

## Idaho Open Range Law

### ICA Annual Meeting

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#### 1. Generally.

In Idaho, livestock areas outside of cities and villages fall into two categories—open range and herd districts. Open range includes all areas of the state not within cities, villages, or established herd districts. On open range land, livestock may roam freely, including on the highway, without risk of owner liability. Idaho is a “fence-out” state, where, unless in a herd district, it is the duty of landowners to fence livestock out of their land. Herd districts are a legislative exception to the “fence-out” rule. Once a herd district is created, a livestock owner must “fence-in” his or her own land in order to prevent his or her livestock from roaming onto another’s property or a highway, and potentially being held liable for damage caused by livestock.

#### 2. Open Range and Herd Districts Established.

a. **Open Range.** “Open range” is defined under I.C. § 25-2118, enacted in 1961:

“ANIMALS ON OPEN RANGE – NO DUTY TO KEEP FROM HIGHWAY: . . . “Open range” means all uninclosed [sic] lands outside of cities, villages and herd districts, upon which cattle by custom, license, lease, or permit, are grazed or permitted to roam.”

b. Herd Districts.

i. **Creation.** Landowners may revert to a fence-in rule by following statutory procedures to create a herd district. Herd districts may be created by county

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commissions after a majority of landowners petition the county to create a herd district. Idaho Code § 25-2401(2).

(1) **Commissioners May Create Herd Districts Upon Petition by Landowners.** Under Idaho Code § 25-2401, county commissioners in Idaho have the power to create, modify and eliminate herd districts within the county after a majority of the owners of taxable real property, in a district, including legal entities, petition county commissioners to create, modify or eliminate a herd district. A county cannot create statutory herd districts on their own without a petition. *Benewah County Cattlemen's Ass'n v. Board of County Comm'rs*, 105 Idaho 209, P.2d 85 (1983). After a petition is presented to the county, the county commissioners shall establish a five-member committee, to make a recommendation on whether to enact the herd district in accordance with Idaho Code § 25-2404. If the committee finds the proposed creation, modification or elimination of a herd district sufficient to control or regulate the livestock in the area subject to the proposed herd district, the county commissioners proceed to enact the herd district in accordance with Idaho Code § 25-2404.

(a) If the committee finds that creation, modification or elimination of a herd district is insufficient to control or regulate the livestock in the area subject to the proposed herd district, the county commissioners may regulate the running at large by livestock by ordinance. Any fencing made necessary by such ordinance is paid for by the county. I.C. § 25-2401(2).] The county's power to enact an ordinance to control livestock is outside of the statutory procedure for creating herd districts and is granted by Idaho Constitution, art. 12 § 2, which provides "Any county . . . may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with general laws." *Benewah County*, P.2d 85 at 88. In *Benewah*, an ordinance controlling the roaming of livestock, which was not a herd district but rather an ordinance enacted by the commissioners, was upheld based on the county's constitutional police power and absence of any conflicting constitutional or statutory provisions. Unlike as applied to statutory herd districts, the county commissioners specifically did not apply strict liability to violation of the ordinance. The court held that the difference in liabilities imposed by herd districts and by the subject ordinance showed that the ordinance had a different "purpose and effect" from herd districts and was valid. *Benewah County* at 88.

(2) **Petition Requirements.** For petitions to eliminate an existing herd district or any portion of an existing herd district, the subject area must be contiguous to open range. A petition must describe the boundaries of the proposed herd district and designate what animals it seeks to prohibit from running at large. A petition may also state the conditions and locations, if any, for the construction of legal fences and cattle guards which may be required to prohibit the running at large of livestock within the proposed herd district. If a petition does not address fencing and cattle guards, county commissioners have the power to establish fencing requirements upon their approval of a proposed herd district.

ii. **Herd District Requirements.** Pursuant to I.C. § 25-2402, no herd district shall:

“(a) Contain any lands owned by the United States of America or the state of Idaho, upon which the grazing of livestock has historically been permitted.

(b) Result in the state, a county, a city or a highway district being held liable for personal injury, wrongful death or property damage resulting from livestock within the public right-of-way.

(c) Prohibit trailing or driving of livestock from one location to another on public roads or recognized livestock trails.”

iii. **Funding and Fencing.** The owners of “taxable real property within the herd district” pay certain costs of fencing constructed after the herd district is established. Such costs and allocations are set forth in I.C. § 25-2402(4), which requires that the owners of taxable real property:

“(a) Pay the costs, including on private land, of constructing and maintaining legal fences as required on the district’s border with open range so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district.

(b) Pay the costs, including on private land, of constructing and maintaining cattle guards as required on the district’s border with open range so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district; except that the costs of maintaining a cattle guard located on a public right-of-way shall thereafter be paid by the state, county, city or highway district responsible for maintaining said right-of-way.

(c) Pay seventy-five percent (75%) of the costs, including on private land, of constructing legal fences required, at the time of the creation or modification of the district only, to control livestock within the interior of the district; provided that (i) the costs of maintaining such fences shall thereafter be paid by the owner(s) of the land on which the fencing is constructed as prescribed by chapter 1, title 35, Idaho Code [*referring to Legal Fences, see section on Legal Fences below*], and that (ii) the costs of constructing and maintaining fences on livestock operations which come into existence after the creation or modification of the district shall be paid by owner(s) of the land on which the fencing is constructed as prescribed by chapter 1, title 35, Idaho Code.

(d) Pay seventy-five percent (75%) of the costs, including on private land, of constructing legal cattle guards required, at the

time of the creation or modification of the district only, to control livestock within the interior of the district; provided that (i) the costs of maintaining a cattle guard located on a public right-of-way shall thereafter be paid by the state, county, city or highway district responsible for maintaining the public right-of-way on which the cattle guard is located, or, in the case of a cattle guard located on private land, by the owner(s) of the land on which the cattle guard is constructed as prescribed by chapter 1, title 35, Idaho Code, and that (ii) the costs of constructing and maintaining cattle guards on livestock operations which come into existence after the creation or modification of the district shall be paid by the owner(s) of the land on which the cattle guard is constructed as prescribed by chapter 1, title 35, Idaho Code.

(e) In the case of a new herd district created contiguous to an existing herd district, there shall be no obligation to maintain a legal fence or cattle guards on the border between the new district and the existing district, except to the extent that said fence or cattle guards, or any portion thereof, may be required to control movement of livestock on the interior of the district. In the case of a modification of an existing herd district which alters its borders with open range, there shall be no obligation to maintain a legal fence or cattle guards on its previous border with open range, except to the extent that said fence or cattle guards, or any portion thereof, may be required to control movement of livestock on the interior of the district.”

iv. **Number of Herd Districts in Idaho.** There is not a central record of the number of herd districts state-wide. Each county individually keeps track of its herd districts. The Idaho Rangeland Resource Commission aggregates county herd district maps, but does not make any representation to the complete nature of the maps. Maps collected by the Commission can be found here: <http://idrange.org/ranchers/Open%20Range/open-range>. Approximate numbers of herd districts by county are listed below and based only on the reader’s best estimation of districts shown on maps provided by the counties:

<b>Counties Showing Herd Districts</b>	<b>Approximate Number of Herd Districts</b>
Ada	29
Bear Lake	1
Bingham	10
Blaine	7
Boundary	17
Butte	1
Canyon	22
Fremont	20

Gem	8
Idaho	15
Jefferson	12
Jerome	2
Latah	30
Madison	9
Minidoka	2
Nez Perce	29
Owyhee	4
Payette	8
Power	16
Twin Falls	14
Valley	16
Washington	2
<b>Total</b>	<b>274</b>

c. Estrays.

i. **Defined.** An estray is any livestock whose owner is unknown or otherwise cannot be located, or, if its owner is known, is livestock permitted to roam at large on public or private land in violation of law or regulation or without permission. I.C. § 25–2301.

ii. **Attempt to Notify Owner and Sale.** If a recognized mark is found on an estray, the owner shall be notified if possible. If the estray’s marks are unrecognizable, a local or state official shall be notified. I.C. § 25–2303. If no owner is identified, or the owner fails to take possession of the livestock within five days after notification, the sheriff or brand inspector shall proceed to auction the livestock at public market no sooner than 15 days after publication of the auction. I.C. § 25–2302.

**3. Liability.**

a. **Guiding Principles in Idaho.** In a 1985 appeal, the Idaho Supreme Court summarized Idaho law as it relates to owners of animals that cause accidents on roads in either an open range or a herd district, identifying six guiding principles:

“(1) the owners of domestic animals are not liable or negligent when the animals cause a highway collision in ‘open range’ or when the animals are ‘lawfully on any highway,’ I.C. §§ 25–2118, –2119;

(2) if the ‘open range’ or ‘lawful’ conditions are not present, then the doctrine of *res ipsa loquitur* supplies an inference that the animal owner was negligent;

- (3) the inference can be supplemented by other evidence of the owner's negligence;
- (4) the inference can be rebutted by a satisfactory explanation or showing by the animal owner of proper care, enclosures, and any other evidence tending to negate the inference of the owner's negligence;
- (5) when properly placed at issue by the parties, the issues of lawful presence, inference of negligence, and rebuttal of the inference, are questions for the trier of facts; and
- (6) in any event, the vehicle owner may be liable for contributory negligence under various theories."

*Griffith v. Schmidt*, 110 Idaho 235, 715 P.2d 905, 909 (Idaho 1985).

b. Open Range.

i. Statutory Exemption from Liability.

(1) **No Duty to Keep Off Highway.** I.C. § 25-2118 provides that livestock owners have no duty to keep livestock off the highway and no liability for damage to vehicles or persons caused by a collision with the livestock:

"ANIMALS ON OPEN RANGE – NO DUTY TO KEEP FROM HIGHWAY: No person owning, or controlling the possession of, any domestic animal running on open range, shall have the duty to keep such animal off any highway on such range, and shall not be liable for damage to any vehicle or for injury to any person riding therein, caused by a collision between the vehicle and the animal . . ."

(2) **Negligence Not Presumed on Open Range Highway.** I.C. § 25-2119, also enacted in 1961, states that:

"OWNER OR POSSESSOR OF ANIMAL NOT LIABLE FOR ANIMAL ON HIGHWAY. No person owning, or controlling the possession of, any domestic animal lawfully on any highway, shall be deemed guilty of negligence by reason thereof."

ii. **Absolute Immunity on Highway.** In 1999, the Idaho Supreme Court held that the open range statute grants absolute immunity from liability for negligence to the owner of domestic animals involved in an accident on a public highway, where the owner of

those animals has established that animals were “lawfully” on highway at time of accident. *Adamson v. Blanchard*, 133 Idaho 602, 990 P.2d 1213 (1999).

iii. **Lawful Fences.** As a “fence-out” state, any person maintaining in good repair a lawful fence may recover damages for trespass from the owner of any livestock that break through such fence. I.C. § 35-101. Without a lawful fence, the landowner has no civil recourse for damage done to their property by trespassing livestock. A lawful fence is described in the Idaho Code § 35-101 as follows:

“LAWFUL FENCES IN GENERAL. A lawful fence, except as hereinafter provided, must be not less than four and one-half (4 1/2) feet high, and the bottom board, rail, pole or wire must not be more than twenty (20”) inches above the ground, and the space between the top and bottom board, rail, pole or wire must be well divided.”

The Idaho code further sets forth particular requirements for lawful fences under I.C. § 35-102. Lawful fences:

- “1. If made of stone, four feet (4’) high, two feet (2’) base, and one foot (1’) thick on top.
2. If it be a worm fence, the rails must be well laid and at least four feet (4’) high.
3. If made of posts, with boards, rails or poles, the posts must be well set in the ground and not more than eight feet (8’) apart, with not less than three (3) six-inch (6”) boards, or rails, or poles not less than two and one-half inches (2 1/2) in diameter at the small end; if four (4) poles are used, they must not be less than two inches (2”) in diameter at the small end. The top board, rail or pole must not be less than four feet (4’) from the ground, the spaces well divided, and the boards, rails or poles securely fastened to the posts; if poles not less than three inches (3”) in diameter at the small end are used, the posts may be set twelve feet (12’) apart.
4. If wire be used in the construction of fences, the posts must not be more than twenty-four feet (24’) apart, set substantially in the ground, and three (3) substantial stays must be placed at equal distances between the posts, and all wires must be securely fastened to each post and stay with not less than three (3) barbed wires, or four (4) coiled spring wires of not less than number nine (9) gauge. The bottom wire shall be not more than twenty-one inches (21”) from the ground, and the other wires a proper distance apart. The wires must be well stretched and the fence not less than

forty-seven inches (47”) high. If all woven wire fencing is used, the top and bottom wire must be not less than number nine (9) gauge, or two (2) number thirteen (13) gauge wires twisted together, with intermediate bars not less than twelve inches (12”) apart and of not less than number fourteen (14) gauge wire, and the stay wires not more than twelve inches (12”) apart, and the top wire not less than forty-seven inches (47”) from the ground. If woven wire less in height is used, it must be brought to the height of forty-seven inches (47”) by additional barbed wires, or coiled spring wire of not less than number nine (9) gauge, and not more than twelve inches (12”) between the wires: provided, that if barbed wire only is used, and the posts are not more than sixteen feet (16’) apart, no stays need be used. Provided further that the minimum forty-seven inch (47”) fence height specified above may be reduced to forty-two inches (42”) for right-of-way fences on the state highway system when mutually agreed by the Idaho director of department of transportation and the director of the Idaho fish and game department as necessary to accommodate big game animals at major migration crossings.

5. If made in whole or in part of brush, ditch, pickets, hedge, or any other materials, the fence, to be lawful, must be equal in strength and capacity to turn stock, to the fence above described.

6. All fences in good repair, of suitable material and of every description, and all creeks, brooks, rivers, sloughs, ponds, bluffs, hills or mountains, that present a suitable obstruction to stock are deemed lawful fences.”

iv. **Federal Highways.** It is unclear whether open range immunity applies on federal interstate highways. Under the open range statutes in the Idaho Code, “highways” is not defined. However, given that federal interstates and roads are for the most part fenced off, provided the fences are “lawful fences,” as described in I.C. § 35-101, there most likely would be an inference of negligence on the part of the owner if livestock traversed the fence and caused damages. *See Griffith, supra.* In other words, the question is: if there is a “lawful fence” under the Idaho Code along the federal highway, has the federal government “fenced out” the livestock? Whether the livestock owner would have liability for damages in connection with livestock on the federal interstate where no fence, and perhaps no signs are posted, is unclear.

c. Herd Districts.

i. Statutes.



(1) **Civil Liability For Animals at Large.** It is a civil offense for a livestock owner to permit his or her livestock to run at large in a herd district. Under I.C. § 25-2407:

“VIOLATION OF COMMISSIONERS’ ORDER -- CIVIL LIABILITY. Any person who shall, in violation of any order made pursuant to the provisions of section 25-2404, Idaho Code, permit or allow any of the animals designated in such order, owned by him or under his control, to run at large in such herd district, or to be herded on the said highway, shall be deemed guilty of a civil offense, for which, within a period of one (1) year, law enforcement officials shall issue a warning on at least the first and second such offense, and thereafter, for which a civil penalty of not to exceed fifty dollars (\$50.00) may be imposed per animal unit in violation, the aggregate of which shall not exceed five hundred dollars (\$500), plus restitution to the owner for any damage to property. The pendency of any such action shall not prevent nor prejudice the bringing of another action against the same party for a violation of such order committed after the commencement of such pending action. For purposes of this section, an animal unit shall be as defined, at the time of such violation, by federal and state agencies which administer the grazing of livestock on public lands.”

ii. **Immunity if Lawfully on the Highway.** It is lawful in a herd district to “[trail or drive] livestock from one location to another on public roads or recognized livestock trails”. Idaho Code § 25-2402. A livestock owner still has immunity in a herd district provided that his or her cattle are legally on the road. *Moreland v. Adams*, 143 Idaho 687 (2007).

iii. **Civil Liability.** Any owner of animals permitted to run at large in a herd district, or herded in violation of statute is liable for damage resulting from trespass by the animals, “without regard to the condition of the fence” maintained by the owner. I.C. § 25-2408. Any person damaged by such animal trespass in a herd district has a lien on the animals for the amount of damage. *Id.*

iv. **Challenge to Validity of Herd District.** In a 2008 case, plaintiffs suffered injuries and death when their vehicle struck a cow in an area Jefferson County, Idaho that had been designated as a herd district. Defendants argued that the herd district was invalid because it included federal or state grazing lands. The court was not persuaded, finding that the defendants, who had the burden of showing the ordinance creating the herd district was invalid, presented no evidence establishing that the federal and state lands included in the herd district were historically grazed. A herd district is not invalid because it contained lands owned by the United States; a challenger must show that the herd district includes land “upon which the grazing of livestock has historically been permitted.” I.C. § 25-2402(2)(a). *Arguello v. Lee*, No. CV-06-485-E-BLW (D. Idaho Oct. 8, 2008). Section 9 of the complaint states that this case was

brought in federal court based on diversity of citizenship (plaintiff was a citizen of Mexico working in Idaho) and amount in controversy.

**4. Federal Law.**

**a. Cases Brought Against Federal Government Under Federal Tort Claims Act.** One case (brought in federal district court in Oregon) came up among searches for FTCA claims against the federal government as relates to animals on public highways in BLM districts.

**i. In A 1982 D. Or. Case, Federal Tort Claims Act Action Against the Government, State Grazing Laws Had No Application to Federal Lands.** In an action brought under Federal Tort Claims Act arising out of collision between plaintiffs' car and a Forest Service pack horse on highway within national forest in Oregon, the federal district court found that Forest Service employee was negligent under Oregon law in failing to use reasonable care to control animals so as to prevent escape, that such negligence was a sufficient cause of plaintiffs' injuries, and that plaintiff and the injuries suffered were foreseeable. *Bilderback v. United States*, 558 F. Supp. 903 (D. Or. 1982). In *Bilderback*, the District Court held that: (1) the national forest was not open range under Oregon law, since federal law controlling grazing in the national forests overrides Oregon open range law; (2) the FTCA did not require that the Oregon open range law be applied despite its conflict with federal grazing regulations; and (3) the evidence was sufficient to establish that a government employee was negligent in failing to use reasonable care to control animals so as to prevent escape, that such negligence was sufficient cause of plaintiffs' injuries, and that both plaintiffs and the injuries suffered were foreseeable. Notably, the Court did not go so far as to find that the federal grazing regulations impose a duty on the federal government. As opposed to being a source of tort duty, the federal grazing provisions were merely interpreted as voiding the application of the Oregon open range law. *Bilderback v. United States*, 558 F. Supp. 903, 909 (D. Or. 1982).

**b. Taylor Grazing Act of 1934.** The Taylor Grazing Act authorized the Secretary of the Interior (BLM) to create grazing districts on unclaimed public lands and to charge a grazing fee to livestock owners permitting their livestock to graze within such districts. 43 U.S.C. 315(3). Preference is given to those with property that serves as a base for the livestock operation, though the base property does not have to adjoin the public lands being used for grazing livestock. *Id.* The Secretary also has discretion to issue grazing leases outside of grazing districts "where vacant, unappropriated, and unreserved lands of the public domain are so situated", though in such instances, the base property usually is adjacent to the public land. 43 U.S.C. 315(15)

**i. Taylor Grazing Act Preempts State Fencing Laws.** In a 1999, Colorado Federal District Court case, a horse owner was charged with willful grazing trespass on BLM lands without a permit or lease. At issue in the case was whether Colorado's open range law applied as a defense to charges of willful trespass on lands controlled by the United States government through the BLM. The state statute reads, in part, "[a]ny person maintaining in good repair a lawful fence . . . may recover damages for trespass and injury to grass, garden or

vegetable products, or other crops of such person from the owner of any livestock which break through such fence . . .” C.R.S. § 35–46–102. The District Court held that: (1) Colorado fencing laws were preempted by Taylor Grazing Act, and (2) the owner’s grazing trespass was willful (though because unlawful grazing on public lands is considered a “public welfare offense” the element of intent could be proven by proof of the act of unlawful grazing itself). *United States v. Shenise*, 43 F. Supp. 2d 1190 (D. Colo. 1999).

## 5. Other States.

a. **Trends.** There are generally three categories of western states when dealing with open range issues: (1) states that statutorily or judicially apply the open range no duty rule to livestock-motorist relationships and provide complete immunity for stock owners in the open range (e.g., Idaho, Nevada, Oregon); (2) states that apply ordinary negligence to livestock-motorist relationships by judicial interpretation (e.g., Arizona, Colorado); and (3) states that judicially interpreted an ordinary negligence relationship to apply, but have legislatively increased the standard from ordinary negligence (e.g., New Mexico, Montana). *See* Ryan M. Archer, *SEARCHING FOR THE MONTANA OPEN RANGE: A JUDICIAL AND LEGISLATIVE STRUGGLE TO BALANCE TRADITION AND MODERNIZATION IN AN EVOLVING WEST*, 63 *Mont. L. Rev.* (2002). Available at: <http://scholarship.law.umt.edu/mlr/vol63/iss1/5>.

### b. Montana.

i. **No Owner Liability for Damage on Highways in the Absence of Gross Negligence or Willful Misconduct.** In 2000, Montana reversed decades of precedent in a case where a motorist struck an Angus bull and sued. Lower courts dismissed the case, citing open range laws. However, the Montana Supreme Court decided the other way, finding that motorists and livestock owners each had an equal right to occupy the highway and should share the liability. *Larson-Murphy v. Steiner*, 2000 MT 334 (2000). The next year, the Montana Legislature stepped in to change the law, absolving livestock owners of liability except in cases of “gross negligence or willful misconduct.” *Mont. Code. Section 27-1-724*.

### c. Wyoming.

i. **Wyoming is a Fence-Out State.** Similar to Idaho law, the Wyoming Statutes make certain requirements of what constitutes a lawful fence. *Wyo. Stat. § 11-28-102*. The board of county commissioners of each county in the state may create livestock districts. *Wyo. Stat. § 11-33-101*. After a livestock district is established, the owner of animals permitted to run at large, or herded in violation with an order of such county’s commissioners, is liable for damage from the trespasses of the animals without regard to the condition of the livestock owner’s fence. *Wyo. Stat. § 11-33-108*.

ii. **No Livestock Owner Duty to Keep Livestock Off of Highways.** The Supreme Court of Wyoming has once addressed livestock owner liability for damaged caused by livestock on highways in open range. In *Andersen v. Two Dot Ranch, Inc.*, 2002 WY 105, 49 P.3d 1011 (Wyo. 2002), a cow had escaped from a fenced pasture onto adjoining BLM

open range land. A BLM agent informed the ranchers of the escaped cattle; however, the cattle had still not been retrieved four days later when one cow wandered onto a highway and was struck by a motorist. The Court stated that though there was a reciprocal and general duty of care owed by livestock owners pasturing cattle in posted open range and motorists driving on unfenced highways passing through the open range, the duty did not require the livestock owner to prevent livestock from wandering onto public highways so long as the area was posted as open range. Further, the owners owed no duty to the vehicle driver to remove the livestock from the open range land even after notification by the BLM. The Court came to its conclusion taking into consideration policy factors supporting no duty for the owner of a cow to prevent his cow from wandering onto unfenced public highways, where motorists, who were forewarned of the possibility of livestock on the highway, had greater capacity to foresee potential danger. In *Anderson*, the Court held where that the cow owner's only conduct was grazing cattle in posted open range area, no moral blame could be attached to the owner's conduct. The Court reasoned that imposing a duty on the owner to physically restrain livestock from wandering across an unfenced public highway would be overly board and would essentially nullify open range doctrine. *Andersen v. Two Dot Ranch, Inc.*, 2002 WY 105, 49 P.3d 1011 (Wyo. 2002).