

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

Court of Appeals of New Mexico
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Mark Reynolds

4 **No. A-1-CA-42585**

5 **WILD HORSE OBSERVERS**
6 **ASSOCIATION, INC.,**

7 Plaintiff-Appellee,

8 v.

9 **NEW MEXICO LIVESTOCK**
10 **BOARD, NEW MEXICO LIVESTOCK**
11 **BOARD REGIONAL SUPERVISOR**
12 **BENJAMIN GONZALES,**

13 Defendants-Appellants,

14 and

15 **ANDRE BIANE, JAMES CARROLL,**
16 **DAVID GONZALES, BOARD OF**
17 **COUNTY COMMISSIONERS OF THE**
18 **COUNTY OF SANDOVAL, and**
19 **SANDOVAL COUNTY SHERIFF**
20 **JESSIE JAMES CASAUS,**

21 Defendants.

22 **APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY**
23 **Christopher Perez, District Court Judge**

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OPINION

DUFFY, Judge.

{1} This interlocutory appeal requires us to again consider the New Mexico Livestock Board’s (the Board) duty to return wild horses captured on private land to public land. This Court recently addressed the Board’s duty in *Wild Horse Observers Association, Inc. v. New Mexico Livestock Board (Wild Horse II)*, 2022-NMCA-061, ¶ 25, 519 P.3d 74, stating that “when the Board is asked to address wild horses captured on *private* land, . . . its duty was to return the subject horses to the public land they inhabit.” The Board contends the duty expressed in *Wild Horse II* is limited, arising only where the Board first voluntarily and wrongfully takes possession of wild horses on private land. We disagree that the Board’s duty is limited in this manner and affirm the district court.

BACKGROUND

{2} Defendants New Mexico Livestock Board and Benjamin Gonzales, the Board’s regional supervisor, appeal the district court’s denial of their motion to dismiss a petition and complaint filed by Plaintiff Wild Horse Observers Association (WHOA) for failure to state a claim. Because we are reviewing an appeal of a Rule 1-012(B)(6) NMRA motion, “we accept all well-pleaded factual allegations in the complaint as true and resolve all doubts in favor of sufficiency of the complaint.” *Wild Horse Observers Ass’n, Inc. v. N.M. Livestock Bd. (Wild Horse I)*, 2016-

1 NMCA-001, ¶ 10, 363 P.3d 1222 (internal quotation marks and citation omitted).

2 The following facts are taken from WHOA’s petition and complaint.

3 {3} On March 30, 2023, four wild horses, including a foal, entered a corral on
4 property owned by James Carroll¹ in Sandoval County. The property is contiguous
5 to Sandoval County public land and near other state and federal public lands. Despite
6 knowing the horses were wild, Mr. Carroll closed his gates and trapped the wild
7 horses on his property. Mr. Carroll contacted the Board to arrange for an inspector
8 to come inspect the wild horses. Defendant Gonzales went to Mr. Carroll’s property
9 and, after inspecting and photographing the captured horses, determined that the
10 Board had no “jurisdiction” over the horses because they were not livestock.
11 Defendant Gonzales then informed Mr. Carroll that since the horses did not belong
12 to anyone, Mr. Carroll “could do with the horses as he wanted.” The wild horses
13 were removed from Mr. Carroll’s property and transported to Belen, where they
14 were sold at auction; at least one horse was transported across state lines into
15 Colorado to be sold at auction.

16 {4} WHOA brought an action against the Board, Mr. Gonzales, and other
17 defendants not party to this appeal, contending that the removal of the wild horses
18 from public land and their subsequent transportation from Mr. Carroll’s property

¹Mr. Carroll is a defendant in the proceedings in the district court but is not a party to this appeal.

1 violated multiple sections of the Livestock Code, NMSA 1978, §§ 77-2-1 to -18-6
2 (1869, as amended through 2025). WHOA requested, in relevant part, a writ of
3 mandamus and a declaratory judgment compelling the Board to comply with its duty
4 under New Mexico law to either instruct private citizens holding wild horses to
5 release the wild horses back to public land, or to return the wild horses back to the
6 public land itself.

7 {5} In lieu of an answer, Defendants filed a motion to dismiss for failure to state
8 a claim, asserting that the Board does not have “jurisdiction” over wild horses on
9 private land. Defendants argued that the Board has “jurisdiction” over livestock, but
10 wild horses are not livestock, and the Livestock Code, § 77-18-5, provides the Board
11 with limited authority over wild horses captured on public land. Defendants
12 acknowledged, however, that they have a duty to return wild horses to public lands
13 as follows: “Should a wild horse wander onto private property, . . . Defendants can
14 return the wild horses to the public land they inhabit, . . . which is clearly in
15 accordance with [the Board]’s . . . duties.” In their reply, Defendants framed their
16 duty more narrowly, arguing that a duty to return the wild horses only arises when
17 the Board “unlawfully” takes possession of wild horses on private land.

18 {6} The district court rejected Defendants’ argument that the Board’s “duty to
19 return wild horses to public land is only applicable when [the Board] is in possession
20 of the horses already and the duty is not absolute for every case involving wild

1 horses.” The district court denied Defendants’ motion to dismiss but certified its
2 ruling for interlocutory appeal. We granted Defendants’ application for interlocutory
3 appeal to address the Board’s duty to return wild horses captured on private land to
4 the public lands they inhabit.

5 **DISCUSSION**

6 **I. Standard of Review**

7 {7} We review de novo the district court’s denial of a Rule 1-012(B)(6) motion to
8 dismiss for failure to state a claim. *Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031,
9 ¶ 9, 320 P.3d 482; *Wild Horse I*, 2016-NMCA-001, ¶ 10. In this case, the district
10 court’s ruling was based on its interpretation of the Board’s duty with respect to wild
11 horses captured on private land. The existence and scope of a defendant’s duty is a
12 question of law for the courts to resolve. *See Delfino v. Griffo*, 2011-NMSC-015,
13 ¶ 12, 150 N.M. 97, 257 P.3d 917.

14 **II. The Board’s Duty to Return Wild Horses to the Public Lands They** 15 **Inhabit**

16 {8} The Board contends that it had no duty to take any action with respect to the
17 wild horses in this case. The Board argues that any duty imposed by *Wild Horse II*
18 was limited to the factual circumstances of that case—i.e., circumstances where the
19 Board first took possession of the wild horses from the private landowner. The Board
20 maintains that because it declined to take possession of the horses in this case, it had
21 no duty to return the wild horses to the public land. We disagree, and explain.

1 {9} In *Wild Horse II*, a private citizen contacted the Board complaining about a
2 herd of wild horses near her private property in Alto. 2022-NMCA-061, ¶ 2. The
3 Board informed the citizen that it could only take possession of wild horses corralled
4 or captured by a private citizen. *Id.* The citizen then corralled twelve wild horses and
5 again contacted the Board, which took possession of the horses and transported them
6 to Santa Fe. *Id.* Although the Board informed residents in Alto that the wild horses
7 would be returned to the area, the Board posted on its website that the horses would
8 be sold at auction. *Id.* WHOA filed a complaint for declaratory and emergency
9 injunctive relief seeking to prevent the Board from unlawfully impounding and
10 selling the horses. *Id.* ¶ 3. This Court concluded first that the horses remained
11 “protected as ‘wild horses’ because the definition of that term does not depend on
12 whether, at the moment of their capture, the horses happened to be on land that is
13 private, but instead depends on whether the horses generally roam public land.” *Id.*
14 ¶ 20. Given this, the Court concluded that the Board was not authorized to treat the
15 wild horses as estray, and therefore, the Board’s actions of impounding the horses
16 and putting them up for auction were wrongful. *Id.* ¶ 28; *see* §§ 77-13-2, -5(B)
17 (authorizing the Board to impound, auction, or otherwise dispose of unclaimed
18 estray horses).

19 {10} Turning to what the Board was required to do, this Court observed that Section
20 77-18-5(B) “does not contemplate a scenario where a wild horse is captured on

1 private land.” *Wild Horse II*, 2022-NMCA-061, ¶ 22. However, the Court noted that
2 when read “in connection with Section 77-18-5(C)—which authorizes a wild horse’s
3 removal from public lands in only justified and limited circumstances, such as
4 population control—it is clear that the goal of . . . our Legislature is to leave wild
5 horses in their natural habitat unless there is a valid reason to remove them.” *Wild*
6 *Horse II*, 2022-NMCA-061, ¶ 23. That goal would be defeated, the Court reasoned,
7 if either the Board or a private citizen was allowed to retain possession of wild
8 horses, thereby removing wild horses from their natural habitat. *Id.* ¶¶ 18, 24; *see*
9 *State ex rel. Sofeico v. Heffernan*, 1936-NMSC-069, ¶¶ 16, 18, 41 N.M. 219, 67 P.2d
10 240 (stating that “the state holds title to the wild animals in trust for the people” and
11 wild animals “are not of common right open to capture and possession by the
12 public”). Thus, when faced with circumstances where a private citizen had taken
13 possession of wild horses and asked the Board to deal with the horses, the Court
14 concluded that the Board has a duty to return the subject horses to their public
15 habitat. *See Wild Horse II*, 2022-NMCA-061, ¶ 25.

16 {11} Defendants attempt to cabin our holding in *Wild Horse II*, arguing that the
17 Court’s use of the phrase “in such circumstances as the Board here faced” acts as
18 qualifying language that means the duty is only triggered in factual circumstances
19 similar to those in *Wild Horse II*. *See id.* ¶ 25 (stating that “when the Board is asked
20 to address wild horses captured on *private* land . . . *in such circumstances as the*

1 *Board here faced*, its duty was to return the subject horses to the public land they
2 inhabit” (second emphasis added)). According to Defendants, those factual
3 circumstances are limited to instances where the Board takes possession of wild
4 horses from a private citizen. It is clear, however, that the “circumstances as the
5 Board [then] faced” in *Wild Horse II* were that a private citizen had taken possession
6 of wild horses, and the Court’s answer focused on the remedy, instructing the Board
7 that it should have returned the horses to the public land rather than taking possession
8 of the horses and wrongfully treating them as estray. *See id.* Because neither the
9 private citizen nor the Board had a right to capture the horses and treat them as estray,
10 the Court chose the only viable option: the Board must return the wild horses to the
11 public land they inhabit. *See id.* ¶¶ 24-25.

12 {12} The factual difference in this case—that the Board declined to take
13 possession—does not compel a different conclusion. Whether the Board
14 affirmatively treats the horses as estray (as in *Wild Horse II*) or, through inaction,
15 allows a private citizen to treat the horses as estray, the result is the same: wild horses
16 are unlawfully removed from their natural habitat. Both approaches are contrary to
17 the Legislature’s goal “to leave wild horses in their natural habitat,” *id.* ¶ 23, and
18 “eviscerate the purpose of the statute in a way that would be not only nonsensical,
19 but potentially harmful to the animals protected by . . . important federal, state, and
20 regulatory enactments.” *Id.* ¶ 18. Consequently, we can perceive no justification for

1 concluding that the Board, when asked to address wild horses on private property,
2 can disregard its duty through inaction.²

²If we were to accept the dissent’s narrow view that the Board’s duty is discretionary and triggered only when the Board voluntarily decides to take possession of wild horses captured on private land, we would be authorizing the Board to do nothing at all when asked by a private citizen to address wild horses on private land. And when the Board is notified about wild horses on private land but does nothing, the result is to allow wild horses to be treated (by a private citizen, at the acquiescence of the Board) as stray. Such a result is contrary to *Wild Horse I* and *Wild Horse II*, which make clear that treatment of wild horses as stray is not permissible or lawful. The dissent’s reliance on possession to limit the construction of *Wild Horse II* is not persuasive and ignores other reasoning in *Wild Horse II* expressing that private citizens cannot capture and attempt to remove wild horses from their natural habitat because to do so would violate the statutory directives protecting wild free-roaming horses even when they stray from public lands. *See Wild Horse II*, 2022-NMCA-061, ¶ 24. Nor are we persuaded that the duty expressed in *Wild Horse II* imposes untenable responsibilities or expenses upon the Board. *Wild Horse II* did not impose an affirmative duty on the Board to scout for wild horses on private land or even necessarily to go pick up wild horses on private land when notified—the Board, if informed that a private citizen had captured wild horses, could simply instruct the private citizen not to corral the horses and to open the gates and let them go. Finally, while the dissent makes much of the Legislature’s silence or failure to pass more recently-proposed legislation to regulate wild horses, we cannot rely on the Legislature’s failure to act to discern legislative intent, particularly in light of the past precedents of this Court construing the Board’s duties with respect to wild horses. *See Arco Materials, Inc. v. N.M. Tax’n & Revenue Dep’t*, 1994-NMCA-062, ¶ 19, 118 N.M. 12, 878 P.2d 330 (Black, J. specially concurring) (“I believe it is more important for this Court to follow its own precedent than to allow the rights of the parties to be governed by which panel of judges is assigned to the case.”), *rev’d on other grounds by Blaze Constr. Co. v. N.M. Tax’n & Revenue Dep’t*, 1994-NMSC-110, ¶ 22, 118 N.M. 647, 884 P.2d 803; *State v. Montano*, 2022-NMCA-049, ¶ 18, 517 P.3d 267 (stating the fact “[t]hat the Legislature did not pass this (or similar) legislation does not appear to be a legislative mistake or oversight, but instead appears to be a product of legislative inaction or choice, which, as far as we are aware, provides no basis for departing from” past precedent), *aff’d*, 2024-NMSC-019, 557 P.3d 86; *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 20, 378 P.3d 13 (“Because the Legislature has not taken any steps in the interim to correct

1 {13} To the extent Defendants also suggest that the Board has no authority over
2 wild horses unless they are captured on public land, *Wild Horse II* made clear that
3 “the phrase ‘on public land’ means that the wild horses’ *habitat* includes public land,
4 regardless of where such horses are found at any given point in time.” 2022-NMCA-
5 061, ¶ 17. Simply put, because wild horses retain their status as “wild” even when
6 they enter onto private land, the Board’s authority over wild horses does not abate
7 simply because the horses happened to wander onto private land.³ *See id.* ¶¶ 17, 19
8 (rejecting the Board’s argument that horses are not wild horses because they were
9 captured on private land and holding that a wild horse does not “lose[] its ‘wild’
10 status, and thus become[] estray, when it steps over an unenclosed private property
11 boundary, and sets hoof on private land”). Defendants appear to have acknowledged
12 as much in the district court, noting that the Board “*can* return the wild horses to the

or change these long-standing interpretations . . . , their inactivity is an endorsement of the case law, absent any evidence to the contrary.”); *State v. Chavez*, 2008-NMSC-001, ¶ 21, 143 N.M. 205, 174 P.3d 988 (“The Legislature’s continuing silence on the issue we confront herein is further evidence that it was both aware of and approved of the existing case law. . . . If the Legislature had intended to modify or clarify those rules, it would have done so expressly.”).

³Defendants also appear to argue that the horses at issue in this case are federal wild horses over which the Board has no jurisdiction. However, the complaint alleges that the horses at issue are New Mexico wild horses within the meaning of Section 77-18-5. Because this is an appeal of a Rule 1-012(B) motion, we accept these allegations as true. *See Wild Horse II*, 2022-NMCA-061, ¶ 10 (stating that 16 U.S.C. § 1332(e) of the federal Wild Free-Roaming Horses and Burros Act governs wild horses on federally-managed lands and the state statute governs wild horses “on all other public lands except state trust land that is controlled by the state land office”).

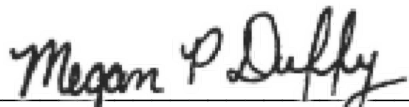
1 public land they inhabit, . . . which is clearly in accordance with [the
2 Board]’s . . . duties.”

3 {14} For all of these reasons, we reaffirm our holding in *Wild Horse II* that the
4 Board’s duty to return wild horses to the public land they inhabit applies “when the
5 Board is asked to address wild horses captured on private land,” *see* 2022-NMCA-
6 061, ¶ 25 (emphasis omitted), and is not qualified by any requirement that the Board
7 first take possession of the wild horses. As a final matter, because our holding may
8 require the Board to briefly take possession of wild horses captured on private land
9 to the limited extent necessary to relocate them to public land, we note that *Wild*
10 *Horse II* does not prevent such conduct. Rather, the conduct at issue in *Wild Horse*
11 *II* was possession that led to the removal of the horses from their public habitat and
12 treatment of the horses as estrays. *Id.* ¶¶ 23-25. Accordingly, any brief possession
13 by the Board for the purpose of returning wild horses to public land is not
14 “wrongful.” *See id.* ¶ 25.

15 CONCLUSION

16 {15} We affirm the district court’s denial of the Board’s motion to dismiss and
17 remand to the district court for further proceedings consistent with this opinion.

1 {16} IT IS SO ORDERED.

2 
3 _____
MEGAN P. DUFFY, Judge

4 I CONCUR:

5 
6 _____
JENNIFER L. ATTREP, Judge

7 KRISTOPHER N. HOUGHTON, Judge, dissenting.

1 **HOUGHTON, Judge (dissenting).**

2 {17} I respectfully dissent. The majority today holds that the Livestock Board has
3 an affirmative duty to rescue wild horses captured by private actors on private lands
4 and ensure their return to public lands. *Maj. op.* ¶¶ 1, 14. The majority concludes
5 that it “reaffirm[s] our holding in *Wild Horse II*.” *Id.* ¶ 14. I disagree that this Court
6 in *Wild Horse II* created any duty beyond the unique factual circumstances it
7 encountered. Moreover, reading *Wild Horse II* this broadly is problematic for a
8 number of reasons. First, the duty that the majority says *Wild Horse II* imposed on
9 the Board appears nowhere in statute. Second, this duty will encourage landowners
10 to summon the Board to retrieve wild horses on private land, undermining the
11 Legislature’s mandate in Section 77-16-1 that landowners erect fencing to keep out
12 trespassing animals. And finally, such a duty should be created by the Legislature,
13 which is best equipped to consider the unforeseen cost and liability of imposing such
14 a duty on an executive agency.

15 {18} I would, instead, read the holding of *Wild Horse II* as limited to its factual
16 confines and in a manner that would not run afoul of core principles such as
17 separation of powers. I would then employ established tools of statutory construction
18 to conclude that the Legislature has not—as yet—enacted such a duty. Accordingly,
19 I would reverse the district court’s dismissal of the Board’s motion to dismiss,

1 insofar as it finds the Board has a duty to rescue wild horses captured by private
2 actors on private lands and ensure their return to public lands.

3 **III. The Statute**

4 {19} Unlike the federal government, New Mexico has not enacted a comprehensive
5 scheme regulating wild horses. *Compare* § 77-18-5 (Wild horses), *with* 16 U.S.C.
6 §§ 1331-1340, (The Wild and Free-Roaming Horses and Burros Act of 1971). The
7 New Mexico statute at issue does not, for example, contain a single reference to wild
8 horses on *private* land. In contrast, the federal statute expressly addresses that
9 scenario:

10 If wild free-roaming horses or burros stray from public lands
11 onto privately owned land, the owners of such land may inform the
12 nearest Federal marshall or agent of the Secretary, who shall arrange to
13 have the animals removed. In no event shall such wild free-roaming
14 horses and burros be destroyed except by the agents of the Secretary.
15 Nothing in this section shall be construed to prohibit a private
16 landowner from maintaining wild free-roaming horses or burros on his
17 private lands, or lands leased from the Government, if he does so in a
18 manner that protects them from harassment, and if the animals were not
19 willfully removed or enticed from the public lands. Any individuals
20 who maintain such wild free-roaming horses or burros on their private
21 lands or lands leased from the Government shall notify the appropriate
22 agent of the Secretary and supply him with a reasonable approximation
23 of the number of animals so maintained.

24 16 U.S.C. § 1334.

25 {20} Apart from a definitional section and a section giving stock-reduction power
26 to “the mammal division of the museum of southwestern biology,” the New Mexico
27 statute reads in its entirety:

1 A wild horse that is captured on *public* land shall have its conformation,
2 history and deoxyribonucleic acid tested to determine if it is a Spanish
3 colonial horse. If it is a Spanish colonial horse, the wild horse shall be
4 relocated to a state or private wild horse preserve created and
5 maintained for the purpose of protecting Spanish colonial horses. If it
6 is not a Spanish colonial horse, it shall be returned to the public land,
7 relocated to a public or private wild horse preserve or put up for
8 adoption by the agency on whose land the wild horse was captured.

9 Section 77-18-5(B) (emphasis added).

10 {21} The instant question is answered by examining the plain language of the
11 statute. *See Sims v. Sims*, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153 (“The
12 plain meaning rule of statutory construction states that when a statute contains
13 language which is clear and unambiguous, we must give effect to that language and
14 refrain from further statutory interpretation.” (alteration, internal quotation marks,
15 and citation omitted)). Nothing in the statute addresses wild horses on *private* land,
16 let alone imposes on the Board a duty to retrieve them when there. Apparently,
17 members of our Legislature have realized this statutory void because they have
18 repeatedly proposed bills to more comprehensively regulate wild horses in New
19 Mexico, though none have been enacted into law.⁴

⁴S.B. 158, 54th Leg., 1st Sess. (N.M. 2019),
<https://www.nmlegis.gov/Sessions/19%20Regular/bills/senate/SB0158.pdf>;
H.B. 445, 54th Leg., 1st Sess. (N.M. 2019),
<https://www.nmlegis.gov/Sessions/19%20Regular/bills/house/HB0445.pdf>;
S.B. 385, 55th Leg., 1st Sess. (N.M. 2021),
<https://www.nmlegis.gov/Sessions/21%20Regular/bills/senate/SB0385.pdf>;
S.B. 301, 56th Leg., 1st Sess. (N.M. 2023),
<https://www.nmlegis.gov/Sessions/23%20Regular/bills/senate/SB0301.pdf>;

1 {22} This Court in *Wild Horse I* considered one such gap in the statutory scheme
2 and observed that it is the Legislature’s duty to fill it. *See* 2016-NMCA-001, ¶ 17
3 (“To the extent that wild horses not in captivity appear to be unprotected by animal
4 cruelty statutes, perhaps our Legislature has a void to fill.”); *accord Johnson v. N.M.*
5 *Oil Conservation Comm’n*, 1999-NMSC-021, ¶ 27, 127 N.M. 120, 978 P.2d 327
6 (We are not permitted to “read into a statute . . . language which is not there,
7 particularly if it makes sense as written.” (internal quotation marks and citation
8 omitted)); *Bolles v. Smith*, 1979-NMSC-019, ¶ 6, 92 N.M. 524, 591 P.2d 278 (“A
9 change in the law is a matter for the Legislature. In the meantime, the courts must
10 construe the statute as it exists based upon the facts presented in each case.”); *Segura*
11 *v. J.W. Drilling, Inc.*, 2015-NMCA-085, ¶ 15, 355 P.3d 845 (“Courts must construe
12 statutes as they find them and may not amend or change them under the guise of
13 construction.” (internal quotation marks and citation omitted)).

14 {23} Over the years, this Court has deferred to the Legislature when confronting
15 statutory silence. In *Segura*, for example, this Court faced a push by workers to read
16 into the Minimum Wage Act (MWA) provisions related to compensable travel time.

H.B. 284, 57th Leg., 1st Sess. (N.M. 2025),
<https://www.nmlegis.gov/Sessions/25%20Regular/bills/house/HB0284.pdf>;
H.B. 315, 57th Leg., 2d Sess. (N.M. 2026),
<https://www.nmlegis.gov/Sessions/26%20Regular/bills/house/HB0315.pdf>.

1 Despite acknowledging that such provisions would further the MWA’s purpose, this
2 Court refused to read them into the statute, stating:

3 Under our rules of construction, “if the Legislature is silent on an
4 issue, we look at the overall structure and function of the statute, as well
5 as the public policy embodied in the statute.” *Delfino* . . . , 2011-
6 NMSC-015, ¶ 12 Holding that some portion of employees’ travel
7 time is compensable would likely further [the purpose of the MWA].
8 But to do what Workers ask would require us to resolve a number of
9 policy questions The effect of such an effort—in the face of
10 legislative silence—would be to amend the current statutory language.
11 This we are loath to do.

12 2015-NMCA-085, ¶ 15 (alteration omitted). In line with *Segura*, we should not use
13 our interpretation of the purpose of Section 77-18-5 as license to amend the existing
14 statutory language to create duties not enacted by our Legislature.

15 {24} The majority today does not address the statutory chasm left by our
16 Legislature. Nor does it advocate for judicial legislation. Instead, it concludes that
17 *Wild Horse II* already created the duty at issue. *Maj. op.* ¶ 1. But if that were true, it
18 would mean that this Court in *Wild Horse II* overreached in the first instance,
19 contrary to principles of judicial restraint. I do not believe this Court in *Wild Horse*
20 *II* intended to do so. Accordingly, and as outlined further below, I believe the
21 majority today applies *Wild Horse II* beyond its intended context.

22 **IV. The Case Law**

23 {25} There are just two published cases addressing this statute: *Wild Horse I* and
24 *Wild Horse II*. In *Wild Horse I*, this Court faced a situation in which the Board

1 captured wild horses on public land and sold them at auction as “estrays.” 2016-
2 NMCA-001, ¶¶ 1, 5. This Court relied on the relevant statutory definitions to
3 conclude that wild horses are not “estrays” because they are not “livestock.” *Id.* ¶¶ 12-
4 18. This Court also wrangled with determining who was responsible to carry out the
5 duty enacted in Section 77-18-5 to test and relocate wild horses captured on public
6 land. *Wild Horse I*, 2016-NMCA-001, ¶¶ 19-25. This Court concluded that, though
7 the Legislature was silent on the matter, it nonetheless intended to assign that express
8 duty to the Board. *Id.* To arrive at that conclusion, this Court employed familiar tools
9 of statutory construction: considering the “overall structure and function of the
10 statute, . . . public policy embodied in the statute,” that the Board was the default
11 entity to carry out the provisions of the Livestock Code, and the need to avoid
12 rendering the statute “inert.” *Id.* ¶¶ 21-25. As a result, this Court held that the Board
13 could not treat wild horses captured on public land as estrays to be sold at auction;
14 rather, the Board was dutybound “to test and relocate [wild] horses captured on
15 public land as required by Section 77-18-5(B).” *Wild Horse I*, 2016-NMCA-001,
16 ¶ 25.

17 {26} In *Wild Horse II*, this Court confronted a variant of *Wild Horse I*. This time,
18 the Board took possession of wild horses captured by a private actor on private land
19 and then sought to sell them at auction as “estrays.” *Wild Horse II*, 2022-NMCA-061,
20 ¶¶ 1, 2. This Court, relying on *Wild Horse I* and the relevant statutory definitions,

1 held that the capture of wild horses on private land does not convert them into estray
2 and allow their sale at auction. *Wild Horse II*, 2022-NMCA-061, ¶¶ 16-20. But this
3 Court, recognizing the limited nature of Section 77-18-5(B), reversed the district
4 court’s order that the Board was dutybound to test and relocate the horses. *Id.* ¶¶ 21-
5 25. “In our view, the directive set forth in Section 77-18-5(B), alongside our Court’s
6 interpretation of this section in *Wild Horse I*, is clear and unambiguous—the Board’s
7 duty to test the conformation, history, and DNA of a wild horse is only applicable
8 where a wild horse is captured on *public* land.” *Wild Horse II*, 2022-NMCA-061,
9 ¶ 22 (emphasis added) (internal quotation marks omitted); § 77-18-5(B). Thus, this
10 Court in *Wild Horse II* recognized the important distinction between private and
11 public land implicit in the statutory text: “Because this statutory directive does not
12 contemplate a scenario where a wild horse is captured on private land, we deem it to
13 be inapplicable to the facts at hand.” 2022-NMCA-061, ¶ 22 This Court went on to
14 hold that

15 the district court erred in determining that the Board failed to follow its
16 statutory duties under Section 77-18-5(B). Rather, in our view, when
17 the Board is asked to address wild horses captured on *private* land, it
18 has no authority to test the conformation, history, and DNA of such
19 horses, any more than it does to take possession of and remove the wild
20 horses from their public habitat in circumstances that do not otherwise
21 justify such action. Rather, in such circumstances as the Board here
22 faced, its duty was to return the subject horses to the public land they
23 inhabit.

1 *Wild Horse II*, 2022-NMCA-061, ¶ 25. The majority today dismisses the context of
2 the language quoted above from *Wild Horse II*. *See maj. op.* ¶¶ 11-12. The full quote
3 strongly suggests that this Court in *Wild Horse II* did not believe the Board’s duties
4 under Section 77-18-5 apply to situations where wild horses are captured on private
5 land. And this Court’s use of the caveat, “in such circumstances as the Board here
6 faced,” *Wild Horse II*, 2022-NMCA-061, ¶ 25, demonstrates an intent to limit its
7 holding to the facts encountered in *Wild Horse II*: where the Board *is in possession*
8 of wild horses captured on private land. In my view, that limited holding should not
9 be expanded to compel the Board to *take possession of* or otherwise act whenever
10 wild horses are captured on private land.

11 {27} Finally, *Wild Horse II* underscored the importance of reading the Board’s duty
12 to wild horses in harmony with the longstanding duty of private landowners to fence-
13 out “trespassing animals,” pursuant to Section 77-16-1. *Wild Horse II*, 2022-NMCA-
14 061, ¶ 19 (internal quotation marks and citation omitted); *see id.* (“[U]nder Section
15 77-16-1, if [the private landowner] does not want the subject horses to trespass on
16 her property, she ‘shall make a sufficient fence,’ which is not intended to be used to
17 corral the subject horses on private property, but instead to keep them from it.”
18 (quoting § 77-16-1)). The majority’s opinion today, however, will encourage exactly
19 what *Wild Horse II* sought to discourage. Now landowners can avoid the expense of

fencing-out wild horses as demanded by Section 77-16-1 by simply calling the Board to remove them, rendering Section 77-16-1 inert.

{28} In conclusion, I disagree that *Wild Horse II* controls the case at bar. “A precedential case is directly controlling if it compels the outcome of the issue in the current case; that is, if the precedential case answers the definitive question in the case at bar.” *State v. Mares*, 2024-NMSC-002, ¶ 41, 543 P.3d 1198 (alterations, internal quotation marks, and citation omitted). Here, we should not expand *Wild Horse II* to answer the important question presented in this case, particularly when this Court in *Wild Horse II* explicitly cabined its opinion to “such circumstances as the Board here faced.” 2022-NMCA-061, ¶ 25.

V. The Impact

{29} In my view, the majority’s expansive reading of *Wild Horse II* necessarily means this Court in *Wild Horse II* supplanted the prerogatives of the Legislature and Executive, undercutting principles of separation of powers. *See Cont’l Oil Co. v. City of Santa Fe*, 1918-NMSC-134, ¶ 17, 25 N.M. 94, 177 P. 742 (“The courts cannot venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers.” (internal

1 quotation marks and citation omitted)). It also undermines the enforcement
2 discretion we typically afford executive agencies. *See Old Abe Co. v. N.M. Mining*
3 *Comm’n*, 1995-NMCA-134, ¶ 28, 121 N.M. 83, 908 P.2d 776 (“Agencies . . . with
4 important responsibilities must have considerable discretion in order to fulfill their
5 responsibilities effectively. Inadequate discretion probably is a larger problem than
6 excessive discretion.” (internal quotation marks and citation omitted)).

7 {30} On the practical side, the potential danger of saddling the Board with this new
8 duty, and concomitant liability, troubles me. How much will it cost for the Board to
9 gain possession of and transport wild horses from private lands across the span of
10 our great state? How many trailers and supplies will it need to purchase? How many
11 employees and horse experts will it need to hire? What training will it need to
12 provide them for the safe handling of wild horses? How many more workplace
13 injuries should the Board expect with the increased contact between its employees
14 and wild horses? If the Board does not arrive quickly enough and people or animals
15 are injured or killed by the wild horses in the meantime, will the Board shoulder
16 liability? The majority’s suggestion that the Board need only call the private
17 landowner presumes the landowner would be willing and able to discharge the
18 Board’s “duty to return wild horses to the public land.” *See maj. op.* ¶ 12 n.3; *id.*
19 ¶ 14. It also minimizes the potential ramifications and costs of the duty it imposes.
20 These concerns, as well as those that focus on the wellbeing of wild horses, are best

1 considered by our Legislature and Executive, within their respective duties as
2 lawmakers and administrators of New Mexico's finances.

3 {31} For all these reasons, I respectfully dissent.

4 
5 **KRISTOPHER N. HOUGHTON, Judge**