



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

January 7, 2008

Office of the County Commissioners
County of Cassia
1458 Overland Avenue
Burley, Idaho 83318

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Creation of Herd Districts in the State of Idaho

Dear Board of Commissioners:

QUESTIONS PRESENTED

Your letter dated September 10, 2007, asked for an Attorney General's Opinion regarding certain issues related to herd districts. In your letter, you indicated that Cassia County has already created the five person panel contemplated in Idaho Code section 25-2401(2). You then asked the following three questions:

1. If a panel is established and the panel determines that a herd district is the correct method to control the movement of animals within an area, can the Commissioners then establish such a herd district without awaiting the receipt of a petition from the majority of the owners of taxable real property or do the requirements of Idaho Code § 25-2402 still have to be met?
2. If a herd district is created in an area where animals are currently fenced in, must the district place additional fences around the perimeter of the herd district?
3. If the panel determines that a herd district is not the correct method to control the movement of animals within an area, can the Commissioners then pass an ordinance that assigns liability to the owners of animals if the animals leave the area designated for control?

CONCLUSIONS

My conclusions, discussed in more detail below are:

1. The Commissioners may not establish a herd district absent receipt of a petition from the majority of owners of taxable real property within the boundaries of the proposed district. The County may, however, regulate the movement of livestock via ordinance, as set forth in Idaho Code Section 25-2401(2).
2. If the outer boundary of the herd district is already fenced, the district need not place additional fences in those already-fenced areas.
3. The County probably cannot “assign liability” via passage of an ordinance. However, the County may enact an ordinance regulating the movement of livestock within the county, and that ordinance’s existence may lead to application of the *negligence per se* doctrine in a negligence action.

ANALYSIS

At the outset, I will discuss general legal principles regarding livestock movement. The Idaho Supreme Court has provided a good background discussion of laws related to livestock and fencing:

At common law it was the duty of an owner of livestock to fence his animals in, and an adjoining landowner had no duty to fence his property so as to prevent others’ animals from entering it. [Citation omitted]. However, that English common law rule does not prevail in Idaho and the “fence out” rule prevails in this state where if a landowner’s property is not within a herd district, and is outside a city or village, the landowner desiring to prevent animals of others from straying onto his property must fence them out. [Citations omitted].

Herd districts are a legislative exception to the “fence out” rule. A majority of the landowners of more than 50% of the land within a proposed district may petition county commissioners for the creation of a herd district. I.C. § 25-2403. It is held that a herd district provides an alternative to landowners who wish to protect their land from damage caused by roaming stock but do not wish, or cannot afford, to fence their land. [Citation omitted]. Once a herd district is created, the rule of fencing out which requires landowners to keep out another’s livestock by construction of a fence no longer applies. Rather, an owner of stock who allows animals to run at large in a herd district is guilty of a misdemeanor. I.C. § 25-2407. Additional civil liability is imposed for damage

caused by trespasses of such animals without regard to the condition of the landowner's fence. I.C. § 25-2408.

Easley v. Lee, 111 Idaho 115, 117, 721 P.2d 215, 217 (1986).

- A. If a panel is established and subsequently determines that a herd district is the correct method to control the movement of animals within an area, the petition procedure set forth in Idaho Code Section 25-2402 must nevertheless be followed. However, the Commissioners may regulate via ordinance.**

Idaho Code section 25-2401 is captioned "Commissioners may create herd districts." However, a careful reading of that section leads to the conclusion that Commissioners may not unilaterally create a herd district, although Commissioners may regulate livestock via ordinance.

Prior to 1990, Section 25-2401 provided in its entirety as follows:

The board of county commissioners of each county in the state shall have power to create herd districts within such county as hereinafter provided; and when such district is so created, the provisions of this chapter shall apply and be enforceable therein.

See, e.g., 1990 Idaho Sess. Laws, Ch. 222. In 1983, the Idaho Supreme Court held that "herd districts may not be created *sua sponte* by a county but only in response to a petition of a majority of the landowners within a certain area." *Benewah County Cattlemen's Ass'n, Inc. v. Board of County Comm'rs*, 105 Idaho 209, 213, 668 P.2d 85, 89 (1983).

Section 25-2401 was amended in 1990, in what may have been legislative adoption or clarification of the holding in *Benewah County*. That section now provides, in pertinent part:

- (1) The board of county commissioners of each county in the state shall have power to create, modify or eliminate herd districts within such county as hereinafter provided; and when such district is so created, modified, or eliminated, the provisions of this chapter shall apply and be enforceable therein. ***On and after January 1, 1990, no county shall regulate or otherwise control the running at large of [livestock] within the unincorporated areas of the county unless such regulation or control is provided by the creation of a herd district pursuant to the provision of this chapter, except as provided by subsection (2) of this section. . . .***
- (2) A panel of five (5) members may be created in a county Only if a majority of said panel, after a public hearing held with notice as prescribed by law, concludes that the creation, modification or elimination of a herd district is insufficient to control or otherwise regulate the movement of livestock in an

area, the board of county commissioners shall have the power to establish such control by ordinance

I.C. § 25-2401 (emphasis added). While the Idaho Supreme Court has yet to address the question you specifically posed, I conclude that, pursuant to Section 25-2401, a county may not create a herd district, unless a petition is first presented to the Commissioners. Section 25-2401 provides that while commissioners “shall have the power to create, modify or eliminate herd districts . . .” that power may be exercised only “as hereinafter provided.” I.C. § 25-2401(1). The language set forth in bold above further clarifies that in unincorporated areas of a county, the county can control livestock running at large only in one of two ways: (1) by creation of a herd district “pursuant to this chapter,” or (2) in accordance with Section 25-2401(2). Thus, counties may create a herd district by following the procedures set forth in Section 25-2402, or may regulate animals running at large via ordinance as set forth in Section 25-2401(2).

That conclusion is support by the Statement of Purpose for the legislation passed in 1990. The Statement provides:

This proposed legislation makes substantive changes to the current herd district law. It would allow a county, through an appointed panel, to control the movement of livestock by ordinance if it is deemed that the creation or modification of a herd district is insufficient to control or regulate the movement of livestock in an area. This proposed legislation sets forth requirements on the establishment of the panel and provides taxing authority.

Statement of Purpose, RS 23902C1, (1990 House Bill No. 713, as amended).

Thus, while Commissioners may not unilaterally create a herd district, they may, after a finding that the creation of a herd district is insufficient to control or regulate livestock movement, establish control via ordinance.

- B. If a herd district is created in an area where animals are already fenced in, the district need not place additional fencing, so long as the existing fences will prevent livestock from roaming, drifting or straying from open range into the district.**

Idaho Code section 25-2402(4) governs the installation of fencing following the creation of a herd district. Subsection (a) provides that:

- (4) The owners of taxable real property within the herd district shall:
(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.*

I.C. § 25-2402(4)(a) (emphasis added). The Idaho Supreme Court has held that “[t]he purpose of the herd district statutes was to prove an alternative to landowners who wished to protect their land from damage caused by roaming stock but did not desire, or were unable, to afford fence out stray cattle. A herd district ordinance requires fencing in.” *Etcheverry Sheep Co. v. J.R. Simplot Co.*, 113 Idaho 15, 17, 740 P.2d 57, 59 (1987).

If there are existing fences around the perimeter of the herd district, separating open range from the district, the district need not build additional fences. However, if there are unfenced areas, fences will need to be built pursuant to Idaho Code Section 25-2402(4)(a).

C. If the panel determines that a herd district is NOT the correct method to control the movement of animals within an area, the Commissioners may enact an ordinance regulating the movement of animals.

In your correspondence, the specific question you have asked is whether the Commissioners can “pass an ordinance that assigns liability to the owners of animals if the animals leave the area designated for control?” Before responding to that question, it is important to clarify the relative rights and liabilities under Idaho’s open range and herd district laws.

In 1999, the United States District Court for the District of Idaho certified the following question to the Idaho Supreme Court for decision:

Does § 25-2119 of the Idaho Code grant absolute immunity from liability for negligence to an owner of domestic animals involved in an accident on a public highway, where the owner of those animals has established that they were “lawfully” on the highway at the time of the accident?

Adamson v. Blanchard, 133 Idaho 602, 604, 990 P.2d 1213, 1215 (1999). In response to the question, the Supreme Court analyzed Idaho Code Sections 25-2118 and -2119.¹ The Court held that Section 25-2118 was a grant of absolute immunity from damages for owners of livestock in

¹ Idaho Code section 25-2118 provides that:

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. “Open range” means all unenclosed lands outside of cities, villages and herd districts, upon which cattle by custom, license, lease or permit, are grazed or permitted to roam.

Id. Section 25-2119 provides that:

No person owning, or controlling the possession of, any domestic animal lawfully on any highway, shall be deemed guilty of negligence by reason thereof.

open range areas, while Section 25-2119 was a grant of absolute immunity from damages from owners of livestock in herd districts, **but only when** the livestock are lawfully on the highway, (i.e., they are being driven on the highway). Specifically, the Court held:

Idaho Code § 25-2118 relates to owner liability in open range and grants total immunity from liability for any damages. By contrast, I.C. § 25-2119 addresses only an owner's right to drive animals on public roads, or otherwise lawfully position animals upon the highway, and grants immunity only from liability for negligence associated with this activity. The legislature; therefore, used absolute language in I.C. § 25-2118 because it intended to completely immunize owners in open range areas from liability under any cause of action. The legislature then used more limited language in I.C. § 25-2119 because it intended to immunize owners from a negligence cause of action only in the limited situation where animals are lawfully present on the highway. [Footnote omitted].

. . . the legislature intended to grant owners absolute immunity from any liability for damages in the open range, I.C. § 25-2118, and to grant absolute immunity from liability for negligence in order to preserve an owner's right to drive animals on the highway in a herd district.

Id. at 607, 990 P.2d at 1218.

I have included that discussion because your correspondence sets forth your understanding that "if a vehicle strikes an animal while in a herd district or within the city limits of an incorporated city or village that the owner of the animal is strictly liable for any damages that result. . . ." September 10, 2007, correspondence. That statement is not entirely accurate, as the owner of the animal has been granted absolute immunity for negligence if the animal was **lawfully** on the highway. Moreover, rather than stating that "if a vehicle strikes an animal outside the limits of a herd district or a village or city, the owner of the vehicle is strictly liable," it is more accurate to say that the owner of the animal enjoys absolute immunity from an action for damages, whether that action be under a negligence or a strict liability theory.

Your third question specifically asks whether the Commissioners may pass an ordinance assigning liability to animal owners if the animals leave the area designated for control. The law is not clear whether a County may "assign liability." What *is* clear is that a County may enact an ordinance which establishes control over livestock movement within the county. See I.C. § 25-2401(2). As held by the Idaho Supreme Court in an earlier case, "in the absence of a state legislative enactment clearly indicating that livestock must be free to roam the lands of Idaho uninhibited by the ownership or character of the lands, counties and municipalities may validly exercise their police power to prohibit such free roaming livestock." *Benewah County*

Cattlemen's Ass'n, Inc. v. Board of County Comm'rs., 105 Idaho 209, 214, 668 P.2d 85, 90 (1983).

If Cassia County enacts an ordinance restricting the movement of livestock within county boundaries, that ordinance may form the basis for the application of the *negligence per se* doctrine in a tort action. In a standard negligence action, a plaintiff must prove "(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage." *O'Guin v. Bingham County*, 142 Idaho 49, 122 P.3d 308 (2005) (additional citations omitted). If a plaintiff is successful in establishing *negligence per se*, he or she has (by application of law) proven the first two elements of negligence, and need only prove causation and damages.

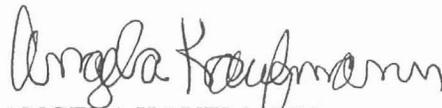
In order for *negligence per se* to apply,

- (1) the statute or regulation must clearly define the required standard of conduct;
- (2) the statute or regulation must have been intended to prevent the type of harm the defendant's act or omission caused;
- (3) the plaintiff must be a member of the class of persons the statute or regulation was designed to protect; and
- (4) the violation must have been the proximate cause of the injury.

O'Guin, 142 Idaho at 52, 122 P.3d at 311.

In short, while the county may not be able to "assign liability," passage of an appropriate ordinance regulating the movement of animals within the county may have the effect, in a negligence action, of satisfying the elements necessary for the doctrine of *negligence per se* to apply.

Very truly yours,



ANGELA KAUFMANN,
Deputy Attorney General
Natural Resources Division