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Public Lands - The Liability of the Federal Government for the Trespass of Wild Horses and Burros - Mountain States Legal Foundation v. Clark

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Public Lands—The Liability of the Federal Government for the Trespass of Wild Horses and Burros. *Mountain States Legal Foundation v. Clark,* 740 F.2d 792 (10th Cir. 1984).

On December 15, 1971, Congress enacted the Wild and Free-Roaming Horses and Burros Act.[1] The Act declared all unclaimed horses and burros on public lands to be under the jurisdiction of either the Secretary of Agriculture or the Secretary of Interior for the purpose of management and protection.[2] Within six months, the Rock Springs Grazing Association (RSGA) began making repeated requests to the Secretary of the Interior to remove the wild horses from its private lands.[3]

RSGA owns or controls a large quantity of grazing land interspersed with public land in a "checkerboard" pattern in southwestern Wyoming.[4] Between 1972 and 1979 the Bureau of Land Management (BLM) removed almost fourteen hundred horses from these checkerboard lands.[5] Even with these removals, the herd size increased from eleven hundred in 1971 to twenty eight hundred in 1979.[6] In response to the increase of wild horses, RSGA filed suit in the United States District Court for the District of Wyoming.[7]

In the district court, RSGA asserted three distinct causes of action. First, RSGA sought a writ of mandamus to compel the Secretary of the Interior to remove the horses from the public and private lands within the checkerboard area. Second, it claimed nominal damages for the unconstitutional taking of forage on its private lands within the checkerboard. Third, RSGA sought substantial damages from the Director of the BLM due to his alleged improper management of wild horses under the Act.[8]

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1. 16 U.S.C.S. §§ 1331-1340 (Law. Coop. 1984).
2. *Id.* §§ 1331, 1332, 1333.
3. Opening Brief for Appellant at 7, Mountain States Legal Foundation v. Clark, 740 F.2d 792 (10th Cir. 1984) [hereinafter Appellant's Opening Brief].
4. Mountain States Legal Foundation v. Clark, 740 F.2d 792, 793 (10th Cir. 1984). When the first transcontinental railroad was being constructed, the United States government conveyed to the Union Pacific Railroad the odd numbered sections of land in a forty mile swath following the railroad route. The government retained the even numbered sections in this area. The resulting land ownership pattern therefore looked like a checkerboard.

The rationale behind this pattern of checkerboard disposition was that the value of land along the railroad would increase. Thus, the government would recover at least as much revenue from selling the half it retained as it would have recovered from selling the whole if the railroad was not present. This scheme worked well to accomplish the government's goal of land disposition for settlement of the West except on lands west of the 105th Meridian. The climate west of there was too arid for dry-land farming and was never settled by farmers. The checkerboard pattern of land ownership remains today in these arid regions. For a more detailed explanation of checkerboard lands, see Leo Sheep Co. v. United States, 440 U.S. 668, 669-78 (1979).

5. Appellant's Opening Brief, *supra* note 3, at 6 n.1.
6. *Id.* at 6.
7. *Id.* at 3.
8. *Mountain States,* 740 F.2d at 793.

The district court granted the writ of mandamus to RSGA and ordered the BLM to remove all wild horses from the private land within one year. The writ further ordered the BLM to reduce the wild horse population on the checkerboard area within two years. The court then granted the government's motions for summary judgment for both damage claims.[9]

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the summary judgment of the damage claim against the BLM Director and reversed the trial court on the taking claim. The Tenth Circuit remanded the taking issue to the trial court to determine whether forage was taken by the Secretary's failure to manage wild horses by permitting their continued foraging on private lands through the increased numbers of horses since 1971.[10] Therefore, the court of appeals implicitly ruled that foraging by wild horses on privately owned sections within the checkerboard is an unconstitutional taking of property if it results from the government's failure to manage the wild horses. This is the first case in which a court has ruled that the federal government's failure to manage wild animals under its control may be a taking.

The Tenth Circuit Court of Appeals' decision in *Mountain States Legal Foundation v. Clark* might radically affect the BLM's management of wild horses and burros wherever there are unfenced private lands intermingled with public land. In order to examine that decision, it is necessary to discuss the statutory provisions which allow grazing on the public checkerboard lands of southwestern Wyoming. It is also necessary to discuss prior state and federal cases dealing with unconstitutional takings.

BACKGROUND

Taylor Grazing Act

Grazing on the public lands in the checkerboard is administered by the BLM under authority of the Taylor Grazing Act.[11] The checkerboard is administered as a grazing "allotment"[12] in which slightly over half the forage is on the public land.[13] RSGA holds a grazing preference[14] which entitles it to graze its livestock on the public lands within the allotment.

The BLM must manage the public land "on the basis of multiple-use."[15] In order to achieve that objective, the BLM can either suspend livestock use on public land[16] or remove excess numbers of wild horses.[17]

9. *Id.* at 794.
10. *Id.* at 795.
11. 43 U.S.C.A. §§ 315-315q (West 1974 & Supp. 1984).
12. For a definition of allotment see 43 C.F.R. § 4100.0-5 (1984): "[A]n area of land designated and managed for grazing of livestock."
13. BLM, Salt Wells-Pilot Butte Grazing Environmental Impact Statement 18 (1983). Table 1-13 specifies that 49.1 percent of the forage in the Rock Springs Allotment (the checkerboard area) is located on private land.
14. 43 C.F.R. § 4110.2-2 (1984). The grazing preference is the amount of grazing use allocated to a qualified livestock operator in a given allotment.
15. 43 U.S.C.S. § 1701(a)(7) (Law. Coop. 1980).
16. 43 C.F.R. § 4110.3-2(b) (1984).
17. 43 C.F.R. § 4740.1 (1984).

This decision is wholly discretionary with the agency. For example, in *Bar X Sheep Co.*, the BLM temporarily suspended a portion of the livestock operators' grazing preference because of a temporary excess number of wild horses on an allotment.[18] The ranchers filed suit and attacked the BLM's decision as arbitrary, capricious, and an abuse of discretion because no time limit was set on the temporary suspension.[19] The court in upholding the government's action, stated:

> There appears to be no requirement in the law that a decision providing for a temporary suspension of grazing preferences specify a time limit for such suspensions. The suspension is by its nature dependent on causes whose duration is difficult to determine. The necessary implication . . . must be that the suspension will be effective at least so long as the situation persists which gave rise to the action.[20]

When an agency makes an allocation decision to achieve multiple-use management goals, it cannot give a higher priority to one use over another unless there is a clear mandate in a specific law to do so.[21] The agency must take into account all pertinent factors such as the ecology, existing uses, and their relative values in a particular area. But, no overall priority is assigned to any specific use under multiple-use management.[22]

In *American Horse Protection Association v. Frizzel*, the United States District Court for the District of Nevada held that both wild horses and cattle possess equal status on public lands.[23] In that action, the Wild Horse Protection Association sought to enjoin the BLM from rounding up part of a wild horse herd in the Stone Cabin Valley area of Nevada.[24] The association contended that horses had a higher priority on public land than did livestock. It maintained that the BLM should suspend cattle grazing before the agency removed the wild horses.[25]

The district court found the area to be overgrazed and also found that removal of the horses was an authorized and reasonable means to prevent further deterioration of the range. The court also noted that it would probably have made the same decision if the BLM had decided to remove cattle instead of horses.[26] *Frizzell* illustrates that courts will generally defer to the BLM when reviewing multiple-use management decisions involving public rangelands unless the BLM clearly gives one use a higher priority than another, in which case the agency's decision will be overruled as

18. Bar X Sheep Co., 88 Interior Dec. 665, 666 (1981).
19. *Id.* at 670.
20. *Id.* at 671 (citations omitted).
21. American Horse Protection Ass'n, Inc. v. Frizzell, 403 F. Supp. 1206, 1221 (D. Nev. 1975).
22. 43 C.F.R. § 1725.3-1 (1984).
23. 403 F. Supp. 1206, 1221 (D. Nev. 1975).
24. *Id.* at 1208-09.
25. *Id.* at 1220.
26. *Id.* at 1221.

arbitrary and capricious.[27] Otherwise, the courts will not overrule a BLM multiple-use management decision.

In managing the public lands within the checkerboard the BLM must administer RSGA's grazing preference in accordance with the Taylor Grazing Act. It must also manage the wild horse herd there as a component of the multiple-use management scheme. If the lands become overgrazed, it must make the choice of either reducing the wild horse herd or partially suspending RSGA's grazing preference on the public land. A partial suspension in RSGA's grazing preference has the potential of affecting up to one-half of its total grazing use on the checkerboard. As long as the BLM's actions are within its statutory authority and are not arbitrary and capricious they will be upheld on judicial review.[28]

It must be noted that suspending RSGA's grazing preference on the checkerboard allotment would not exclude it from using any portion of the public land in the allotment. It would only reduce the amount or level of use over the entire area. This is due to the checkerboard nature of the land ownership pattern. There are few fences in the area and therefore at any particular time there is a fifty percent chance that an animal is grazing on public land. If the BLM suspended all of RSGA's livestock grazing preference on the allotment, there would be no practical way to stop the livestock from grazing on public land. Therefore, fifty percent of RSGA's grazing would still occur on public land. But RSGA would utilize only one-half as much forage on public land, and only half of the forage on its privately owned land. One-half of the forage on the overall area would be left for the BLM to allocate to other uses such as forage for wild horses or other wildlife.[29]

The Wild and Free-Roaming Horses and Burros Act

Congress passed the Wild and Free-Roaming Horses and Burros Act in response to inhumane treatment and economic exploitation of wild horses and burros on public lands.[30] The Act provides that the Secretary of the Interior must protect and preserve all unbranded or unclaimed horses on the public lands of the United States. It also provides that wild horse management be integrated with the multiple-use management system.[31] The United States Supreme Court has upheld the constitutionality of the Act.[32]

27. Bar X Sheep Co., 88 Interior Dec. 665, 670-71 (1981); American Horse Protection Ass'n, Inc. v. Frizzell, 403 F. Supp. at 1217.

28. *See* Arlington Hosp. v. Schweiker, 547 F. Supp. 670, 680 (1982) for the definition of arbitary and capricious: "Agency action is arbitrary and capricious when it is willful and unreasonable action, without consideration and in disregard of [the] facts or circumstances of the case."

29. *See* 43 U.S.C.A. §§ 315-315q (West 1974 & Supp. 1984) for a detailed explanation of grazing use on public lands administered by the BLM.

30. 1971 U.S. CODE CONG. & AD. NEWS 2149-50.

31. 16 U.S.C.S. §§ 1331, 1333 (Law. Coop. 1984).

32. Kleppe v. New Mexico, 426 U.S. 529 (1976).

Under the Act, the Secretary must remove wild horses and burros that stray onto privately owned land.[33] This is an unusual statutory provision among those statutes that protect wild animals.[34] The Act does not expressly provide a remedy to landowners whose property has been invaded by wild horses, but federal courts have issued writs of mandamus requiring the BLM to remove them.[35] For instance, in *Roaring Springs Associates v. Andrus,* ranchers challenged BLM regulations that only required the agency to remove wild horses and burros that entered fenced private land.[36] The United States District Court for the District of Oregon struck down the regulations and held that the government owes a duty to landowners to remove wild horses from private land upon notice, whether the land is fenced or not. The court went on to hold that mandamus is available to the private landowner to require performance of that duty.[37] Since *Roaring Springs,* many actions have been brought against the BLM to require the removal of horses from private lands.[38]

The Taking Issue

The United States government may take private property for a public use through its eminent domain power.[39] The fifth amendment limits this power by specifying that private property cannot be "taken" without just compensation. It also specifies that private property can only be taken for a public use.[40]

The government action need not be an actual use or occupation to constitute a taking. A taking may be found where the action interferes with the use and value of the property.[41] The United States Supreme Court has not developed any set formula for determining when justice and fairness require that economic injuries caused by government action should be compensated. Instead, the Court determines each case on an ad hoc factual basis.[42] In taking cases where eminent domain has not been

33. 16 U.S.C.S. § 1334 (Law. Coop. 1984).

34. Only the Bald and Golden Eagle Act has a similar statutory provision. 16 U.S.C.A. § 668(a) (West Supp. 1984). The Eagle Act allows a property owner to obtain a permit from the Secretary of the Interior to destroy or remove eagles that are destroying livestock or agricultural crops. A similar remedy is provided in the case of grizzly bears in the Code of Federal Regulations. 50 C.F.R. § 17.40 (1983).

35. In Roaring Springs Assocs. v. Andrus, 471 F. Supp. 522, 526 (D. Or. 1978), and in Fallini v. Watt, No. 81-536 (D. Nev. Oct. 4, 1984), the courts ruled that the Secretary has a mandatory duty to remove wild horses from private land promptly upon notice from the landowner.

36. 43 C.F.R. § 4750.3 (1984).

37. Roaring Springs Assocs. v. Andrus, 471 F. Supp. 522, 525-26 (D. Or. 1978).

38. Mountain States Legal Foundation v. Clark, 740 F.2d 792 (10th Cir. 1984); Fallini v. Watt, No. 81-536 (D. Nev. Oct. 4, 1984).

39. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 480 (2d ed. 1983).

40. U.S. CONST. amend. V.

41. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 491 (2d ed. 1983).

42. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

exercised, the property owner must bring an action in inverse condemnation to recover damages.[43]

The United States Supreme Court has used several tests to determine if a government action constitutes a taking of private property. These tests are: the physical invasion test—whether or not the government or its agents have physically used or occupied something belonging to the claimant; and the diminution of value test—the extent of harm sustained by the claimant or the degree to which his property has been devalued.[44]

The Physical Invasion Test

Recently, the Supreme Court has created a *per se* taking rule where the government action is a permanent physical invasion. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the installation of thirty-six feet of one-half inch cable and a four inch square box in an apartment building was found to be a taking.[45] The Court reiterated the rule that a permanent physical occupation is a government action of such unique character that it is a taking without regard to other factors. Although the rule was not new, it had never been applied to such an insignificant invasion. The Court commented that a permanent physical occupation is perhaps the most serious form of invasion of an owner's property interest.[46]

Whenever a government action allows public access to private property, the Court views that action as a physical invasion and a taking will be found. In *Kaiser Aetna v. United States,* the government imposed a navigational servitude which allowed public access to a marina in a privately owned lagoon. The Court found that this was a taking.[47] The Court reasoned that public access denied the owners the right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[48]

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43. *See* Thompson v. Tualatin Hills Park and Recreation Dist., 496 F. Supp. 530, 539 (D. Or. 1980), for a definition of inverse condemnation: "[A] cause of action against a governmental entity to recover value of property taken by entity even though no formal power of eminant domain has been completed."

44. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165 (1967). Professor Michelman identified four possible tests but only the two discussed in the text can apply to the facts in *Mountain States.*

One of the other tests described by Professor Michelman was the *Balancing Social Gains Against Private Losses* test. He stated that it is rarely used, and he cited no Supreme Court cases where it had been used. The test is used where a court assumes the role of appraising the efficiency of a legislative measure. The court then balances society's gain from the legislation against the burden that it places on an individual. There are no objective standards for this test and it will not be discussed in this note. It is impossible to tell from the *Mountain States* opinion whether the Tenth Circuit even considered this test.

The other test described by Professor Michelman was the *Private Fault and Public Benefit* test. The test is used when a landowner is enjoined from using his land in a manner that is perceived as a nuisance. The Supreme Court has used this test to uphold land use regulations that prohibit certain activities. The facts in *Mountain States* clearly do not fit within this test.

45. 458 U.S. 419, 422 (1982).

46. *Id.* at 435.

47. Kaiser Aetna v. United States, 444 U.S. 164, 178-80 (1979).

48. *Id.*

A public-right-of way usually involves a road or some other physical structure. The structure is easily seen as a physical occupation. In *Kaiser Aetna*, the access was by way of a watercourse, not by any type of physical structure.[49] But the result was the same as if the government had built a public road into the landowner's marina. Although the Court in *Kaiser Aetna* based its holding on the landowner's right to exclude the public, it is clear that the government's imposition of a public right-of-way was tantamount to a physical invasion.

A physical invasion may also be found when the invasion is indirect. In *United States v. Causby*, the Supreme Court was asked to decide whether low overhead flights by military aircraft could constitute a physical invasion.[50] The flights were directly over the claimant's home and chicken ranch, and they occurred at all hours of the day.[51] The Court held that whenever a government action directly interferes with a property owner's ability to use and enjoy his land, the action will constitute a physical invasion.[52] But a physical invasion must be permanent to constitute a taking. The Court therefore remanded the case to the trial court to determine if the invasion in *Causby* was permanent.[53]

The Diminution of Value Test

The diminution of value is an important consideration when government regulations prohibit the use of private property and the government action is not a physical invasion.[54] This test is used when a court looks at the validity of land use regulations, such as zoning regulations. In applying the test, it is the degree to which the property is devalued rather than the dollar amount of the harm that is determinative.[55] For instance, in *Pennsylvania Coal v. Mahon Co.*, Justice Holmes stated, "when [the regulation] reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act."[56] In *Mahon*, the regulations restricting coal mining had rendered the claimant's mine useless. The effect of the regulations was found to be so extensive that a taking had occurred.[57]

Under this test, an owner may have to put up with very substantial losses as long as the land retains some use and market value.[58] In *Euclid v. Ambler Realty*, a property owner was denied the ability to develop his land for industrial purposes. No taking was found even though the owner's only option was to develop the land as residential property which resulted in a much lower economic return.[59]

49. *Id.* at 167-68.
50. 328 U.S. 256, 258 (1945).
51. *Id.* at 258-59.
52. *Id.* at 266.
53. *Id.* at 267-68.
54. Michelman, *supra* note 44, at 1191.
55. *Id.* at 1190-91.
56. 260 U.S. 393, 413 (1922).
57. *Id.* at 414.
58. Michelman, *supra* note 44, at 1192.
59. 272 U.S. 365, 384 (1926).

In *Penn Central Transportation Co. v. New York City,* the Supreme Court upheld the validity of regulations which prohibited building a fifty-five story office building on top of Grand Central Station.[60] The Court held that no taking had occurred because the property still retained its present use and value.[61]

Taking Cases Involving Wild Animals

The Supreme Court has never determined whether damage caused by wild animals can constitute a taking. Several state and federal courts have confronted the issue however. The general rule is that the government, through its actions or inactions, is not liable for damage done by wildlife.[62]

This non-liability rule is based on the legal fiction that the government does not actually own wild animals but is instead holding them in trust for the benefit of all people. This attitude was articulated by the Supreme Court in *Douglas v. Seacoast Products Inc.* There the Court stated:

> A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds or animals. Neither the States nor the Federal Government, anymore than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture.[63]

In *Sickman v. United States,* certain actions by government agents caused geese to congregate on the claimant's land and inflict damage to standing crops.[64] The landowners brought suit for damages caused by the trespassing geese. The Court of Appeals for the Seventh Circuit held that the government could not be held liable for the trespasses of animals which are *ferae naturae,* and have not been reduced to possession.[65] Although plaintiffs based their claim on trespass and not on a taking theory, this case points out the general attitude that courts take toward wild animals.

After plaintiffs failed to prevail in *Sickman,* they initiated a new action based on the same set of facts but on a theory that the goose damage constituted a taking of their property.[66] In this suit, entitled *Bishop v. United States,* the court of claims noted that many governmental actions often adversely affect private property and that by itself did not constitute

60. 438 U.S. 104, 116-17 (1978).

61. *Id.* at 127. The Court applied the test from *Mahon,* 260 U.S. 393, 415 (1922), where Justice Holmes stated, "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

62. *See* Leger v. Louisiana Dep't of Wildlife & Fisheries, 306 So. 2d 391 (La. Ct. App. 1975), *writ denied,* 310 So. 2d 640 (1975); Cook v. State, 192 Wash. 602, 74 P.2d 199 (1937); Platt v. Philbrick, 8 Cal. App. 2d Supp. 27, 47 P.2d 302 (Cal. Dist. Ct. App. 1935).

63. 431 U.S. 265, 284 (1977).

64. 184 F.2d 616, 617-18 (7th Cir. 1950), *cert. denied,* 341 U.S. 939 (1951).

65. *Id.* at 618.

66. Bishop v. United States, 126 F. Supp. 449, 451 (Ct. Cl. 1954), *cert. denied,* 349 U.S. 955 (1955).

a taking.[67] It also found that the government's actions were not an invasion of the claimant's property. The court stated:

> The gist of the whole matter is that Congress has passed an Act, valid under the Constitution, which prohibited the hunting of wild geese except as permitted by the Secretary of the Interior, and the Secretary of Interior has refused to give the required permission in the area in question. For this, of course, the Government is not liable as for a taking.[68]

Several state courts have also held that wildlife damage caused by state action is not a taking. *Collopy v. Wildlife Commission, Department of Natural Resources,* is the latest state case dealing with the "taking by wildlife" issue.[69] In *Collopy,* the wildlife commission closed a four square- mile area around the claimant's farm to goose hunting. Geese used the area and damaged crops there. Collopy contended the damage was a compensable taking because the closure had turned his farm into a *de facto* game refuge.[70] The court held that the mere ownership of wildlife by the state does not expose it to liability for wildlife inflicted crop damage.[71]

Collopy involved an action brought under article 2, section 15 of the Colorado Constitution.[72] The Colorado Supreme Court used the diminution of value test in finding that no taking had occurred. The court specifically found that the state had a legitimate goal in protecting wildlife, the closure was substantially related to achieving it, and the landowner was not precluded by the regulation from making a reasonable use of his land.[73] The court also noted it might have reached a different result if plaintiff had incurred more substantial damages.[74]

Not all courts have refused to recognize that wildlife damage cannot constitute a taking. The supreme courts of two states have found takings that resulted from wildlife inflicted damage.[75] In *Shellnut v. Arkansas State Game and Fish Commission,* the Arkansas Supreme Court held that a taking had occurred when wildlife trespassed onto private land because of state action.[76] The state had established a game refuge surrounding the claimant's land and prohibited hunting over the entire refuge, including the claimant's land.[77] The court, using the diminution of value test, found that the state's action seriously restricted the landowner's use

67. *Id.* at 452.
68. *Id.*
69. 625 P.2d 994 (Colo. 1981).
70. *Id.* at 996-98.
71. *Id.* at 1000.
72. COLO. CONST. art. II, § 15. Section 15 states: "Private property shall not be taken or damaged, for public or private use, without just compensation."
73. Collopy v. Wildlife Comm'n, 625 P.2d 994, 1001-02 (Colo. 1981).
74. *Id.* at 1002.
75. 222 Ark. 25, 258 S.W.2d 570 (1953).
76. *Id.* at 29, 258 S.W.2d at 573.
77. *Id.* at 27-29, 258 S.W.2d at 571-72.

of his lands.[78] The same result was reached in Wisconsin in the case of *State v. Herwig,* where the facts were very similar to those in *Shellnut.*[79]

Even though the result in *Shellnut* was different than the result in *Collopy,* the same test was applied in both cases. The difference in the results reflects the difference in what courts will view to be a substantial interference with a landowner's property. A factual difference between *Shellnut* and *Collopy* is that in *Shellnut* the action arose after the state of Arkansas had failed to negotiate leases to allow deer to use Shellnut's land,[80] while in *Collopy* leasing was not in issue.[81] Apparently, in Arkansas it is customary for the state to acquire leases for wildlife use while it is not in Colorado.

A taking will not be found unless the government's actions are a physical invasion or the owner's use of the property is substantially impaired.[82] A physical invasion can occur by the placement of a permanent fixture on the property or by indirect means if it substantially impairs the use of property.[83] If the government's action is not a physical invasion, courts apply the diminution of value test to determine if the property owner's use is impaired to the point that a taking will be found.[84] In cases where wild animals have been the instruments of a government's alleged taking, the diminution of value test is employed by the courts. No taking is found unless the facts show that the animals cause a substantial impairment on the landowner's use of the property.[85]

PRINCIPAL CASE

Mountain States Legal Foundation v. Clark reached the Tenth Circuit Court of Appeals on an appeal of a summary judgment granted to the Secretary of the Interior. The district court had granted the summary judgment against RSGA's inverse condemnation action. The court of appeals had no trial record and its ruling was based on the parties' affidavits and the allegations in the pleadings.[86]

In *Mountain States,* RSGA alleged that the BLM had failed to effectively manage the wild horses on the checkerboard lands as evidenced by the increase in the number of horses in the area since 1971. RSGA also claimed that the resulting foraging of the wild horses constituted a compensable taking of their property.[87]

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78. *Id.* at 29, 258 S.W.2d at 573.

79. 17 Wis. 2d 442, 117 N.W.2d 335 (1962).

80. 222 Ark. 25, 27, 258 S.W.2d 570, 572 (1953). *See also* State v. Herwig, 17 Wis. 2d 442, 448, 117 N.W.2d 335, 339 (1962).

81. 625 P.2d 994 (Colo. 1981).

82. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124-30 (1978).

83. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982); United States v. Causby, 328 U.S. 256 (1945).

84. *See* United States v. Causby, 328 U.S. 256, 261-62 (1945).

85. *See* Collopy v. Wildlife Comm'n, 625 P.2d 994, 1001-02 (Colo. 1981); Shellnut v. Arkansas State Game & Fish Comm'n, 222 Ark. 25, 29, 258 S.W.2d 570, 573 (1953).

86. *Mountain States,* 740 F.2d at 793-95.

87. *Id.* at 793.

The Secretary of the Interior, in his answer, admitted to an overpopulation of horses and an excessive demand on the range, but took no position on whether the horses had been mismanaged.[88] The Secretary, in his motion for summary judgment, alleged that RSGA had no cause of action on the compensable taking claim.

RSGA also alleged that the BLM had an affirmative duty to remove wild horses from their private land and sought a writ of mandamus to compel the government to do so. The district court granted the writ on a motion for summary judgment.[89] The Secretary did not raise the issue on appeal so the court of appeals took no position on the issue in the present case.

The Tenth Circuit Court of Appeals found the BLM had an affirmative duty to manage the horses.[90] It then held that if the BLM had failed to carry out this duty, the resulting foraging of wild horses on private land would be an unconstitutional taking of the landowner's property. The court based its holding on the fact that the Act was unique from other statutes which related to wild birds and animals.[91] The court of appeals remanded the issue to the district court for a factual determination of whether the BLM had failed to manage the wild horses.[92]

The court did not consider the horses to be "wild animals." This view was based on the fact that many of the horses were originally ungathered ranch horses and that local ranchers had introduced studs of good varieties to improve the herds.[93] The court felt that the ancestry of the horses made them unique as to other wild animals under the control of the federal government.

The exclusive and complete control of the wild horses by the government was also used by the court to distinguish the Act from other wild animal statutes. The court noted that no one but the government can manage the horses and stated, "This degree of control can become the significant factor in an examination of the liability of the government."[94] But, the court did not elaborate on exactly how the degree of control was different from other statutes protecting wild animals.

The Tenth Circuit narrowed its holding to cases involving checkerboard lands. It stated, "It is only by reason of the checkerboard ownership of the lands that horse control and management could become a factor or issue on the taking of plaintiffs' property."[95] The court reasoned that the Secretary's actions regarding horse management had a porportionately higher impact on private holdings within checkerboard lands, than on isolated tracts of private property.[96]

88. *Id.* at 794.
89. *Id.* at 793-95.
90. *Id.*
91. *Id.* at 794-95.
92. *Id.* at 795.
93. *Id.* at 793.
94. *Id.* at 794.
95. *Id.* at 795.
96. *Id.*

ANALYSIS

The Duty to Manage

The Court of Appeals for the Tenth Circuit found that the government's liability for a taking arose from the duties imposed on the BLM by the Wild and Free-Roaming Horses and Burros Act. Specifically, the court found the duties imposed on the BLM under the Act are the duty to manage the number of wild horses and the duty to remove them from private property upon an owner's request.[97] The court noted that RSGA's taking allegation was based on the BLM's alleged breach of these duties.[98] The BLM's failure to remove the horses from RSGA's land was remedied by the district court in granting the writ of manadamus.[99] However, the court of appeals held a taking had occurred if the BLM had breached its duty to manage the number of wild horses on the checkerboard.[100] But the court failed to articulate a standard for determining whether the BLM's actions or inactions breached its duty to manage.

Several standards for determining whether the BLM breached its duty to manage may be gleaned from the *Mountain States* opinion. RSGA alleged in its complaint that it desired to maintain and preserve a *reasonable* number of wild horses on the checkerboard.[101] The presence of any horses on the checkerboard means, however, that horses will be present on RSGA land at least fifty percent of the time. The issue therefore, is not the presence of wild horses on private lands but the number of horses in the checkerboard area. If the court interprets the BLM's duty to "manage" to mean controlling the horse population on the checkerboard, then apparently there can be no taking if the horse population were kept at a *reasonable* number. Although the court of appeals did not say so explicitly, it hinted that the 1971 horse population on the checkerboard was the guide in determining what constitutes a reasonable number of horses.[102] The court of appeals only directed the district court to inquire back to 1971, indicating that the horse population on the checkerboard in 1971 was reasonable.[103]

Presumably the duty to remove horses from private lands on the checkerboard does not arise if the horse population on the checkerboard is reasonably controlled. The nature of land ownership in the checkerboard is such that horses in the area will continually trespass on private land. So the court's holding must be interpreted to mean that if the number of horses on the checkerboard is reasonable, there is no breach of the agency's duty to manage. If the horse population exceeds a reasonable number, the BLM will have breached its duty to remove horses from private property and its duty to manage, exposing it to liability for a taking of the

97. *Id.* at 794.
98. *Id.* at 795.
99. *Id.* at 794.
100. *Id.* at 795.
101. *Id.* at 793.
102. *Id.*
103. *Id.* at 795.

private forage consumed. The question which remains, however, is whether the BLM's breach of the duty to manage *necessarily* constitutes a taking as the court of appeals implies.

Taking

The most troubling aspect of *Mountain States* is that the court held the foraging of wild horses could be an unconstitutional taking of RSGA's property. In reaching this decision, the court of appeals failed to cite any cases in support of its holding. The court also failed to engage in any analysis on the taking issue. Therefore, one is left to speculate as to how the court found that the foraging of wild horses of RSGA's lands could be an unconstitutional taking. As the following discussion will show, under any taking analysis, a breach of the BLM's duty to manage wild horses on the checkerboard cannot be a taking under the Supreme Court's taking tests.

Physical Invasion Test

The court in *Mountain States* may have based it's holding on the conclusion that the Secretary of the Interior's actions constituted a physical invasion of RSGA's land. In fact, RSGA argued this very point in its appeal to the Tenth Circuit.[104] As exemplified by *Loretto v. Teleprompter Manhattan CATV Corp.*, a permanent physical occupation is never exempt from the taking clause.[105]

But, the nature of the occupation of *Loretto* was clearly different than the occupation in *Mountain States*. In *Loretto,* a permanent fixture was placed on the claimant's land because of government action.[106] The wild horses are not a permanent fixture on RSGA's private land. They continually move between public and private lands and the number of horses continually varies.

In *Loretto,* the Supreme Court emphasized that in applying the physical invasion test it distinguishes between a permanent physical occupation and the situation where the government's action is a "more temporary invasion."[107] Under *Loretto,* there is no *per se* taking unless the government's action constitutes a *permanent* physical occupation. The horses are not a permanent physical occupation because the BLM continually removes horses from the area.[108] Also, under the Wild Horse Act, if the BLM fails to remove horses from private land, private landowners

104. Appellant's Reply Brief at 1-2, Mountain States Legal Foundation v. Clark, 740 F.2d 792 (10th Cir. 1984).

105. 458 U.S. 419 (1982).

106. *Id.* at 422.

107. *Id.* at 428.

108. BLM, Salt Wells-Pilot Butte Environmental Impact Statement 76 (1983). Table 2-18 shows the horse population on the checkerboard area had been reduced to below 2,100 horses by February, 1983. Whether the population was further reduced is not known but the reduction shows the BLM is actively removing wild horses.

can obtain a writ of mandamus to require the BLM to remove the horses.[109] In fact, RSGA obtained a writ of mandamus from the district court in *Mountain States.*

The court in *Mountain States* may have found the presence of the horses to be an indirect occupation. In *United States v. Causby,* the Court found that an indirect occupation by the government could be a physical invasion. But like the diminution of value test, the indirect physical invasion test requires a showing that the landowner's use and enjoyment of his property is substantially impaired. The Court found a taking in *Causby* if low overhead flights of military aircraft made a claimant's property uninhabitable and destroyed the owner's chicken raising business.[110]

If the court found that the horses constituted an indirect occupation in *Mountain States,* the court misapplied the test. RSGA did not show that it had been denied the use of its private land in the checkerboard nor is it likely that it could. Appoximately half of the land in the checkerboard is public land on which RSGA holds a grazing preference administered under the Taylor Grazing Act. Therefore, in order for the court to find an indirect occupation, RSGA would have to show that the wild horses were consuming more than fifty percent of the forage on the checkerboard lands. Unless the horse population reached this level, RSGA could not show that the BLM's actions (or inactions) interefered with the use of its property. RSGA did not even allege that the wild horses were consuming more than fifty percent of the forage on the checkerboard lands.[111]

RSGA also maintained that the BLM's management (or non-management) interfered with their right to exclude others from their property.[112] The Supreme Court found that a taking had occurred in *Kaiser Aetna v. United States* where the government imposed a public access requirement to a private marina. The court reasoned that allowing public access denied the property owners the right to exclude others and was analogous to a physical invasion.[113]

The holding in *Kaiser Aetna* clearly does not apply to the facts in *Mountain States.* In *Kaiser Aetna,* the government imposed a public right of way onto private property.[114] In *Mountain States,* the BLM did not impose a public right-of-way on RSGA's land. The BLM only allowed the increase of the wild horses that have been on the checkerboard area since before RSGA owned any property there.

Kaiser Aetna held that the right to exclude others was a fundamental element of the right to own property.[115] This right to exclude others

109. *See* Roaring Springs Assocs. v. Andrus, 471 F. Supp. 522, 526 (D. Or. 1978); Fallini v. Watt, No. 81-536, slip op. at 4 (D. Nev. Oct. 4, 1984).
110. United States v. Causby, 328 U.S. 256, 261-62 (1945).
111. *Mountain States,* 740 F.2d at 797 (McKay, J., dissenting).
112. Appellant's Opening Brief, *supra* note 3, at 19-20.
113. *Kaiser Aetna,* 444 U.S. 164, 174-80 (1979).
114. *Id.* at 168.
115. *Id.* at 179-80.

should apply only to people and not to wild animals. No courts have ever held that the federal government must obtain an easement before wild animals can enter upon private land. If that was the rule, the government would be theoretically liable for a taking every time a wild animal ate a blade of grass on private property. *Kaiser Aetna* should be limited to cases involving public access, and should not be extended to wild animals.

Diminution of Value Test

Using the diminution of value test, the grazing of wild horses on RSGA's private land could not be a taking. Under this test, RSGA would have to show that the wild horses substantially impaired the use of their land. In *Penn Central Transportation Co. v. New York City,* the Court found no taking in spite of the fact that the owners had to forego a substantial investment return. The Supreme Court pointed out they had not been completely deprived of their use of the property.[116] The same conclusion was reached in *Euclid v. Ambler Realty.*[117] In *Pennsylvania Coal Co. v. Mahon,* where the Court did find a taking, the owners had been completely denied all use and investment return of their coal mine.[118] In *Mountain States,* RSGA did not even argue they had been deprived of all beneficial use of their lands.[119] In fact, it is clear that RSGA has not been completely deprived of any grazing use on either the public or private lands in the checkerboard. RSGA can still graze livestock on its private land in the area.

State and federal cases dealing with the wildlife taking issue have all used the diminution of value as the test to determine if there was a taking.[120] In these taking cases, the facts underlying the alleged taking were extremely important in determining whether an actual taking had occurred. This is exemplified by the split in authority between the *Collopy*[121] and *Shellnut*[122] decisions. However, in *Mountain States,* the court had only minimal facts before it because the issue came up on summary judgment motions.[123] If the court did use the diminuition of value test, it was inapropriate in light of the fact that the court had only a scant evidentiary record.

The Wild and Free-Roaming Horses and Burros Act

In order to justify its taking holding, the Tenth Circuit Court of Appeals made several distinctions between the Wild Horse Act and other legislation which protects wild animals. The court reasoned that the Wild Horse Act was unique because wild horses are not "wild animals" and

116. 438 U.S. 104, 130-31 (1978).
117. 272 U.S. 365, 384-85 (1926).
118. 260 U.S. 393, 414 (1922).
119. 740 F.2d at 797 (McKay, J., concurring in part, dissenting in part).
120. *See infra* text accompanying notes 64-81.
121. Collopy v. Wildlife Comm'n, 625 P.2d 994, 1001 (Colo. 1981).
122. Shellnut v. Arkansas State Game and Fish Comm'n, 222 Ark. 25, 29, 258 S.W.2d 570, 573 (1953).
123. *Mountain States,* 740 F.2d at 793-94.

because the government has complete and exclusive control over them.[124] The former distinction is irrelevant and the latter is simply not true.

It is irrelevant whether the horses are "wild animals"; they, like other wild animals, are not owned by private individuals. The question is whether their legal status under the Wild and Free-Roaming Horses and Burros Act is different from other wild animals. In his dissenting opinion in *Mountain States,* Judge McKay stated he did not think so.[125] The majority cited no authority to support its theory that the wild horses are viewed differently in the eyes of the law than other animals protected by Congress. The natural history of wild horses should not be a consideration in comparing the legal consequences of the Wild Horse Act with other wildlife protection legislation.

The "exclusive control" distinction used by the court of appeals to distinguish the Wild Horse Act is simply erroneous. Every wildlife protection act gives the federal government the exclusive control over the animals being protected.[126] The typical statute states that it is unlawful to *take* the protected animal unless authorized by the appropriate agency. The definition of *take* is very broad and includes virtually any active encounter with the protected species.[127] None of the statutes allow landowners to remove wild animals merely because they are on private property. The Wild Horse Act also prohibits landowners from removing horses from their property. On that basis, the Wild Horse Act is no different than any other wildlife protection statute.

Other courts could easily reject the Tenth Circuit's distinctions and apply the holding of *Mountain States* to other wildlife statutes. The resulting liability of the federal government would be startling if it had to compensate landowners for damage caused to private property by wild animals other than wild horses.

The district court had provided RSGA with a remedy to prevent future trespasses by ordering the removal of wild horses on the checkerboard. But this did not provide relief for past damages allegedly suffered by RSGA. The Tenth Circuit was apparently attempting to remedy this by ruling that there was a taking if the BLM had not properly managed the horses. The court could have reached the same result by holding that RSGA had a cause of action in trespass.[128] With a trespass action, the court could have avoided the difficult taking issue. In order to hold that

124. *Id.* at 794.

125. *Id.* at 796 (McKay, J., concurring in part, dissenting in part).

126. *See* The Bald and Golden Eagle Protection Act, 16 U.S.C.A. §§ 668-668d (West 1974 & Supp. 1984); Migratory Bird Treaty, 16 U.S.C.A. §§ 703-711 (West 1974 & Supp. 1984).

127. *See* Migratory Bird Treaty, 16 U.S.C.A. § 703 (West 1974 & Supp. 1984) for a definition of *take*: "It shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, . . . [specified bird or animal species]."

128. *See* 28 U.S.C.S. § 1346 (Law. Coop. 1977 & Supp. 1984). Section 1346(b) of the Federal Torts Claim Act waives sovereign immunity for claims for money damages against the United States for injury or loss of property caused by the negligent or wrongful act or omission

there was a possible taking, the court had to hand down a decision citing no precedent and lacking any relevant analysis. If it had recognized a trespass action for RSGA, the court could have remanded for the factual determination of the elements of a well-established tort action. Instead, the district court was left to determine what constituted proper horse management even though it was given no standard by which to measure proper management.

CONCLUSION

The Court of Appeals for the Tenth Circuit found a taking but never engaged in any in-depth analysis or cited any precedent for its ruling. The BLM may have breached its statutory duty to manage the horses on the checkerboard. However, the court should have but failed to recognize that the only remedy under the Wild and Free Roaming Horses and Burros Act was the removal of horses from the checkerboard. If the court wished to provide an additional remedy to RSGA, providing an unconstitutional taking action was inappropriate. When a taking analysis is done, it is obvious that no taking occurred. Because of the court's lack of analysis and its questionable distinction of the Wild and Free-Roaming Horses and Burros Act with other wildlife protection statutes, *Mountain States* may be applied to other wildlife statutes. If that happens, the *Mountain States* decision could radically affect the government's management of wildlife for years to come.

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of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. A tort action against the government within the facts of *Mountain States* is outside the scope of this note.

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