (citing *Hunt*, 278 U.S. 96). Of course, feral equids do damage to rangeland, but Congress made no such finding because the statute sought to protect them.

149. *Id.*

150. 16 U.S.C. § 1331 (2006).

151. *Id.* (finding wild horses are an “integral part of the natural system of the public lands”).

cultural context may help 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 1975.¹⁵² Then, as now, federal law permitted appeal of a three-judge district court decision directly to the Supreme Court.¹⁵³ The stage was set for a dramatic showdown in Washington.

While the case was on appeal, 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.¹⁵⁴ Thomas S. Kleppe, a Republican congressman from North Dakota, replaced Morton as Secretary of the Interior.¹⁵⁵ 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.¹⁵⁶ Nevertheless, federal prerogatives were at stake in the case, and the transition at the Interior did not alter the course or substance of the United States’ appeal.

The appeal gained the attention of Wyoming, Idaho, and Nevada,¹⁵⁷ which realized that much more was at stake than the seized burros.¹⁵⁸ Abandoned horse and estray laws, which existed in almost every western state,¹⁵⁹ would be preempted by conflicting provisions of the WFRHBA.¹⁶⁰ Moreover, a state

152. *Sec’y of the Interior v. New Mexico*, 423 U.S. 818 (1975).

153. 28 U.S.C. § 1253 (2006).

154. Rogers Morton, *Official in Nixon, Ford Cabinets*, PITT. POST-GAZETTE, Apr. 20, 1979, at 12.

155. Matt Schudel, *Thomas Kleppe, 87; Interior Secretary During Mid-1970s*, WASH. POST, Mar. 4, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/03/AR2007030301196.html>.

156. *Id.* To Secretary Kleppe’s credit, several of his decisions, such as banning the use of lead shot in waterfowl hunting, were environmentally noteworthy. *Id.*

157. *See infra* notes 182–202 and accompanying text.

158. *See, e.g.*, Brief of Amicus Curiae State of Idaho, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1974 WL 175952 at *3 [hereinafter Idaho Brief] (“In this case, much, much more is at issue than the validity of the Wild Free-Roaming Horse and Burro Act.”).

159. *See* sources cited *supra* note 65.

160. Wyoming worried that “without the provisions of the State Estray laws relative to capture and control of such animals, the local rancher or farmer finds

victory would restore the dominant priority ranchers had enjoyed in their competition with feral equids for scarce range-land resources. A loss, the states feared, would open the door “for eventual and complete erosion of any state jurisdiction . . . on federally-owned lands.”¹⁶¹ For Nevada in particular, which had the largest population of estrays and the second highest proportion of federal land ownership, the stakes were high.¹⁶² Although New Mexico served as a plaintiff in the litigation, Nevada led the charge for the Sagebrush Rebellion,¹⁶³ advancing arguments for states’ and ranchers’ interests that would live on long after the resolution of *Kleppe*.

1. The Briefs

The parties’ briefs alone foreshadow the outcome of the case. The United States asserted that the power of Congress under the Property Clause to protect feral equids is “beyond any reasonable doubt.”¹⁶⁴ The only restrictions on Congress’s powers under the Property Clause, the United States argued, are that the actions must be “needful” and “respecting” federal land.¹⁶⁵ Within those constraints, the Property Clause provides Congress with “what are essentially police powers to protect and preserve the natural resources of the public lands.”¹⁶⁶

New Mexico could not muster a persuasive response to the United States’ arguments. New Mexico argued for a very limited scope of the Property Clause, framing the issue as

himself without an effective remedy to prevent disease and/or damage to his livestock.” See Brief of Amici Curiae State of Wyoming Wyoming Livestock Board, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1976 WL 181209 at *5 (Feb. 17, 1976) [hereinafter Wyoming Brief]. Nevada lamented that if the WFRHBA survived, “Nevada’s control of estrays would be emasculated.” Brief of Amici Curiae Nevada State Board of Agriculture Central Committee of Nevada State Grazing Boards, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1975 WL 173619 at *4 (Aug. 18, 1975) [hereinafter Nevada Board Brief].

161. Idaho Brief, *supra* note 158, at *3; see also Nevada Board Brief, *supra* note 160, at *4–5; Wyoming Brief, *supra* note 160, at *5.

162. Nevada Board Brief, *supra* note 160, at *4–5.

163. MICHAEL W. BOWERS, *THE SAGEBRUSH STATE: NEVADA’S HISTORY, GOVERNMENT, AND POLITICS* 134 (2006). Former Utah Governor Scott Matheson described Nevada as assuming leadership of the rebellion. Scott M. Matheson, *Rebels Defied Federal Land Dominance*, *DESERET NEWS*, Sept. 22, 1986, at 1A, 4A.

164. Brief for the Secretary of the Interior, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1975 WL 173620 at *15 (Dec. 1, 1975) [hereinafter Interior Brief].

165. *Id.* at *17.

166. *Id.* at *11.

whether feral equids “are a part of the federal soil.”¹⁶⁷ In addition to its narrow interpretation of “property,” New Mexico asserted that only harm-avoiding regulations are “needful,”¹⁶⁸ and that Congress erroneously found that equids were at risk of harm.¹⁶⁹ Perhaps most detrimental to New Mexico’s case,¹⁷⁰ it acknowledged that the burros at issue were seized on BLM lands,¹⁷¹ though New Mexico nevertheless maintained that the burros spent “the majority of their time on private land.”¹⁷² In the debate over the extent of Congress’s authority under the Property Clause, New Mexico appeared outmatched.

Eleven amicus briefs were filed: four supporting the United States, six opposing, and one taking a mixed position. In support of the federal government the American Horse Protection Association,¹⁷³ the International Association of Game, Fish, and Conservation Commissioners,¹⁷⁴ the Humane Society,¹⁷⁵ an author and wild horse conservationist named Hope Ryden,¹⁷⁶ and Wild Horse Organized Assistance, Inc.¹⁷⁷ filed amicus briefs. They argued, among other things, that the holding of the court below jeopardized “[p]ast and future

167. Answer Brief for the State of New Mexico, et al., *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1976 WL 181207 at *9 (Jan. 19, 1976) [hereinafter New Mexico Brief]; see also *id.* at *15 (arguing that “horses and burros do not constitute real property”).

168. New Mexico Brief, *supra* note 167, at *8.

169. *Id.* at *10–11.

170. See *infra* notes 231–42 and accompanying text.

171. New Mexico Brief, *supra* note 167, at *4.

172. *Id.*

173. Brief of American Horse Protection Ass’n, Amicus Curiae, in Support of Appellant, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1975 WL 173616 (May 30, 1975) [hereinafter AHPA Brief].

174. Brief of Amicus Curiae, International Ass’n of Game, Fish and Conservation Commissioners, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1975 WL 173617 (Aug. 13, 1975). The Association argued that the WFRHBA was within Congress’s Property Clause authority because feral animals are not wildlife, and therefore not within the management responsibility of the states. *Id.* at *5–7. In this respect the Association supported the United States. However, the Association also opposed the United States by arguing for a narrow interpretation of the Property Clause. *Id.* at *12. In this respect, the Association’s position was mixed.

175. Brief of Amicus Curiae the Humane Society of the United States, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1975 WL 173622 (Nov. 19, 1975).

176. Brief of Amicus Curiae Hope Ryden, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 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 65, at 134–42.

177. Brief of Amicus Curiae Wild Horse Organized Assistance, Inc., *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1975 WL 173624 (Nov. 20, 1975).

legislation enacted pursuant to the Territory and Property Clause establishing national forests and public parks and providing protection for wildlife therein.”¹⁷⁸

The United States also worried that the trial court’s narrow interpretation of the Property Clause might seriously undermine federal agencies’ ability to manage the public lands. The Justice Department’s brief noted that the very permit authorizing Stephenson to graze his cattle on public land could be unconstitutional if the Property Clause allowed Congress to act only on harm-avoidance grounds.¹⁷⁹ Other routine public land management activities, such as the manipulation of elk populations in the National Elk Refuge, would be difficult to justify under the terms of the lower court’s ruling.¹⁸⁰ Moreover, the boundary between avoiding harm and producing benefits is notoriously muddled, and has vexed takings law for decades.¹⁸¹ Applying the harm-avoidance principle to police congressional compliance with the Property Clause would invite endless litigious mischief.

Among the amici supporting the State of New Mexico were the Nevada State Board of Agriculture,¹⁸² the Nevada Central Committee of Grazing Boards,¹⁸³ the Pacific Legal Foundation,¹⁸⁴ the State of Idaho,¹⁸⁵ and the Wyoming Livestock Board.¹⁸⁶ 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 environmental

178. *E.g.*, AHPA Brief, *supra* note 173, at *8.

179. Interior Brief, *supra* note 164, at *18.

180. See Robert L. Fischman & Angela King, *Savings Clauses and Trends in Natural Resources Federalism*, 32 WM. & MARY ENVTL. L. & POL’Y REV. 129, 131–41 (2007) (discussing elk management controversy in the refuge, and its conflict between Wyoming and the United States).

181. See, *e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1024–27 (1992) (“[T]he distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder.”).

182. Brief of Amicus Curiae Nevada State Board of Agriculture, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1975 WL 173627 (Jan. 2, 1975).

183. Brief of Amicus Curiae Nevada State Board of Agriculture Central Committee of Nevada State Grazing Boards, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1975 WL 173619 (Aug. 18, 1975).

184. Brief of Pacific Legal Foundation as Amicus Curiae in Support of Appellees, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1975 WL 173626 (Aug. 14, 1975) [hereinafter PLF Brief].

185. Idaho Brief, *supra* note 158.

186. Wyoming Brief, *supra* note 160.

legislation.¹⁸⁷ Nevada, for example, claimed that the “ ‘parade of horrors’ just cannot be supported in the law”¹⁸⁸ because the constitutional infirmity is unique to the WFRHBA. Specifically, Nevada argued that other environmental laws, such as the National Wildlife Refuge System Act¹⁸⁹ and the Wild and Scenic Rivers Act,¹⁹⁰ were “self-cleansing—they contain either specific language ruling against such confrontation with State fish and game laws, or they are easily distinguished.”¹⁹¹

The Pacific Legal Foundation, founded just two years earlier, made essentially the same points as New Mexico.¹⁹² Idaho, on the other hand, took a more extreme position and attacked the idea of protecting the horses and burros as “absurd.”¹⁹³ 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.”¹⁹⁴

Certainly this position was inconsistent with the broad public sentiment that led Congress to pass the Act,¹⁹⁵ and it

187. See, e.g., Nevada Board Brief, *supra* note 160, at *11.

188. *Id.* at *9.

189. 16 U.S.C. § 668dd, ee (2006).

190. 16 U.S.C. § 1271 (2006).

191. Nevada Board Brief, *supra* note 160, at *11.

192. PLF Brief, *supra* note 184. 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. See *Environmental Regulation Cases*, PAC. LEGAL FOUND., <http://www.pacificlegal.org/page.aspx?pid=270> (last visited July 26, 2011).

193. Idaho Brief, *supra* note 158, at *5.

194. *Id.* at *5 (quoting WALKER D. WYMAN, *THE WILD HORSE OF THE WEST* (1962)) (emphasis added).

195. One author captured this sentiment by describing the wild horse as follows: “[t]he most 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 (1971) (quoting author J. Frank Dobie).

can perhaps be best explained as evidence of 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.¹⁹⁶

The case was of particular interest to Nevada, because it had been making the same argument as New Mexico—that the WFRHBA is unconstitutional and that wild and free-roaming equids belong to the states—in a separate controversy.¹⁹⁷ Furthermore, Nevada’s ability to control horses on the public lands was of special import because the federal government owns such a large proportion of its land area, more than eighty percent.¹⁹⁸ Nevada thus saw the Act as interfering with its police powers, arguing 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 powers be stripped, state sovereignty is necessarily questioned.”¹⁹⁹ Robert List, Nevada’s Attorney General, hence asserted 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.”²⁰⁰ Again, the states’ arguments suggested something of greater political consequence than the mere management of wild horses. The equal footing argument, which would remain a complaint of Nevada’s for many years,²⁰¹ as well as the states’ other arguments concerning the Tenth Amendment and state police

196. Wyoming Brief, *supra* note 160. Wyoming instead chose to illustrate the factual circumstances of free roaming equids in Wyoming.

197. SYMANSKI, *supra* note 63, 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 Prot. Ass’n v. Frizzell*, 403 F. Supp. 1206 (D. Nev. 1975), but the State did not raise the issues of state ownership and the constitutionality of the Act.

198. See *infra* note 273 and accompanying text.

199. Brief for Nevada State Board of Agriculture, *supra* note 182, at *12.

200. *Id.* at *13 (citing *Ward v. Race Horse*, 163 U.S. 504 (1896)).

201. See *infra* text accompanying notes 303–10.

powers,²⁰² began to frame a public lands conflict that would long outlive the *Kleppe* dispute.

2. The Argument

Deputy solicitor general and adjunct professor of law at Georgetown, Arthur Raymond Randolph, Jr., represented the United States before the Supreme Court.²⁰³ 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.²⁰⁴ Apparently New Mexico was impressed with Randolph's performance, for he later 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 Supreme Court. For this task, the firm called on veteran litigator George T. Harris, Jr., a former president of the New Mexico Bar Association,²⁰⁵ who had twice before unsuccessfully represented New Mexico as a special assistant attorney general in petitions for certiorari to the Court.²⁰⁶

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.²⁰⁷ 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.²⁰⁸ Justice Stevens was not easily persuaded, referring to the trial court's opinion which stated that "[t]he controversy involved here began when a New Mexico rancher . . . discovered several unbranded and unclaimed burros wandering on his *private*

202. See, e.g., Idaho Brief, *supra* note 158, at *2; New Mexico Brief, *supra* note 167, at *12-13; Wyoming Brief, *supra* note 160, at *5.

203. *Biographical Directory of Federal Judges: Randolph, Arthur Raymond*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1964&cid=999&ctype=na&inststate=na>.

204. *Id.*

205. *Past Presidents*, N.M. BAR ASS'N, <http://www.nmbar.org/AboutSBNM/Governance/pastpresidents.html> (last visited Mar. 31, 2009).

206. See *N.M. State Game Comm'n v. Hickel*, 396 U.S. 961 (1969); *N.M. State Game Comm'n v. U.S. Court of Appeals for Tenth Circuit*, 396 U.S. 953 (1969).

207. Oral Argument at 3:09, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), available at www.oyez.org/cases/1970-1979/1975/1975_74_1488.

208. *Id.* at 5:18.

land . . . and also on public land.”²⁰⁹ 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.²¹⁰

Randolph analogized the case to *Light v. United States*,²¹¹ one of the seminal Supreme Court decisions establishing federal natural resource management authority over public lands.²¹² 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.²¹³ He also likened the WFRHBA to the sixth century Justinian right of a landowner to prevent others from killing animals on his land.²¹⁴ 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 letters to both the Senate and the House expressing support for the Act.²¹⁵

George Harris was outmatched. He conceded that the burros at issue were not seized on private land, which opened the door to an onslaught of challenges.²¹⁶ Time and again, the Justices questioned how New Mexico could have standing to bring arguments about Congress’s power to protect wild equids

209. *Id.* at 29:40–32:05; see also *New Mexico v. Morton*, 406 F. Supp. 1237, 1237 (D.N.M. 1975).

210. Oral Argument, *supra* note 207, at 30:10. 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 New Mexico 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 was successful in the courts, see, e.g., *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), it does not raise the grand constitutional issues that rally movements.

211. 220 U.S. 523 (1911); see also the companion case to *Light, United States v. Grimaud*, 220 U.S. 506 (1911).

212. Oral Argument, *supra* note 207, at 20:45.

213. *Id.*

214. *Id.* at 19:40.

215. Near the end of the argument the bench signaled its view that the issues at stake were minimal. One Justice stated that Randolph probably drew straws for this case. Randolph answered, “[a]nd I lost,” to which the Justices responded with laughter. *Id.* at 25:45.

216. *Id.* at 36:56.

on private land given Harris's concession that the burros at issue were not seized on private land.²¹⁷ Harris was without response, stating at one point: "I'm sorry, I'm not sure I'm following here."²¹⁸

3. The Decision

On June 17, 1976, in one of two unanimous opinions written by Justice Marshall and issued that day,²¹⁹ the Supreme Court handed the western states a crushing defeat. Summarily dismissing New Mexico's arguments, the Court reached back to a long line of cases endorsing broad federal resource management to declare that "[t]he power over the public land thus entrusted to Congress is without limitations."²²⁰

The Court unpacked the lawsuit into four main issues: (1) the scope of the challenge to the WFRHBA; (2) the breadth of federal power authorized by the Property Clause; (3) the distinction between the Property Clause and the Enclave Clause; and (4) the division of jurisdiction between the state and federal government on public land. These issues closely track the four sections of the Court's opinion.

Narrowly defining the constitutional issues raised by the WFRHBA, the Court proceeded on the basis that the dispute concerned only federal authority over wildlife on public lands. Though the protection of the Act extends to horses and burros on either public or private land,²²¹ the state's counsel had acknowledged at oral argument that the roaming burros were rounded up on public land.²²² The Court therefore reserved the more troublesome and inflammatory issue of federal authority over private land, stating: "[W]e do not think it appropriate . . . to determine the extent, if any, to which the Property Clause

217. *Id.* at 37:27, 39:36, 40:48, 42:10, 43:40, 44:50.

218. *Id.* at 46:18.

219. *See* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976).

220. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (citing *United States v. San Francisco*, 310 U.S. 16, 29 (1940)). As early as *United States v. Gratiot*, 39 U.S. 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).

221. *Kleppe*, 426 U.S. at 531-32.

222. *Id.* at 534 & n.3.

empowers Congress to protect animals on private lands or the extent to which such regulation is attempted by the Act.”²²³

With the scope of the state’s challenge so cabined, the Court held that the WFRHBA as applied to public land falls within congressional authority under the Property Clause. The state’s construction of the Property Clause purported to limit federal authority to (1) “the power to dispose of and make incidental rules regarding use of federal property; and (2) the power to protect federal property,” meaning the land itself.²²⁴ New Mexico argued that the WFRHBA’s wildlife protection extended beyond the boundaries of the Property Clause because it failed to protect the realty itself. This is the essence of the district court’s opinion in *New Mexico v. Morton*.²²⁵

Rejecting New Mexico’s “narrow reading” of the Property Clause as inconsistent with a long line of case law, the Court endorsed an “expansive reading” of the clause.²²⁶ *Kleppe* reiterated that congressional power over the public lands is “without limitations.”²²⁷ While it does not possess a general police power, “Congress exercises the powers both of a proprietor and of a legislature over the public domain,”²²⁸ which “necessarily includes the power to regulate and protect the wildlife living there.”²²⁹

Arguing that the WFRHBA was not based on science and actually harms the public lands, New Mexico attempted to prompt the Court to question the empirical connection between the terms of the law and the aims of the Property Clause. In a footnote dismissal, the Court declined the invitation to “reweigh the evidence and substitute our judgment for that of Congress.”²³⁰ Courts inevitably will decide challenges to

223. *Id.* at 546. Many commentators in the years after *Kleppe* attempted to address this question regarding the scope of the Property Clause. See, e.g., Jennifer Pruett Loehr, *Expansive Reading of Property Clause Upheld*, 23 NAT. RESOURCES J. 197 (1983) (discussing cases decided in years following *Kleppe*); Shepard, *supra* note 23 (arguing limitations on Property Clause should come from political process and not courts); Plumb, *supra* note 23, at 189 (predicting “erosion of states’ control over hunting and fishing within their borders” and the “expansion of federal control in areas others than wildlife regulation”).

224. *Kleppe*, 426 U.S. at 536.

225. 406 F. Supp. 1237 (D.N.M. 1975).

226. *Kleppe*, 426 U.S. at 539.

227. *Id.*

228. *Id.* at 540.

229. *Id.* at 541.

230. *Id.* at 541 n.10. According to the Court, determinations of what are “needful” rules “respecting” the public lands under the Property Clause “are entrusted primarily to the judgment of Congress.” *Id.* at 536.

statutes passed pursuant to the Property Clause, but the standard of review will be lenient, as exemplified in *Kleppe*. Thus, *Kleppe* signals that the Court will rely primarily on the political process to place limits on the exercise of the Property Clause.²³¹

The *Kleppe* opinion also made clear that the Property Clause is a stand-alone basis for federal authority on public lands. New Mexico relied on the Enclave Clause to argue that the federal government could not supplant state police power under the New Mexico Estray Law without first obtaining the state's consent.²³² The Constitution's Enclave Clause is a separate source of federal authority for certain enumerated purposes,²³³ which requires state consent for the transfer of jurisdiction. The state can cede exclusive or partial jurisdiction to the federal government, thereby extinguishing state police power over the land to the extent such power is transferred.²³⁴ Under the Property Clause, in contrast, no state consent is necessary. The Court held that the federal government possesses pre-emptive jurisdiction over the public domain under the Property Clause even if it does not secure jurisdiction under the Enclave Clause.²³⁵

In response to the state's claims that the WFRHBA intruded upon sovereign police powers, the Court stated that "[t]he Act does not establish exclusive federal jurisdiction over the public lands in New Mexico; it merely overrides the New Mexico Estray Law insofar as the state agency attempts to

231. Deference to Congress's decisions about the scope of its constitutional power is much discussed in the literature. See, e.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The Supreme Court took a dramatically less deferential approach to congressional findings in interpreting the Commerce Clause, beginning in the 1990s. See *United States v. Lopez*, 514 U.S. 549 (1995). It remains unclear the extent to which the disparity between *Kleppe* and *Lopez* is a function of the difference between the two constitutional clauses, or between the attitudes of the Court in two different eras.

232. *Kleppe*, 426 U.S. at 542.

233. U.S. CONST. art. I, § 8, cl. 17 (granting Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings").

234. *Kleppe*, 426 U.S. at 542.

235. *Id.* at 542-43.

regulate federally protected animals.”²³⁶ Congress and the states exercise concurrent, not mutually exclusive, jurisdiction over the public domain. To the extent that the laws of each conflict, federal law is supreme and preempts inconsistent state law. Despite New Mexico’s lamentations, the states retain considerable authority over public lands in the absence of federal legislation or regulation. Indeed, the states retain “broad trustee and police powers over wild animals within their jurisdictions.”²³⁷ This may be little solace to the states—exercising power only to the extent the federal government has not acted—but it is not insignificant or unconstitutional.

Thus, *Kleppe* slammed the door shut on challenges to federal control of the public rangelands.²³⁸ The decision undoubtedly “sharpened the ranching community’s attention to the finer points of constitutional law,”²³⁹ 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 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.²⁴⁰

While the “ranchers” on the Court endorsed Justice Marshall’s opinion, the *Kleppe* decision inflamed the public land ranchers in the West. The following part explores the Sagebrush Rebellion that resulted.

236. *Id.* at 545.

237. *Id.*

238. George Cameron Coggins & Robert L. Glicksman, *Power, Procedure, and Policy in Public Lands and Resources Law*, NAT. RES. & ENV’T, no. 10, 1995, at 3, 4.

239. Sally Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945, 971 (1982).

240. Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10606, 10617 (1993).

III. 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.²⁴¹ Though a national park can be a source of pride, most federal land ownership (especially BLM jurisdiction) “has always been a politically attractive whipping boy for western politicians.”²⁴² 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”²⁴³ 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.²⁴⁴

The Sagebrush Rebellion began as narrowly focused rancher frustration with the WFRHBA, and in less than half a decade grew to encompass a wide array of public land conflicts. After the crushing defeat of *Kleppe*, Nevada grabbed the baton and led the movement for greater state control of public lands, advancing a regional political agenda. As Nevada pressed forward, Congress enacted a more comprehensive public rangelands management reform statute. That legislation helped draw more stakeholders into the rebellion.

This Part focuses on two statutes that fomented subsequent conflicts over federal natural resources, further stoking the Sagebrush Rebellion. The first is the 1976 Federal Land Policy and Management Act,²⁴⁵ which helped spread western disgruntlement beyond ranchers in the wake of *Kleppe*. The statute provided special avenues for states to influence federal public land management through cooperative federalism, and its implementation neglected to significantly change the extent of grazing on public lands. Nonetheless, it sparked more western grievances. The second statute is the 1979 Nevada law asserting proprietary control over federal public lands.²⁴⁶ That law inspired other states to enact similar

241. Wilkinson, *supra* note 35, at 955.

242. COGGINS ET AL., *supra* note 24, at 76.

243. *Id.*; see also Leshy, *supra* note 11, at 343.

244. Leshy, *supra* note 11, at 354–55 & n.116.

245. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2744 (codified at 43 U.S.C. § 1701 (2006)).

246. NEV. REV. STAT. ANN. § 321.5973(1) (LexisNexis 2008).

declarations. Historian Patricia Limerick identifies the Nevada statute as the opening salvo of the Sagebrush Rebellion,²⁴⁷ but the legislation's roots extend to the WFRHBA and discontent with *Kleppe*. This Part concludes with a description of Nevada's failed judicial challenge to the 1976 Act, punctuating another cycle in the development of the Sagebrush Rebellion, which continued to feed on discontent generated, in part, from judicial losses. The story of these legal developments following *Kleppe* highlights "un-cooperative federalism" as a key strategy of western states resisting federal limitations on longstanding public land users.

A. *The Federal Land Policy and Management Act*

Even as the litigation over the WFRHBA wound down, Congress considered a score of bills to reduce overgrazing and bring a more systematic approach to management of the unreserved public lands, which had not yet been removed from the disposal laws facilitating privatization.²⁴⁸ On October 21, 1976, four months after the Court issued the opinion in *Kleppe*, Congress passed the Federal Land Policy and Management Act (FLPMA).²⁴⁹ After decades of administrative drift, the FLPMA provided the BLM with organic legislation, a comprehensive legislative charter for the largest public land system in the United States.²⁵⁰ Although the FLPMA retained much of the Taylor Grazing Act and so stopped short of a thorough overhaul of the law of livestock grazing,²⁵¹ it dramatically shifted the center of gravity in land management on public lands. The FLPMA brought comprehensive, pluralistic planning to the BLM.²⁵² It imposed on the public rangelands the multiple-use,

247. PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 46 (1987).

248. ENVIRONMENTAL LAW STORIES, *supra* note 19, at 2304.

249. Federal Land Policy and Management Act, 90 Stat. 2744.

250. See Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 *ECOLOGY L.Q.* 457, 501–10 (2002) (discussing various meanings of organic legislation).

251. COGGINS ET AL., *supra* note 24, at 799.

252. See 43 U.S.C. § 1712 (2006). Oliver Houck argues that *Nat. Res. Def. Council v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1976), paved the way for long-range planning on BLM lands by imposing NEPA environmental impact analysis on the grazing districts. Houck, *The Water, the Trees, and the Land*, *supra* note 22, at 2305–08.

sustained-yield rubric,²⁵³ which had been the guiding legislative mandate of the national forests since 1960.²⁵⁴ This shift in legislative policy meant that grazing no longer claimed dominant status on the rangelands.²⁵⁵ Indeed, the FLPMA placed new environmental restrictions on BLM authority, including limits on grazing that caused unnecessary and undue degradation.²⁵⁶ 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, including recreationists and environmentalists. In addition to providing the BLM with expansive rangeland management authority, including the ability to designate and regulate areas of critical environmental concern,²⁵⁷ the FLPMA explicitly affirmed that “the public lands [will] be retained in Federal ownership.”²⁵⁸ Frustrations boiled over again, and the combination of *Kleppe* and the FLPMA prompted the coalescence of a political movement to limit federal management that reduced the influence of ranchers and other traditional users of the public lands: the “Sagebrush Rebellion.”²⁵⁹

Some commentators date the start of the Sagebrush Rebellion as late as 1979.²⁶⁰ Most mark the passage of the

253. 43 U.S.C. §§ 1701(a)(7), 1702(c) (2006). 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 65, at 103 (testimony of Michael J. Pontrelli, Assistant Professor of Biology, University of Nevada, Reno) (arguing against livestock dominant use and in favor of multiple use management to protect horses).

254. Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531 (2006).

255. *Nat'l Wildlife Fed'n v. BLM*, 140 I.B.L.A. 85, 99–101 (1997). In practice, ranchers remained successful in dominating grazing use decisions on BLM lands. Joseph M. 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. 10021, 10021, 10025 (2001); see also Joseph M. Feller, *What Is Wrong With the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 570 (1994).

256. 43 U.S.C. § 1732(b) (2006).

257. *Id.* § 1701(a)(11).

258. *Id.* § 1701(a)(1).

259. Dale D. Goble, *Public Lands and Agricultural Pollution*, 30 IDAHO L. REV. 433, 437 (1994).

260. See, e.g., LIMERICK, *supra* note 247, at 46; 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 Constitutionality*, 23 ARIZ. L. REV. 263, 263–64 (1981) (dating the “Sagebrush Rebellion” to the formation of the Western Coalition in 1978); Ed Quillen, *Ronald Reagan: The Accidental Environmentalist*, HIGH

FLPMA in 1976 as the triggering event.²⁶¹ This story of *Kleppe* supports an earlier origin: the enactment of the 1971 WFRHBA.²⁶² The WFRHBA was the first congressional enactment reforming public land law in the modern environmental era. *Kleppe* was the first in a line of lawsuits lashing back at the modern framework of allocating scarce public natural resources.

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.²⁶³ In 1955, the western commentator, Bernard DeVoto, identified interest groups supporting a version of "home rule which means basically that we want federal help without federal regulation."²⁶⁴ From this perspective, the Sagebrush Rebellion is 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.²⁶⁵

Former Secretary of the Interior Bruce Babbitt, as prominent an opponent of 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

COUNTRY NEWS, Jan. 10, 2011, <http://www.hcn.org/articles/ronald-reagan-the-accidental-environmentalist/>.

261. Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 694 (1981); Leshy, *supra* note 11, at 341.

262. Cf. Fairfax, *supra* note 239, at 970–71 (highlighting *Kleppe* among the three main events triggering the rebellion); Goble, *supra* note 259, at 437 (pairing enactment of the FLPMA with the *Kleppe* decision to date the rebellion to 1976).

263. Goble, *supra* note 259, at 438; see also DANIEL FELLER, PUBLIC LANDS IN JACKSONIAN POLITICS 163, 166 (1984) (documenting many state objections to federal retention of public lands in the early nineteenth century).

264. BERNARD DEVOTO, THE EASY CHAIR 254–55 (1995).

265. R. MCGREGGOR CAWLEY, FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND WESTERN POLITICS 71–76 (1993); see also Richard D. Clayton, *The Sagebrush Rebellion: Who Should Control the Public Lands*, 1980 UTAH L. REV. 505, 509–11 (1980) (identifying western ineffectiveness in Congress and adverse federal regulation as two causes of the Sagebrush Rebellion).

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.²⁶⁶

Congress (especially through the committees that drafted the FLPMA, which were dominated by westerners) responded to the legitimate western state claims of a special interest in public rangelands. It peppered the FLPMA with several provisions inviting states to influence federal management through the tools of cooperative federalism.²⁶⁷ The BLM resource management plans, in particular, must be attentive to state and local management goals.²⁶⁸ The legislation promotes consistency in planning between levels of government.²⁶⁹ But the Sagebrush Rebellion had little patience for jumping through the hoops to qualify for FLPMA consideration. What distinguished the Sagebrush Rebellion from other efforts to promote traditional and local economic interests was its rejection of cooperative federalism. Instead, the rebellion chose to push what we call “un-cooperative federalism.”²⁷⁰

The following two subparts show how Nevada led the charge to advance the Sagebrush Rebellion by employing “un-cooperative federalism,” first in state legislation challenging federal control of public lands and second in litigation seeking to overturn the FLPMA.

B. Nevada’s Assembly Bill 413

Recall that New Mexico had not been alone in its fight with the federal 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.²⁷¹ Nevada had expressed particular interest in the issue, with its

266. Babbitt, *supra* note 260, at 853.

267. Cooperative federalism is an arrangement of power under which a national government induces coordination from subordinate jurisdictions. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 200 (2005); *see also* Fischman & King, *supra* note 180, at 147, 152–53, 162 (discussing how the FLPMA manifests cooperative federalism).

268. 43 U.S.C. § 1712 (2006).

269. *Id.*; *see also infra* notes 315–23 and accompanying text (discussing how cooperative federalism works in the FLPMA).

270. *See supra* note 18, for other uses of “un-cooperative federalism.”

271. Answer Brief for the State of New Mexico, et al., *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1448), 1976 WL 181207, at *35.

Board of Agriculture filing three separate amicus briefs.²⁷² Like its fellow amici in the *Kleppe* litigation, Nevada contains substantial amounts of federally-owned land.²⁷³

From the perspective of these states, federal legislation like the FLPMA and the WFRBHA were burdens unfairly imposed by Washington outsiders who knew little about life on the range.²⁷⁴ The general sentiment was that “the policy arena was distinctly biased in favor of environmental values.”²⁷⁵ Such sentiments arose for a variety of reasons, including the fact that the BLM’s only effective tool for managing horse and burro populations in accordance with the law was to reduce livestock grazing allotments.²⁷⁶ But what fundamentally stoked the rebellion was 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.²⁷⁷ And, as the comments of one Nevada jurist reflect, the ends of federal policies sometimes appeared dubious from a westerner’s 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.”²⁷⁸ Thus, many westerners concluded

272. See Brief of Amici Curiae on the Merits Central Committee of Nevada State Grazing Boards and Duckwater Shoshone Tribe, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1448), 1975 WL 173625; Brief of Amici Curiae Nevada State Board of Agriculture Central Committee of Nevada State Grazing Boards, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1448), 1975 WL 173619; Brief of Amicus Curiae Nevada State Board of Agriculture, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1448), 1975 WL 173627.

273. The federal government owns 83% of the land in Nevada, 63% in Alaska, 65% in Utah, 53% in Oregon, 63% in Idaho, 45% in Arizona, 49% in Wyoming, and 34% in New Mexico. BUREAU OF LAND MGMT., U.S. DEPT OF THE INTERIOR, PUBLIC LAND STATISTICS 2000, at tbl.1-3 (2000), available at http://www.blm.gov/public_land_statistics/pls00/index.html (follow “Table 1-3” hyperlink).

274. See generally SYMANSKI, *supra* note 63.

275. CAWLEY, *supra* note 265, at 69.

276. *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 57, at 513. Somewhat surprisingly, one federal official testified to Congress that protecting wild horses would *not* require reductions in livestock grazing permits. *House Hearings*, *supra* note 65, at 69 (testimony of Edward P. Cliff, Chief, Forest Service).

277. Leshy, *supra* note 11, at 345.

278. David R. Gamble, *Max Allred, Desperado*, NEV. LAWYER, Mar. 1998, at 25 (describing the WFRHBA). In their amici brief in *Kleppe*, Nevada’s grazing and agricultural boards described themselves as the “knowledgeable, actual users of the western range” Brief of Amici Curiae Nevada State Board of Agriculture

that 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 needed to use the nation’s resources for survival.”²⁷⁹

Frustrated by Congress and rebuffed by the courts, Nevada reasserted the traditional, pre-WFRHBA influence over the public rangelands through “un-cooperative federalism” involving direct challenges to federal authority. The Nevada legislature began studying public land policy reform in 1975,²⁸⁰ while *Kleppe* was on appeal. Decrying the “uneven quality and sometimes arbitrary and capricious” nature of federal land management and its effects on livestock and mining, the Nevada legislature directed its commission to explore how to secure greater control over public lands through federal political and judicial processes.²⁸¹ Six months after the *Kleppe* decision, the commission reported to the legislature.²⁸² Referring to *Kleppe*, the legislative counsel advised the commission that due to “the machinations of the Supreme Court,”²⁸³ Nevada had no legal claim to the public lands.²⁸⁴ The counsel complained similarly of Congress.²⁸⁵ Nonetheless, the commission saw political value in pursuing additional litigation “to reinforce other arguments . . . involving federal-state controversies.”²⁸⁶ In this regard, Nevada recognized that even unsuccessful litigation could play an important role in furthering the agenda of increasing state influence over federal resource management. Because the commission completed its findings before the passage of the FLPMA,²⁸⁷ the legislative counsel’s complaint against Congress may be traced to the WFRHBA.

Central Committee of Nevada State Grazing Boards, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (No. 74-1488), 1975 WL 173619, at *4.

279. 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.”).

280. S. Con. Res. 35, 1975 Leg., 59th Sess. (Nev. 1975).

281. *Id.*

282. NEV. LEGIS. COMM’N OF THE LEGIS. COUNSEL BUREAU, *MEANS OF DERIVING ADDITIONAL STATE BENEFITS FROM PUBLIC LANDS*, Bulletin No. 77-6, 58th Sess., at 3 (Dec. 1976).

283. *Id.* at 65.

284. *Id.* at 16.

285. *Id.* at 65.

286. *Id.* at 16.

287. *Id.* at 24–25.

In response to the commission's report, the legislature created the Select Committee on Public Lands in 1977 to rally support for state control of public lands.²⁸⁸ The six Nevada lawmakers appointed to the Committee pushed forward Assembly Bill 413, now known as the Sagebrush Rebellion Bill.²⁸⁹ 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.²⁹⁰ The law declared that "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."²⁹¹ 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."²⁹² In other words, the Bill authorized the state land office to dispose of federal lands.²⁹³ "According to the authors of Assembly Bill 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."²⁹⁴ Addressing the *Kleppe* controversy specifically, one Nevada sagebrush rebel legislator said, "[s]ome of those people from Washington ought to see what a wild horse will do to a range and a watering hole."²⁹⁵

288. *A Guide to the Records of Sagebrush Rebellion Collection No. 85-04*, U. OF NEV., RENO, MATHEWSON-IGT KNOWLEDGE CENTER, <http://www.knowledgecenter.unr.edu/specoll/mss/85-04.html> (last updated June 22, 2008). The Select Committee was, at the time, unique in the annals of the Nevada legislature. NEV. LEGIS. COMM'N OF THE LEGIS. COUNSEL BUREAU, SELECT COMM. ON PUB. LANDS, BULLETIN NO. 79-19: REPORT TO THE LEGISLATIVE COMMISSION, 4 (1978) [hereinafter SELECT COMM. ON PUB. LANDS].

289. NEV. REV. STAT. §§ 321.596-.599 (1979). See generally Titus, *supra* note 260.

290. NEV. REV. STAT. ANN. § 321.5973(1) (LexisNexis 2008).

291. *Id.*

292. *Id.* § 321.598(1).

293. *Id.*

294. LISA SCHOCH-ROBERTS, NAT'L PARK SERV., *A CLASSIC WESTERN QUARREL: A HISTORY OF THE ROAD CONTROVERSY AT COLORADO NATIONAL MONUMENT* (quoting CAWLEY, *supra* note 265, at 96), available at http://www.nps.gov/history/history/online_books/colm/adhi1-preface.htm; see also SELECT COMM. ON PUB. LANDS, *supra* note 288, at 6 (decrying the federal government's "lack of awareness of the impact of federal lands on state and local governments").

295. Joseph Seldner, *The Sagebrush Rebellion*, NAT'L L.J., Sept. 1980, at 1 (quoting State Sen. Keith Ashworth, "a leader in the early Sagebrush Rebellion") (internal quotation marks omitted).

Seeking to rally political support for its “un-cooperative federalism,” Nevada hosted a conference of western states likely to be sympathetic to its cause.²⁹⁶ 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 Public Lands,²⁹⁷ a primary proponent of the “wise use” movement.²⁹⁸ The “wise use” slogan was an outgrowth of the Sagebrush Rebellion and would outlast the Rebellion as a rallying point for ranchers and other western commodity interests.

More importantly, several western states passed their own versions of Assembly Bill 413. Arizona, New Mexico, and Utah enacted bills similar to Assembly Bill 413 that called for state ownership of BLM lands.²⁹⁹ The Arizona legislature even overrode Governor Bruce Babbitt’s veto.³⁰⁰ While Nevada pioneered legislative attempts to wrest control of public lands from the BLM, Wyoming took the approach one step further and laid claim not only to BLM lands but also to all Forest Service lands within its borders.³⁰¹ The legislatures of California, Colorado, and Idaho took the more tempered and less confrontational route of calling for feasibility studies of transferring federally owned lands to state ownership.³⁰²

296. SELECT COMM. ON PUB. LANDS, *supra* note 288, at 8 (referring to a meeting held in Carson City in 1977); Titus, *supra* note 260, at 263–64 (marking the 1978 agreement from the Nevada meeting as the moment that the Sagebrush Rebellion transformed from “attitude to actuality”).

297. SELECT COMM. ON PUB. LANDS, *supra* note 288, at 8, 14; *see also* A GUIDE TO THE SAGEBRUSH REBELLION COLLECTION, *supra* note 288.

298. *Wise Move?* (PBS Online Newshour broadcast Feb. 19, 1996), (transcript available at http://www.pbs.org/newshour/bb/environment/wise_use_2-19.html) (last visited Dec. 17, 2009).

299. 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 265, at 2.

300. CAWLEY, *supra* note 265, at 2.

301. WYO. STAT. ANN. § 36-12-109 (1980) (claiming ownership to all federal lands within Wyoming except for land controlled by the United States Department of Defense, national parks, national monuments, wildlife refuges, wilderness areas, and land held in trust for Indians).

302. 1980 Cal. Stat. 2607–09; 1980 Colo. Sess. Laws 857–58; 1980 Idaho Sess. Laws 1003–04. The Hawaii Senate passed a similar resolution. Titus, *supra* note 260, at 264.

C. *Nevada's Judicial Challenge to the FLPMA*

Legislative declarations like Assembly Bill 413 were largely symbolic, for they could not control federal management decisions. But they were rallying points for asserting political arguments about unfair imposition of federal will upon western public land users. Similarly, attacks on federal authority through litigation could not reasonably be expected to yield judicial relief. But they could build more political support for greater state control of federal resources. That support could influence legislation and agency administration of public lands.

Spoiling for such a fight, the Nevada State Board of Agriculture took the issue of western rangeland control back to court with a direct attack on the constitutionality of the FLPMA.³⁰³ The ambitious new State Attorney General, Richard H. Bryan, used the cause as a stepping-stone to higher office.³⁰⁴ Bryan made a second attempt at persuading the bench with the arguments the state had raised in the *Kleppe* litigation. Again arguing for state control of western rangelands, Nevada asserted that “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.”³⁰⁵ As in its *Kleppe* amicus brief, 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.³⁰⁶

303. *Nev. ex rel. Nev. State Bd. of Agric. v. United States*, 512 F. Supp. 166, 168 (D. Nev. 1981), *aff'd*, 699 F.2d 486 (9th Cir. 1983).

304. Bryan was elected Nevada governor following his term as attorney general and then enjoyed two full terms in the U.S. Senate. *See Bryan, Richard H.*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000993> (last visited Oct. 4, 2011).

305. *Nev. ex rel. Nev. State Bd. of Agric. v. United States*, 512 F. Supp. at 170 (quoting Nevada’s brief) (internal quotation marks omitted); *see also* Eugene R. Gaetke, *Refuting the “Classic” Property Clause Theory*, 63 N.C. L. REV. 617, 621 n.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).

306. *Nev. ex rel. Nev. State Bd. of Agric. v. United States*, 512 F. Supp. at 170; *see also* Leshy, *supra* note 11, at 319–29 (providing thorough exploration of equal footing argument).

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 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.”³⁰⁷ 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.”³⁰⁸ The doctrine “does not cover economic matters,” the court reasoned, because “there never has been equality among the states in that sense.”³⁰⁹ The Ninth Circuit had no trouble affirming the decision,³¹⁰ thus putting an end to western states’ legal attempts to wrest control of the public rangelands from the federal government. 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.³¹¹ 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.³¹²

IV. *KLEPPE’S* ROLE AS A POLITICAL TOOL

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

307. Nev. *ex rel.* Nev. State Bd. of Agric. v. United States, 512 F. Supp. at 172.

308. *Id.* at 171 (citing *Island Airlines, Inc. v. Civil Aeronautics Bd.*, 363 F.2d 120 (9th Cir. 1966)).

309. *Id.* (citing *United States v. Texas*, 339 U.S. 707, 716 (1950)).

310. Nev. *ex rel.* Nev. State Bd. of Agric. v. United States, 699 F.2d 486 (9th Cir. 1983).

311. See *Nevada v. Watkins*, 914 F.2d 1545, 1553 (9th Cir. 1990) (rejecting Property Clause challenge to statute authorizing waste facility); *Nuclear Energy Inst., Inc., v. U.S. Env’tl. Prot. Agency*, 373 F.3d 1251, 1304–305 (D.C. Cir. 2004) (rejecting both Property Clause and equal footing challenges).

312. *United States v. Gardner*, 107 F.3d 1314, 1317 n.1 (9th Cir. 1997); see also *United States v. Nye Cnty.*, 920 F. Supp. 1108, 1120 (D. Nev. 1996).

Many have regarded the Sagebrush Rebellion as a bizarre and misguided movement.³¹³ As one author asked, “[w]hy would the commodity interests—ranchers, loggers, et al.—want to *own* federal lands that already offered such a bounty of subsidies?”³¹⁴ The reality is that ranchers did not really want to own the federal lands. Instead, ranchers and their representatives 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 the ranchers depended. The 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.³¹⁵

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 for meaningful public involvement of State and local government officials.”³¹⁶ This is a version of cooperative federalism that is characterized by “state favoritism in federal process.”³¹⁷ The FLPMA encourages federal agencies to account for state concerns, but often requires little more than that the BLM “pay attention.”³¹⁸ Ultimately, the agency may adopt its own ideas about what is best for federal land management.³¹⁹ The BLM’s regulations, though, go further than the FLPMA mandates in

313. See Babbitt, *supra* note 260, at 853.

314. Donald Snow, *The Pristine Silence of Leaving It All Alone*, in *A WOLF IN THE GARDEN*, *supra* note 51, at 28 (citing, for example, “absurdly cheap grazing fees”).

315. See Fischman & King, *supra* note 180.

316. 43 U.S.C. § 1712(c)(9) (2006). 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 11, at 348.

317. Fischman, *Cooperative Federalism and Natural Resources Law*, *supra* note 267, at 200 (describing this type of cooperative federalism in natural resources law which provides special avenues for states, available to no other stakeholders (other than tribes), to influence federal decision-making).

318. *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 459 F. Supp. 2d 1102, 1120–21, (D.N.M. 2006), *aff’d in part, vacated in part, rev’d in part*, 565 F.3d 683 (10th Cir. 2009) (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 also Fischman & King, *supra* note 180, at 162–63 (discussing Otero Mesa dispute in the context of cooperative federalism).

319. *N.M. ex rel. Richardson*, 459 F. Supp. 2d at 1120–21.

structuring cooperative federalism.³²⁰ 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.”³²¹ 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.³²² The BLM approach to its statute is more accommodating of state interests than any other example of state favoritism in federal process.³²³

A. *“Un-cooperative Federalism” as a Legacy of the Sagebrush Rebellion*

The importance of cooperative federalism in the FLPMA starkly contrasts the Sagebrush Rebellion’s distinctive “un-cooperative” methods, which also characterize some contemporary assertions of local control over federal lands, especially in Utah. In this respect, the Sagebrush Rebellion extends the spectrum of “un-cooperative federalism” as conceptualized by Jessica Bulman-Pozen and Heather Gerken.³²⁴ The most extreme opposition to federal objectives in their model is “civil disobedience,” as exemplified by state resolutions opposing federal policies or declaring that a state will not enforce or participate in a federal scheme.³²⁵ The Sagebrush Rebellion demonstrates rebellious actions that lie beyond the uncooperative endpoint of their continuum, such as state challenges to federal legislation (e.g., the WFRHBA and the FLPMA) and direct interference with agency management

320. 43 C.F.R. §§ 1610.3-1 to -.3-2 (2010); see Fischman & King, *supra* note 180, at 159–60.

321. 43 C.F.R. § 1610.3-2(a).

322. 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 sixty 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) (2010).

323. Fischman, *Cooperative Federalism and Natural Resources Law*, *supra* note 267, at 200.

324. See generally Bulman-Pozen & Gerken, *supra* note 18.

325. *Id.* at 1271, 1278–80.

(as exemplified by the Kane County roads dispute, described below).³²⁶

While most states put substantial energy into shaping public land policy through the channels created by Congress, the rebellion (and its modern “wise use” adherents) 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. Thus, after Nevada enacted its Sagebrush Rebellion bill,³²⁷ “state officials hurried to Washington to make sure that their claim of ownership would not result in interruption of federal payments to the state which were based on continuing federal land ownership.”³²⁸

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 the Sagebrush Rebellion, and the related “wise use” banner, continue to directly challenge federal authority.³²⁹ Rather than “a last gasp of a passing era,”³³⁰ the Sagebrush Rebellion signaled the continued vitality of “un-cooperative federalism” as a tool for political leverage.

For instance, Kane County, Utah engages in an ongoing battle with the federal government over road claims on public lands in southern Utah. Kane County stands with a new “Sagebrush Coalition” in opposing federal efforts to close roads or limit motor vehicle access on federal lands.³³¹ Like the *Kleppe* challenge to the WFRHBA, the county was spurred into action by what it perceived as federal overreaching into the 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-

326. See *infra* notes 332–43 and accompanying text.

327. See *supra* notes 289–95 and accompanying text (discussing Assembly Bill 413).

328. COGGINS ET AL., *supra* note 24, at 77.

329. See sources cited *supra* note 29.

330. Leshy, *supra* note 11, at 349; see also Clayton, *supra* note 265, 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 over the public land management decision process,” and concluding that the Rebellion would result in “cooperative federalism seldom paralleled in the nation’s history”).

331. See Jackson, *supra* note 29.

Escalante National Monument.³³² 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.³³³ The BLM called them “primitive trails.”³³⁴ Crews employed by the county graded sixteen of these “roads” without getting approval from the BLM or even notifying the agency.³³⁵ Kane County defiantly claimed ownership of the rights-of-way under an 1866 statute commonly called RS 2477.³³⁶ 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.³³⁷ Prompted by the Southern Utah Wilderness Alliance, the BLM sought an injunction against the county,³³⁸ 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.³³⁹ The BLM then attempted to

332. Establishment of the Grand Staircase-Escalante National Monument, 61 Fed. Reg. 50,223 (Sept. 18, 1996). Utah reacted with animosity. *See, e.g.*, James Brooke, *New Reserve Stirs Animosities in Utah*, N.Y. TIMES Oct. 13, 1996, <http://www.nytimes.com/1996/10/13/us/new-reserve-stirs-animosities-in-utah.html?scp=1&sq=grand+staircase-escalante&st=nyt>.

333. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 742 (10th Cir. 2005) [hereinafter *SUWA*]; *see also* Larry Warren, *Utah Counties Bulldoze the BLM, Park Service*, HIGH COUNTRY NEWS Oct. 28, 1996, http://www.hcn.org/issues/92/2868/print_view.

334. *SUWA*, 425 F.3d at 742. The county claimed title to over sixty roads on federal lands, and “at least 30 roads within or on the boundary of Grand Staircase-Escalante National Monument.” Eryn Gable, *Court Rules Enviro’s Can’t Challenge Utah County’s Road Claims*, LAND LETTER, Jan. 13, 2011.

335. *SUWA*, 425 F.3d at 742; Gable, *supra* note 334.

336. Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (codified at 43 U.S.C. § 932), *repealed by* Federal Land Policy Management Act of 1976, Pub. L. No. 94-579 § 706(a), 90 Stat. 2743 (codified as amended at 43 U.S.C. § 1701 (2006)). 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 741. The FLPMA provided no procedure to validate or record existing RS 2477 rights. *Id.*

337. *SUWA*, 425 F.3d at 745.

338. *Id.* at 743.

339. *The Wilderness Soc’y v. Kane Cnty.*, 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 1308–09. The District Court again addressed the merits of the case in 2008. *See The Wilderness Soc’y v. Kane Cnty.*, 560 F. Supp. 2d 1147 (D. Utah 2008) (holding that county ordinance allowing ORV use

close those same areas to such uses, but the county later took down the BLM signs and placed its own signs indicating the routes were “open.”³⁴⁰ 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.³⁴¹ 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 supporter who rode to the Senate on the latest iteration of the “un-cooperative federalism” movement: the Tea Party.³⁴² 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.³⁴³ In 2011, Utah began dipping into its appropriations under the 2010 eminent domain law to assert ownership of rights-of-way in the neighboring Garfield County portion of Grand Staircase-Escalante National Monument.

B. Social Science Perspective on Kleppe’s Role in the Sagebrush Rebellion

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

on federal land was preempted by federal law), *aff’d*, 581 F.3d 1198 (10th Cir. 2009), *rev’d on other grounds*, 632 F.3d 1162 (10th Cir. 2011) (holding environmental groups lacked standing to challenge county claims to RS 2477 rights on federal public land).

340. *The Wilderness Soc’y*, 560 F. Supp. 2d at 1154–56.

341. *The Wilderness Soc’y*, 632 F.3d at 1165.

342. Gable, *supra* note 334; *see also supra* note 5 and accompanying text (describing Mike Lee’s role in promoting Utah’s 2010 eminent domain law).

343. 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, 1096 (9th Cir. 2006) (reaffirming principle that rights-of-way through federal lands are subject to reasonable regulation by the United States); *The Wilderness Soc’y v. Kane Cnty.*, 581 F.3d 1198, 1229 n.4 (10th Cir. 2009) (McConnell, J., 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.

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.³⁴⁴ 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.³⁴⁵ In the end, “states’ rights” in federal natural resources law may be more important as a political rallying cry than a judicial doctrine.³⁴⁶

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*.³⁴⁷ 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, [and] confrontational” social movements³⁴⁸ can build institutions, “activist networks, and long-term coalitions” in losing battles, which “created the conditions for later success.”³⁴⁹ “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.”³⁵⁰

The story of *Kleppe* fits Weinbaum’s category of a “successful failure.”³⁵¹ The Sagebrush Rebellion would repeat, often intentionally, quixotic lawsuits. Indeed, the legislative history of Nevada’s Assembly Bill 413 explicitly recognized the usefulness of doomed litigation to the larger cause of reducing

344. EPP, *supra* note 14, at 13 (emphasis added).

345. *Id.* at 15–16.

346. Another vehicle for states’ rights constitutional claims is the Tenth Amendment, although this route is unlikely to see much more success than the states’ previous arguments. *See, e.g.*, Shepard, *supra* note 23, at 528–32 (exploring 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).

347. WEINBAUM, *supra* note 14, at 7.

348. *Id.* at 10.

349. *Id.* at 8.

350. *Id.* at 267.

351. Of course, sometimes litigation losses lead to more failure. Benjamin I. Sachs has shown how this is true in labor organizing, where collective action depends on workers’ self-reinforcing dynamic of success. Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2690 (2008).

federal limitations on public land users.³⁵² Utah's 2010 law³⁵³ illustrates the continuing popularity of this approach.

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 limitation of activism through courts is that winning a case does not necessarily ensure compliance.³⁵⁴ An example of this is the litigation that Oliver Houck highlights as the pivotal case paving the way for enactment of the FLPMA.³⁵⁵ 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.³⁵⁶ 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.³⁵⁷

Unsurprisingly, the legal literature concentrates more on the outcomes of litigation than social science research,³⁵⁸ 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. Scheingold's analytical framework "decenter[s]" law to shift its focus from authoritative institutions, such as courts, to "the more fluid terrain" of

352. See *supra* notes 282–87 and accompanying text.

353. H.B. 143, 58th Leg., Gen. Sess., 2010 Utah Laws (codified at UTAH CODE ANN. § 78B-6-503.5 (West 2010)).

354. SCHEINGOLD, *supra* note 13, at 117–18.

355. Houck, *The Water, the Trees, and the Land*, *supra* note 22, at 2305–07.

356. *NRDC v. Morton*, 388 F. Supp. 829, 841 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1976); see also Houck, *The Water, the Trees, and the Land*, *supra* note 22, at 2300–08 (discussing *NRDC v. Morton*).

357. See, e.g., *Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002); *W. 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., Act of Nov. 10, 2003, Pub. L. No. 108–108, § 325, 117 Stat. 1307, 1307–08 (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.

358. See, e.g., sources cited *supra* note 23. (discussing legal scholarship on *Kleppe*).

intermediate institutions, such as agencies and civil society organizations.³⁵⁹ The “decenter[ed]” 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.³⁶⁰

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 helped spark 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.

Perhaps even more relevant for understanding the role of *Kleppe* in the Sagebrush Rebellion is the recent work of Michael Klarman on the civil rights movement.³⁶¹ His analysis of *Brown v. Board of Education*³⁶² cautions that even the highest profile Supreme Court decisions themselves do not (necessarily) directly prompt change. He argues that it was the southern backlash in response to *Brown*, rather than the

359. SCHEINGOLD, *supra* note 13, at xxii.

360. *Id.* at 7; see also ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (documenting legally adjudicated rights playing only a marginal role in resolving on-the-ground conflicts in the context of social norms of liability among ranchers in northern California).

361. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994), available at JSTOR.

362. 347 U.S. 483 (1954).

holding itself, that catalyzed real reform in practice, especially in the form of the federal civil rights laws of the 1960s.³⁶³

Notwithstanding that *Kleppe* has no place in the pantheon of the most important decisions of the Court, Professor Klarman's work offers two lessons for our story. First, commentators should resist the urge to exaggerate the extent to which a judicial opinion directly alters the social-legal framework for allocating influence and power.³⁶⁴ For example, *Brown* itself arguably failed directly to end legal segregation in the deep South.³⁶⁵ Certainly, *Kleppe* failed to stanch western state "un-cooperation" with federal land management objectives. As lawyers ourselves, we perhaps exaggerate the direct role of *Kleppe* in our enthusiasm to connect legislation, litigation, administration, and politics.³⁶⁶ Second, court decisions may be most important for their indirect impacts on political discourse through backlash.³⁶⁷ Klarman argues that it was the violent, massive resistance to *Brown* that had the greatest impact on politics and stands as its lasting legacy.³⁶⁸ He summarizes this argument in stating that "the post-*Brown* racial backlash created a political environment in which southern elected officials stood to benefit at the polls by boldly defying federal authority."³⁶⁹ While the backlash in the West cannot be compared to the South's mass resistance to *Brown v. Board of Education*, "un-cooperative federalism" certainly pays dividends at the polls. Just ask Utah's Senator Mike Lee.

CONCLUSION

With its legal arguments shredded, one might imagine the Sagebrush Rebellion died a simple death. But it lived on, fueled

363. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 361; Klarman, *How Brown Changed Race Relations*, *supra* note 361, at 82.

364. Klarman, *How Brown Changed Race Relations*, *supra* note 361, at 81.

365. *Id.* at 84–85.

366. In this respect, we follow a long line of legal commentators chided by Klarman. *See id.* at 81 n.1. Professor Rosenberg develops a more finely detailed model to determine when litigation succeeds in changing the political balance of power in policy disputes. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1st ed. 1991).

367. Klarman, *How Brown Changed Race Relations*, *supra* note 361, at 82.

368. *Id.* Massive resistance was the "unification of southern racial intransigence, which . . . propelled politics in virtually every southern state . . ." *Id.* Massive resistance included the brutal suppression of civil rights demonstrations. *Id.*

369. *Id.* at 110.

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 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 completely failed to shape the legislation in Congress 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,³⁷⁰ 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 federal power.³⁷¹ 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* and its aftermath 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, Tea Party, 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 interests gained political leverage as a result.

370. See *supra* notes 1–5 and accompanying text.

371. Scott W. Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525 (1993).