

## **Opinion No. 90-01**

January 30, 1990

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Frank A. Murray, Assistant Attorney General

**TO:** The Honorable Garrey Carruthers, Governor of New Mexico, Executive Offices, PERA Building, Santa Fe, New Mexico 87503

### **FACTS**

The White Sands Missile Range contains numerous free roaming wild horses which are principally the remnants of herds left or turned loose by area ranchers when the federal government acquired the missile range. The horses are unbranded and no owner can be identified. The lands in question are under the jurisdiction of the Department of Defense.

### **QUESTIONS**

What is the status, under New Mexico law, of the wild horses on the White Sands Missile Range?

### **CONCLUSIONS**

The animals are estrays and as such are subject to disposition by the New Mexico livestock board.

### **ANALYSIS**

New Mexico, both as a state and territory, closely controlled domestic animals including horses, cattle, sheep, goats and swine. All horses in this state are required to be branded or properly marked, NMSA 1978, § 77-9-3(A)(D) with a recorded brand. NMSA 1978, § 77-9-10. Livestock which is unbranded or being transported without proper proof of ownership is subject to seizure, NMSA 1978, §§ 77-9-3(B), 77-9-21, 77-9-23, and 77-9-45. It is illegal to buy or receive unbranded livestock, NMSA 1978, § 77-9-4 or to import, NMSA 1978, § 77-9-28 export, NMSA 1978, § 77-9-36 or transport livestock in violation of the inspection and proof of ownership requirements established by law or board rules. NMSA 1978, §§ 77-9-48 and 77-9-61. In short, New Mexico's regulation and control of the possession, sale, transportation, and movement of livestock for the purposes of preventing theft and the spread of disease is pervasive. See NMSA 1978, § 77-9-1 through § 77-9-63.

The wild horses on the White Sands Missile Range are not branded or owned by any person. Unbranded animals are to be handled as "estrays". NMSA 1978, §§ 77-9-3, 77-9-23, 77-9-40. NMSA 1978, § 77-13-1 deals with "estrays" stating:

Any livestock or buffalo found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown, or that is branded with a brand which is not on record in the office of the New Mexico livestock board or is a fresh branded or marked offspring not with its branded or marked mother, unless other proof of ownership is produced, shall be known as an "estray," and it shall be unlawful for any person, persons, corporation or any company, or their or either of their employees or agents to take up any such estray and retain possession of the same, except as provided in Sections 77-13-1 through 77-13-10 NMSA 1978.

Livestock means "neat cattle, horses, mules, donkeys, swine, sheep or goats"; NMSA 1978, § 77-10-1. NMSA 1978, § 77-13-2 sets forth how estrays shall be handled by persons having them on their property. The section states:

A. No person shall impound an estray animal except when such animal is found on property the person owns or controls. When any person impounds an estray, he or she shall, within five days of the impoundment, notify the director of the New Mexico livestock board or any livestock inspector of the board of the impoundment.

...

the estray animals detained shall be turned over to a duly authorized inspector or agent of the New Mexico livestock board for disposition in the same manner as provided for other estray animals under this article.

The fact that the property here in question is federal land does not affect the handling of the animals as "estray". The Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 et seq. applies, by its terms, only to lands under the control of the Secretaries of Agriculture and Interior. The land in question is under control of the Secretary of Defense to whom such Act is not applicable. In *Kleppe v. New Mexico*, 426 U.S. 529, 96 S. Ct. 2285, 49 L. Ed. 2d 34 (1976) the Supreme Court stated:

Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause.

...

Appellees' fear that the Secretary's position is that "the Property Clause totally exempts federal lands within state borders from state legislative powers, state police powers, and all rights and powers of local sovereignty and jurisdiction of the states," *id.*, at 16, is totally unfounded. The Federal Government does not assert exclusive jurisdiction over

the public lands in New Mexico, and the State is free to enforce its criminal and civil laws on those lands.

426 U.S. at 543

The Court went on to state:

Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions.

426 U.S. at 545.

Kleppe makes it clear that, until and unless the handling of the horses in question is preempted by Congress, New Mexico Law will control the handling of those animals.

### **CONCLUSIONS**

The wild horses on the White Sands Missile Range are classified as "estrays" under New Mexico law and should be handled and disposed of by the New Mexico Livestock Board.

### **ATTORNEY GENERAL**

HAL STRATTON Attorney General

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