

Opinion No. 94-06

August 25, 1994

OPINION OF: Tom Udall, Attorney General

BY: Allen Ferguson, Jr., Assistant Attorney General

TO: The Honorable Casey E. Luna, Lieutenant Governor, State Capitol, Santa Fe, New Mexico 87503

QUESTIONS

1. Are the wild horses living on the United States Army's White Sands Missile Range subject to the jurisdiction of the New Mexico Livestock Board?
2. Would the Livestock Board have the authority to take possession of the horses if the Army voluntarily transferred them on the Board?
3. Is there any other state agency which has jurisdiction over the horses?
4. Are the horses protected by the federal Wild Horses and Burros Act?
5. Who owns the horses?
6. Who has jurisdiction over the horses: (a) so long as they remain on White Sands Missile Range and (b) if they are removed from the Missile Range?¹

CONCLUSIONS

1. No. The wild horses do not fit within the applicable definition of "livestock" in the New Mexico Livestock Code and, therefore, the Livestock Board does not have the statutory authority to take possession of and sell them as estrays.
2. No. The Livestock Board's statutory authority does not extend to taking possession of or selling animals that do not fit within the applicable statutory definitions, even if a party wishes to voluntarily transfer such animals to the Board.
3. No state agency has the express or implied statutory authority, under current law, to regulate the treatment or disposition of the wild horses. However, the Legislature has the power to enact legislation vesting a state agency with such authority.
4. No. The Wild Horses and Burros Act applies only to wild horses and burros living on United States Forest Service or Bureau of Land Management land.

5. As unregulated wild animals, the horses are jointly owned by the people of New Mexico (with the State as trustee or conservator) and the United States government (as owner of the land on which they live). Unless inconsistent with state law, the landowner (the United States) has the legal authority to capture and take control of the horses, thereby becoming the exclusive owner of the animals.

6. As long as the horses remain on White Sands Missile Range, the State of New Mexico and the United States government have overlapping jurisdiction regarding their treatment, movement and disposition. The United States, as landowner, may take whatever actions it deems appropriate with respect to the horses, subject to any conditions or restrictions imposed by the State through its laws as trustee or conservator of wild animals for the benefit of the people. If the horses remain wild and are moved to land not owned by the United States, then the owner of that land may exercise control over them, again subject to the State's right to restrict or condition their treatment.

In sum, because the White Sands wild horses are wild animals not covered by any existing federal or state statute, the situation lends itself to a cooperative federal-state effort to determine the treatment and disposition of the animals. However, so long as the animals remain wild and remain on White Sands, and so long as neither the State Legislature nor Congress enacts legislation governing their treatment, the federal government, as landowner, has primary authority and responsibility to determine their fate.

FACTS

White Sands Missile Range, a United States Army, Department of Defense installation in eastern New Mexico is the habitat of numerous wildlife species. Several herds of wild horses roam the installation, living off the land, generally independent of human intervention. These animals are the descendants of horses left on or near White Sands by ranchers in the 1940's, when the United States government established the installation. Over time, the herds of wild horses on White Sands have increased to number approximately 1400 head today. During the drought in the early summer of 1994, some of the horses died of starvation and lack of water, precipitating a perceived need to better manage the herds and to relocate many of the animals.

ANALYSIS

1. Jurisdiction of the New Mexico Livestock Board Over the Horses

State agencies have only such powers as are delegated to them by the state's constitution or statutes, are fairly implied therefrom, or are reasonably necessary to carry out powers so delegated. **New Mexico Dept. of Health v. Ulibarri**, 115 N.M. 413, 416, 852 P.2d 686 (Ct. App. 1993); **Redman v. Board of Regents**, 102 N.M. 234, 237, 693 P.2d 1266, 1269 (Ct. App. 1984), **cert. denied**, 102 N.M. 225, 693 P.2d 591 (1985).

The New Mexico Livestock Code creates the Livestock Board to "govern the livestock industry of the state." NMSA 1978, § 77-2-3 (Repl. Pamp. 1993). The Code, as amended by the Legislature in 1993, defines the term "livestock," in pertinent part, as follows:

"livestock" means all domestic or domesticated animals used or raised on a farm or ranch including the carcasses thereof

Id. at § 77-2-1.1(A).

The provisions of the Livestock Code that permit the Livestock Board to take possession of certain animals, require it to sell them and allow it to retain the proceeds if the lawful owner is not found apply to "estrays" as defined in the Code.² That definition is:

"estray" means any **livestock** found running at large upon public or private lands, either fenced or unfenced, whose owner is unknown, or that is branded with a brand which is not on record in the office of the board or is a freshly branded or marked offspring not with its branded or marked mother, unless proof of ownership is produced.

Id. at § 77-2-1.1(K), emphasis added.

From the above it is clear that the statutory term "estray" is limited to animals that come within the Code's definition of "livestock." Because the term "livestock" means "domestic or domesticated animals used or raised on a farm or ranch," animals that are not domestic or domesticated, or are not used or raised on a farm or ranch, cannot be estrays. Since the wild horses on White Sands Missile Range are not domestic or domesticated and have not been raised or used on a farm or ranch, they are not "livestock" and are not "estrays" under the Livestock Code and the Livestock Board does not have jurisdiction to take possession of the horses and sell them as "estrays" under Chapter 13 of the Livestock Code.³

The conclusion that wild horses are not subject to the jurisdiction of the Livestock Board is bolstered by the scope and purposes sections of the Livestock Code. In particular, the Code provides that the general mission of the Livestock Board is "to govern the livestock industry." Section 77-2-3(A). To similar effect, the enumerated purposes of the Livestock Code are "to promote greater economy, service and efficiency in the administration of the laws relating to the livestock industry of New Mexico, to control disease, to prevent the theft or illegal movement of livestock and to oversee . . . meat inspection." Section 77-2-1. The Code's repeated references in its scope and purposes sections to governance and regulation of the "livestock industry" indicate a legislative intent to regulate, through the Livestock Code, only the treatment of animals which (in harmony with the Code's definition of "livestock") are used or raised on a farm or ranch - that is, which may be properly considered commercial or "industry" products -- and not to regulate the treatment of wild animals.⁴

We recognize that under our analysis there may be a question in some circumstances whether a particular unbranded horse is an stray or a wild animal. This is not an issue with respect to the White Sands horses, which clearly are wild. Where it is an issue, a "totality of the circumstances" analysis will be required to determine the proper status of the animal.

2. Authority of the Livestock Board to Accept Voluntary Transfer of Wild Horses

The Livestock Code contains no provisions empowering the Livestock Board to take control of or to sell any animals that do not fall within the category of "estrays" (**Id.** at §§ 77-13-1 through 77-13-9), trespassing animals or animals allowed by their owners to run at large illegally (**Id.** at §§ 77-14-1 through 77-14-36). As noted in the preceding section, the wild horses on White Sands do not fall within the statutory definition of "estrays." The White Sands wild horses also cannot be considered trespassing livestock or livestock illegally running at large within the meaning of the Livestock Code. Although the applicable chapter of the Code (Chapter 14) contains a definition of livestock different from the definition applicable to other sections of the Code, that definition contains the requirement that such animals be "domestic."⁵ Further, both the trespass provision and the running at large provisions of the Code contemplate that the offending animals be on lands other than those of the animals' owner. Sections 77-14-3 through 77-14-36. Neither of these requirements is met in the case of the White Sands wild horses, for they are not domestic and they are their owner's land. (**See** Part 5 below.) Thus, the Livestock Board has no statutory authority to take and sell the White Sands wild horses, even if the Army wishes to transfer them to the Board.

3. Jurisdiction of Other State Agencies

You have asked whether the New Mexico Game Commission, the New Mexico Department of Agriculture, or farm bureaus in the state have any jurisdiction with respect to the White Sands wild horses.⁶ Here we answer those questions and take opportunity to address the broader issue of the State Legislature's authority to determine state agency jurisdiction over, and treatment of, the horses.

State Game Commission. The New Mexico Wildlife Conservation Act defines the term "wildlife" as "any nondomestic mammal, bird, reptile, . . . fish," etc. NMSA 1978, § 17-2-38(G) (Repl. Pamp. 1988). Although wild horses appear to fall within this definition of wildlife as nondomestic mammals, the State Game Commission's authority over wildlife is delimited by statute. For example, because horses are not included in the definition of game animals (§ 17-2-3-(A)), the Game Commission does not have the authority to regulate them pursuant to its authority to regulate the taking and treatment of game animals. **See** §§ 17-2-1 through 17-2-8. In addition, the Game Commission's and Department of Game and Fish's authority and responsibility, under the Wildlife Conservation Act, to list, protect, and regulate the treatment of endangered species does not apply because wild horses are not among the species listed as endangered. Sections 17-2-37 through 17-2-46.

Thus, there appears to be no statute which could, even arguably, grant the Game Commission jurisdiction over the wild horses. Because, as noted above, a state agency has no powers not delegated to it by statute, reasonably implied therefrom or reasonably necessary to carry out powers delegated to it by statute, the New Mexico Game Commission lacks jurisdiction over the horses.

New Mexico Department of Agriculture; Farm Bureaus. The state's statutes delineating the authority of the Department of Agriculture, NMSA 1978, Chapter 76, and providing for the establishment of county farm and livestock bureaus, NMSA 1978 §§ 76-2-10 through 76-2-12 (Repl. Pamp. 1991), do not grant the department or the farm and livestock bureaus authority to regulate the treatment of wild horses or other wild animals, with exceptions not relevant here.⁷ Therefore, so long as the horses remain wild, they do not fall within the jurisdiction of the Department of Agriculture or the farm and livestock bureaus.

The Legislature Authority. The New Mexico Legislature, under the state's Constitution, has plenary authority to enact laws, limited only by the provisions and requirements of the state and federal constitutions (**Ferguson v. State Hwy. Comm'n**, 99 N.M. 194, 195, 656 P.2d 244 (Ct. App. 1982)). In exercising its plenary authority to make laws, the Legislature may enact statutes governing the treatment of wildlife and delegating wildlife management duties to state agencies. Accordingly, it is within the power of the Legislature to enact statutes governing the treatment of and establishing state agency jurisdiction over any wild horses in the state that are not subject to conflicting federal law. Because federal statutes do not preempt state regulation in this area (**See** Part 4 below), the Legislature has the authority to enact statutes regulating the treatment of these animals.

Indeed, Congress has enacted legislation which reinforces this conclusion. The Department of Defense is required to abide by state wildlife laws and to "develop, subject to safety requirements and military security, and in cooperation with the Governor (or his designee) of the State . . . in which the installation . . . is located . . . procedures under which designated fish and game or conservation officials of that State . . . may . . . have full access to that installation to effect measures for the management, conservation and harvesting" of wildlife. 10 U.S.C. § 2671(a)(1), (3). This legislation does not deal expressly left room for considerable state regulation of wildlife on Defense Department lands.

The Wild Free-Roaming Horses and Burros Act

The federal government, as landowner, has the power under the Property Clause of the U.S. Constitution (Art. IV, § 3, Cl. 2) to enact legislation and regulations governing the treatment of wild animals found on federally owned land. **See, Kleppe v. New Mexico**, 426 U.S. 529, 543 (1976). It is clear that where the federal government has enacted legislation regulating the treatment of wild animals on federal land, the federal regulatory system prevails over any conflicting state regulation because the Supremacy Clause of the U.S. Constitution makes the federal law supreme. *Id.*⁸

Exercising its powers under the Property Clause of the Constitution to regulate the treatment of wild animals on certain federal lands, Congress in 1971 enacted the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331 through 1340. The "Congressional findings and declaration of policy" section of Acts provides:

Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West . . . and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands.

16 U.S.C. § 1331. The protection afforded by the Act includes criminal liability for any person who removes, sells, kills, converts, or "permits to be processed into commercial products the remains of" any wild free-roaming horse or burro. 16 U.S.C. § 1338.

"Wild free-roaming horses and burros" are defined as "all unbranded and unclaimed horses and burros on public lands of the United States." 16 U.S.C. 1332(b). "Public lands" are defined as "any lands administered by the Secretary of the Interior through the Bureau of Land Management or by the Secretary of Agriculture through the Forest Service." 16 U.S.C. § 1332(e). Because the wild horses on White Sands, a Department of Defense installation, are not on "public lands" within the narrow meaning of the Wild Horses and Burros Act, they are not protected by that federal statute.⁹

5. Ownership of the Horses

Because no existing state or federal statute determines the ownership of the wild horses in question, it is necessary to look to the common law (that is, nonstatutory case law) to determine their legal status. Under the common law, as developed by court decisions in the United States, the ownership of wild animals, "is in the people of the state in their collective sovereign capacity." Volume 4, **American Jurisprudence 2d**, "Animals," § 14 at 261. The state, as sovereign, holds title to them not as proprietor, but as trustee "for the purposes of regulation and preservation for the common use." **Id.** In this capacity, the state may, if it chooses, enact statutes regulating or prohibiting the killing, capture, or possession of wild animals and regulating their treatment. **Id.** at 261-262.

Where the state has not exercised its power to enact statutes regulating the treatment of a particular type of wild animal, then the owner of the land on which the animal is found has a qualified proprietary interest in it, referred to in the older cases as "property **ratione soli**" or property by reason of the ownership of the soil. **Id.**, § 18 at 264. This limited proprietary interest gives the landowner the right, at common law, to capture or kill wild animals that appear on his or her land. Once the landowner has done so, then the landowner owns the animal or carcass. If, however, a wild animal leaves the landowner's land by its own volition, the landowner no longer has any proprietary interest in it. **Id.**

There appears to be no reason why the limited proprietary right of the landowner in wild animals found on the property should not apply when the landowner is the federal government rather than a private party. Therefore, both the State, as conservator of wild animals for the benefit of the people, and the United States government, as owner of the land on which the animals live, have common law ownership interests in the White Sands wild horses and neither has exclusive ownership.

6. Jurisdiction Over the Horses

As long as the wild horses remain on White Sands Missile Range, because the State and the United States each have ownership interests in them, they also have overlapping jurisdiction regarding the treatment, movement and disposition of the horses. More particularly, the United States, as landowner, may take whatever actions it deems appropriate with respect to the horses, subject to any conditions or restrictions imposed by the State through its laws in its capacity as trustee or conservator of wild animals for the benefit of the people. If the United States captures and takes possession of the animals, then it becomes exclusive owner but still must abide by any state law that might be enacted, so long as Congress does not enact any superseding legislation. This situation, in our view, permits the Defense Department to work cooperatively with the Governor's Office and your Office to arrive at a solution.

If the horses remain wild but are moved to land not owned by the federal government, then the owner of that land would have the authority to exercise control over them, again subject to the State's right to restrict or condition their treatment. If, however, the horses were transferred to Bureau of Land Management or National Forest Service Land, then they would come within the exclusive control of the Secretary of the Interior or the Secretary of Agriculture pursuant to the provisions of the Wild Free-Roaming Horses and Burros Act.

In conclusion, the legal status of the White Sands wild horses as wild animals not covered by any existing federal or state statute lends itself to a cooperative federal-state effort to determine the treatment and disposition of the animals. However, so long as the animals remain wild and remain on White Sands, and so long as neither the State Legislature nor Congress enacts legislation governing their treatment, the federal government, as landowner, has primary authority and responsibility to determine their fate.¹⁰

ATTORNEY GENERAL

TOM UDALL Attorney General

GENERAL FOOTNOTES

[n1](#) The questions you asked have been re-arranged and consolidated. In answering these, we have addressed the legal aspects of each of your questions, except that we have not endeavored to determine the authority and potential role of various federal

agencies because that would depend at least partly upon federal regulations and procedures, the interpretation of which must be made by the federal agencies themselves. Nevertheless, where principles of statutory law, constitutional law or common law that come within the scope of this Opinion indicate ownership or jurisdiction (or lack thereof) on the part of the federal government, we have included these findings in our analysis.

[n2](#) Chapter 13 of the Livestock Code (**Id.** at §§ 77-13-1 through 77-13-9) grants the Livestock Board the power to take possession of and to sell "estrays" animals. That chapter provides, among other things, that the owner of land on which an estray is found may impound it and, if he does so, must notify the Livestock Board. Section 77-13-2(A). The Board then may take possession of the animal, must attempt to ascertain the owner and, if the owner is not found, must sell the animal, placing the proceeds in the Board's fund and retaining the proceeds if the lawful owner is not found within two years. Section 77-13-3, 77-13-4, 77-13-5, 77-13-6, 77-13-7.

[n3](#) Although Attorney General Opinion 90-01 issued January 30, 1990 comes to a conclusion opposite to the one provided in this Opinion, this difference results from a 1993 statutory change which added the definition of "livestock" in § 77-2-1.1. Prior to that time, there was no definition of "livestock" expressly applicable to the estray provisions of the Code, and the present definition did not appear in the Code at all. Therefore, while it was reasonable in 1990 to conclude that the term "estrays" included wild horses, the new narrow definition of "livestock" applicable today requires a different result.

[n4](#) **See also, Mountain State Legal Foundation v. Hodel**, 799 F.2d 1423 (10th Cir. 1986). There, interpreting the federal Wild Free-Roaming Horses and Burros Act, the court stated, "wild horses . . . are no less 'wild' than are the grizzly bears that roam our national parks and forests. Indeed, . . . Congress has explicitly declared 'all unbranded and unclaimed horses and burros on public lands' to be " **wild** ' 16 U.S.C. § 1332(b)." 799 F.2d at 1426, emphasis added by the court. Although, as noted in Part 4 below, the Wild and Free-Roaming Horses and Burros Act does not apply to the White Sands wild horses because they are on Defense Department lands, the court's reasoning with respect to the status of unbranded and unclaimed horses as wild animals applies to the White Sands horses.

[n5](#) Section 77-14-2(A) defines livestock, for purposes of the chapter dealing with trespassing animals and animals running at large, as "domestic animals such as cattle, horses, sheep, hogs, goats and buffaloes." Webster's Third New International Dictionary (1986) defines "domestic animal" as an animal "domesticated by man so as to live and breed in a tame condition."

[n6](#) You also inquired what role, if any, the New Mexico Corrections Department might play with respect to the horses. It appears that although the Corrections Department could accept a gift of the horses from the United States Department of Defense, the complete answer to your question depends upon the Corrections Department's

regulations and procedures regarding the use of horses in its rehabilitation programs and, therefore, is beyond the scope of this Opinion.

[n7](#) The New Mexico Department of Agriculture has limited jurisdiction over bees (NMSA, §§ 76-9-1 through 76-9-13 (Repl. Pamp. 1981)); and may, through New Mexico State University, have limited jurisdiction over crop pests, including insects (NMSA 1978, §§ 76-6-1 through 76-6-16 (Repl. Pamp. 1981)) and predatory wild animals (NMSA 1978, §§ 77-15-1 through 77-15-5 (Repl. Pamp. 1993)).

[n8](#) It is also clear that "a State undoubtedly retains jurisdiction over federal lands within its territory," so long as the state regulation does not conflict with federal "legislation respecting those lands" **Kleppe**, 426 U.S. at 543.

[n9](#) Nonetheless, the protective measures embodied in that statute reflect a national concern over the fate of wild horses in general and a national policy aimed at protecting them.

[n10](#) You have also asked "who shares costs and financial gain for the care and/or sale of the horses." As is clear from this Opinion, that question cannot be answered in the abstract, but will be determined by the particular solution adopted by the federal government and the state.