A MODERN-DAY RANGE WAR: RECONCILING THE CONFLICT BETWEEN TEXAS'S ESTRAY STATUTE AND THE COMMON LAW OPEN RANGE DOCTRINE

Comment

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I. INTRODUCTION

Enthusiasts of classic western movies will recall the familiar range war trope that provided the backdrop for many a good shoot-em-up tales. The newcomer farmer moves onto the open prairie to settle his homestead and builds a fence to enclose his newly-acquired property. Before you know it, the lone farmer becomes embroiled in an action-packed shootout with a cattleman and his cowboys as they all fight to the death over who has the right to a patch of grass. The plot certainly makes for a good movie but many would assume it reflects more of a historical depiction of a bygone era that does not really resonate in today's modern world. Those people would be wrong. In 2019 a new war erupted on the ranges of West Texas. Fortunately, the battle has only been a legal one and the guns have been kept out of it—so far.

In the open range Presidio County—where cattle owners have no duty to restrain their livestock from roaming at large—one rancher's cattle have been entering onto his neighbor's property to access a stream there for years.[1] After the neighbor spent a good deal of money restoring the flow of the stream, which had diminished over the years, he decided that he would no longer allow someone else's cattle to benefit from his work.[2] The neighbor began calling the county sheriff to remove the cattle.[3] The sheriff, believing he was empowered to do so under the estray law found in Chapter 142 of the Texas Agriculture Code, began impounding the cattle and releasing them to their owner only after the owner paid the expenses the county incurred in rounding up and holding the cattle in the county estray pens.[4]

The cattle rancher, confused by this sudden closing of the open range which had been open for centuries, sought legal advice to determine exactly what his rights and responsibilities were.[5] He quickly found out that no one really knew the answer to his question.[6] After examining the estray statute

1. Michael Marks, *How Estray Laws are Causing Beef Among Landowners in Far West Texas*, KUT (July 29, 2019), https://www.kut.org/post/how-estray-laws-are-causing-beef-among-landowners-far-west-texas.

2. *Id.*

3. Abbie Perrault, *County Battle Over Loose Cattle*, BIG BEND SENTINEL (July 17, 2019, 11:30 PM), https://bigbendsentinel.com/2019/07/17/county-battle-over-loose-cattle/.

4. *Id.*

5. *Id.*

6. *Id.*

and the two seminal cases on the matter,[7] the Presidio County Attorney concluded that the estray law cannot apply in an open range county and stated that "[s]eizing cattle under the estray law in Presidio County is illegal and subjects the aggrieved property owner to damages."[8] Bolstered by that statement, the rancher demanded that the sheriff repay him the $3,500 he paid to the county to recover his impounded cattle.[9] The sheriff refused and sought legal advice.[10] The advisor for the Sheriff's Association of Texas, Judge Dan Miller, told the sheriff that he agreed with the county attorney.[11] However, a local attorney and a former Presidio County Attorney advised the sheriff that he did have the power under the estray law to impound estray cattle.[12]

When considering all of those opinions, the end result simply becomes more uncertain. The landowner does not know if he has the right to exclude another's cattle from his property without spending thousands of dollars to build a fence. The landowner is unsure whether he can continue to allow his cattle to roam at large or whether he must build his own fence to avoid trespass and negligence claims—which would also mean spending thousands of dollars to drill a water well to replace his access to his neighbor's stream. The sheriff, who only wants to do his job, does not know if it is even his job to remove the estray cattle, and faces the option of continuing to seize cattle and invite litigation against his office or do nothing and contend with unsatisfied landowners come election day. All of the uncertainty results from the Texas Legislature's failure to define the reach of Chapter 142.[13] However, a simple amendment to § 142.003 can eliminate this confusion and end this modern-day range war.

This Comment does not call for a fundamental shift in the law's treatment of estray cattle rendering landowners helpless against trespassing animals, nor does it advocate giving more rights to cattle owners than they currently possess. This Comment simply encourages the legislature to clearly define the limits imposed on the operation of § 142.003, which exist but have not been clearly illustrated in the statute.[14] By so doing, the legislature can make the rights and responsibilities of landowners, cattle owners, and county sheriffs clearly known and avoid the types of conflicts like the one that arose in Presidio County.

No academic article currently discusses in-depth, or attempts to resolve, the conflict between the estray statute and the open range doctrine. Texas's appellate courts have not had occasion to consider the issue either. Only two

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7. *See* Gibbs v. Jackson, 990 S.W.2d 745 (Tex. 1999); Clarendon Land, Inv. & Agency Co. v. McClelland, 23 S.W. 576 (Tex. 1893).

8. Perrault, *supra* note 3.

9. *Id*.

10. *Id*.

11. *Id*.

12. *Id*.

13. *See* TEX. AGRIC. CODE ANN. ch. 142.

14. *See infra* Part III (proposing an amendment to § 142.003 of the Texas Agriculture Code).

Texas Supreme Court cases, which are separated by nearly a century, exist that clearly explain the status of the open range doctrine, and neither of those address the effect of the estray statute on the doctrine.[15] This Comment stands alone in its attempt to express the limits of the estray statute's operation in Texas open range counties. Additionally, this Comment provides the reader with reasoning for why the open range doctrine should survive at all in a rapidly urbanizing state and explains how an amendment to § 142.003 can ensure that it does indeed survive.[16]

Part II of this Comment provides an overview of federal and Texas fence law, focusing particularly on economic and geographical factors that have driven the changes of those two bodies of law over time.[17] A discussion of the canon of statutory construction avoiding absurdity is found in Part III.A.[18] That discussion exposes the absurd consequences of applying § 142.003 as it is currently written in open range counties.[19] That absurdity would give a Texas court cause to construe the statute as inapplicable in open range counties and underscores the need for an amendment to avoid such results.[20] Part III.B explores the legislative intent underlying the enactment of § 142.003, explains how interpreting that section to eliminate the open range would be contrary to legislative intent, and further points to the need for an amendment to avoid such an interpretation.[21] The potential for the current version of § 142.003 to expose open range cattle ranchers to new civil and criminal liability is examined in Part III.C.[22] While one may argue that it is appropriate to increase the responsibility owed by cattle owners to their neighbors and the public, the current version of § 142.003 leaves the extent of the responsibility uncertain and forces cattle ranchers to choose between spending money for a fence they do not need or paying damages for liability they do not know they have.[23] Part III.D explains how the proposed amendment, while protecting the rights of cattle ranchers, simultaneously increases protection for landowners in open range counties by providing a method for removing certain classes of estray cattle before they cause damage to the landowner, rather than the current sole protection of expensive

15. *See* Gibbs v. Jackson, 990 S.W.2d 745 (Tex. 1999); Clarendon Land, Inv. & Agency Co. v. McClelland, 23 S.W. 576 (Tex. 1893).

16. *See infra* Parts III.A–B (arguing that the current § 142.003 creates absurd results and does not follow the legislative intent).

17. *See infra* Part II (summarizing federal and Texas fence law).

18. *See infra* Part II.A (discussing methods of statutory interpretation).

19. *See infra* Part III.A (discussing how one interpretation of the statute could allow the removal of one stray cow, but not the removal of multiple strays).

20. *See infra* notes 127–137 and accompanying text (discussing how Texas courts could construe the statute as inapplicable in open range counties).

21. *See infra* Part III.B (analyzing the need for an amendment to § 142.003).

22. *See infra* Part III.C (arguing that § 142.003 exposes cattle ranchers to various terms of liability).

23. *See infra* notes 177–180 and accompanying text (explaining how cattle owners are stuck between these two choices unless the statute is amended).

tort litigation provided by the common law doctrine.[24] Finally, Part III.E discusses some economic concerns that the current version of § 142.003 raises.[25] Unless the statute is amended, the significant expenses that ranchers will incur to avoid having their animals confiscated by the county will prove detrimental to local and state economies, and it will increase the burden on county sheriff departments who will be called on to respond to stray cattle complaints more frequently.[26]

II. AN OVERVIEW OF AMERICAN AND TEXAS FENCE LAW

To fully understand the nature of Texas's current fence law and the dilemma it created for cattle producers and local law enforcement, one must have a sense of the historical developments that led to its current form. Upon tracing the path through time that has culminated in modern fence law, a pattern quickly emerges.

Once expansive rangelands—where there was ample room to accommodate free-ranging livestock—transformed as the human population and industrialization increased.[27] Eventually, the human population consumed enough of the rangeland making it infeasible and unsafe to allow cattle to roam at large.[28] With the rise of industrialization, agriculture became less important to the local economy and the open range closed.[29] As discussed below, however, some western states, including Texas, have been partially insulated from this pattern due to their immense size and vast rangelands.[30] Moreover, unlike its eastern counterparts, agriculture and the cattle industry, in particular, remain crucial components of Texas's economy.[31] Understanding these factors helps one understand why Texas's fence law has deviated from the route taken by most other American states and why it is critical for it to continue to do so.

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24. *See infra* Part III.D (explaining that the proposed amendment provides increased protection for landowners in open range counties).

25. *See infra* Part III.E (explaining the economic concerns that the current statute raises).

26. *See infra* notes 195–217 and accompanying text (considering the economic interests of the state and county sheriff departments).

27. *See generally* DAVID GRIGG, LAND TRANSFORMATION IN AGRICULTURE 86–88 (M.G. Wolman & F.G.A. Fournier eds., 1987).

28. *Id.*

29. *Id.*

30. *See infra* notes 50–52 and accompanying text (explaining that some western states have maintained a degree of open range status).

31. *See infra* Part II.A (explaining the historical and economic role of the cattle industry in Texas).

A. The Cattle Industry in Texas

In a nation long known for its industrial prowess, Texas remains an agricultural powerhouse.[32] Before diving into the history of American fence law, one must acknowledge this key difference between Texas and many of its sister states because it explains why Texas's fence law historically and currently differs from most of the country.[33] In 2017, cattle sales alone contributed 12.3 billion dollars to the Texas economy—9.6 billion dollars more than any other agricultural commodity.[34] According to the United States Department of Agriculture's National Agricultural Statistics Service (NASS), as of January 1, 2018 there were approximately 12.5 million head of cattle in Texas.[35] Approximately 7% of that population was located in purely open range counties.[36] That estimation does not account for cattle in counties that are not entirely open range but are specifically open range to cattle, which suggests that the number of cattle affected by the open range doctrine may actually be higher.[37]

B. A Brief History of American Fence Law

Like most legal concepts in American jurisprudence, fence law traces its roots back to the old English common law.[38] English common law established the "fence-in" doctrine, which places a duty on livestock owners to build fences to confine their livestock within their own property.[39] This rule developed in response to the geographical nature, growing human population, and historical animal husbandry practices of England.[40] Rather than consisting of large scale animal production on huge swaths of land,

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32. *Texas Ag Stats*, TEX. DEP'T AGRIC., https://www.texasagriculture.gov/About/TexasAgStats.aspx (last visited May 30, 2020).

33. *See infra* Parts II.B–C (discussing how Texas's fence law developed differently from most of the country).

34. *Texas Ag Stats*, *supra* note 32.

35. U.S. DEP'T OF AGRIC., NAT'L AGRIC. STAT. SERV., CATTLE INVENTORY (2019), https://www.nass.usda.gov/Statistics_by_State/Texas/Publications/Current_News_Release/2019_Rls/spr-cattle-inv-2019.pdf.

36. *Compare* TEX. AGRIC. CODE ANN. § 143.072 (providing a list of Texas counties statutorily mandated to maintain open range status), *and* Allison Rowe, *Open Range Counties in Texas*, ALISON ROWE ATTORNEY AT LAW: EQUINE L. BLOG (June 20, 2011), https://equinelaw.alisonrowelaw.com/2011/06/articles/livestock-laws/open-range-counties-in-texas/ (providing a list of Texas counties that currently maintain open range status by choosing not to enact local stock laws), *with County Estimate Map-Cattle*, U.S. DEPT. AGRIC., NAT'L AGRIC. STAT. SERV., https://www.nass.usda.gov/statistics_by_state/Texas/Publications/County_Estiimates/ce_maps/ce_catt.php (last updated Nov. 21, 2019) (providing estimated cattle populations in Texas by county).

37. *See County Estimate Map-Cattle*, *supra* note 36.

38. *See* Coby Dolan, Comment, *Examining the Viability of Another Lord of Yesterday: Open Range Laws and Livestock Dominance in the Modern West*, 5 ANIMAL L. 147, 151 (1999).

39. *See id.*

40. *See id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 76, at 538–41 (5th ed. 1984)).

historical English agriculture was characterized by small scale subsistence farmers who typically produced animals and crops for their own consumption and lived close to each other.[41] In other words, the probability of property damage resulting from a stray animal was high, as was the cost when one considers that a small crop vulnerable to the neighbor's wandering pig may have been the difference between a family surviving the winter or starving.[42] Therefore, the legal system had a strong incentive to discourage animal producers from allowing their animals to roam at large.[43]

When the English settlers began to colonize America, they brought their common law with them.[44] Those settlers quickly found, however, that their estray law of old England was ill-suited for the expansive American frontier, and it became common practice for colonists to allow their animals to roam at large once more.[45] The unrestricted roaming of animals became so commonplace that there were several recorded instances of Native American tribes complaining to colonial governments about loose animals destroying their crops, and some cases where Native American tribes actually moved their own villages to take themselves out of the path of unrestrained livestock.[46] Over time, however, an increasing colonial population again made the free range of livestock infeasible, and by the end of the eighteenth century many of the original colonies had already reinstated England's fence-in doctrine.[47]

As the United States grew westward, however, a new type of settler—American pioneers—once again discovered that the expansive, undeveloped frontier made the fence-in rule unnecessary.[48] In the western territories, the open range doctrine became the controlling fence law.[49] As those territories entered their statehood, they maintained their open range policy.[50] Many of those states contained federal public rangelands whose open range status was upheld by the United States Supreme Court in *Buford v. Houtz*.[51] In that case, where the plaintiff landowners sought to enjoin neighboring ranchers from accessing open public lands adjoining the plaintiff's private property, the

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41. *See* Lindsay Nash, Note, *Mending Wall: Playing the Game of Neighborhood Ordering*, 21 YALE J.L. & HUMAN. 173, 176 (2009).

42. *See id*. (citing James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003)).

43. *See id.*

44. *See* Dolan, *supra* note 38, at 176.

45. *See id.*; *see generally* Peter Karsten, *Cows in the Corn, Pigs in the Garden, and "the Problem of Social Costs": "High" and "Low" Legal Cultures of the British Diaspora Lands in the 17th, 18th, and 19th Centuries*, 32 LAW & SOC'Y REV. 63, 67–68 (1998).

46. Karsten, *supra* note 45, at 81.

47. *Id*. at 68.

48. Dolan, *supra* note 38, at 152 (citing Valerie Weeks Scott, *The Range Cattle Industry: Its Effects on Western Land Law*, 28 MONT. L. REV. 155, 168 (1967)).

49. *See* Buford v. Houtz, 133 U.S. 320 (1890).

50. *Id.* at 328–29.

51. *Id.* at 332.

Court provided a perfect explanation of the reason for, and the history behind, the open range doctrine in the western states when it said:

> [Plaintiffs] seek to introduce, into the *vast regions* of the public domain which have been open to the use of the herds of stock-raisers for nearly a century without objection, the principle of law derived from England, and *applicable to highly cultivated regions of country*, that every man must restrain his stock within his own grounds . . . . We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, where they are left open and uninclosed, and no act of government forbids this use. For many years past a very large proportion of the beef which has been used by the people of the United States is the meat of cattle thus raised upon the public lands without charge, without let or hindrance or obstruction. The government of the United States in all its branches has known of this use, has never forbidden it, nor taken any steps to arrest it.[52]

Despite increasing urbanization and the introduction of more valuable land uses and environmental concerns, today Idaho, Washington, California, Montana, Utah, New Mexico, Arizona, Wyoming, and Oregon maintain some degree of open range status by statute.[53] Although a comprehensive explanation for maintaining the open range in those states has never been fully articulated, those states have indicated that they have maintained the open range, in part, because their economy still largely depends on agriculture—unlike most eastern states—and the cost of statutorily mandated fences would hinder the agriculture industry.[54] Nonetheless, the western states listed above have imposed some limits on the open range, primarily in the form of "stock districts," which are designated areas that prohibit livestock from roaming at large.[55] Stock districts represent the legislative response to safety concerns that have resulted from the growth of urban populations into formerly agricultural areas, which has placed high vehicle traffic near livestock.[56]

Following the above history, it becomes evident that most changes in American fence law have generally been a response to either changes in population growth—triggering the enactment of fence-in laws—or the availability of expansive grazing regions, leading courts and legislatures to maintain the open range in those regions.[57] Modern fence law has broken this

52. *Id.* at 326 (emphasis added).
53. Dolan, *supra* note 38, at 155.
54. *See id*. at 164.
55. *See id.* at 156.
56. *See id.* at 156.
57. *See id.* at 150.

pattern to some degree.[58] In today's western states, courts and legislatures have continued to protect the open range despite an increase in population and urban sprawl in recognition of the continuing necessity for cost efficient agricultural production.[59] A review of the history of Texas's fence law culminates in a similar modern attitude, although the course taken to reach that point is markedly different.

C. A History of Texas Fence Law

While Texas's current fence law shares many similarities with other western states that still utilize the open range doctrine, Texas's unique history and geography have caused it to take a decidedly different path to get there.[60] And to the extent that these factors have caused Texas fence law to deviate from that of the rest of the United States, they may give some insight into why Texas landowners have clung to the open range doctrine and continue to do so today.[61]

1. Developments of Fence Law During the Pre-Republic of Texas Era

While modern Texas fence law can trace its roots back to English common law like the majority of states, its development over time was also influenced by the Republic of Texas, the Anglo American colonization of the Mexican state of Coahuila y Tejas, and to some degree, the civil law of Spain.[62] When Texas first came under Mexican control after Mexico established its independence from Spain, the northernmost major settlement in the frontier territory was a little outpost named San Antonio de Bexar (modern-day San Antonio).[63] Those familiar with Texas geography will note the significance of this fact because the location of San Antonio is considered to be in the southern region of the state by today's standard.[64] If San Antonio was the northernmost development, it follows that the vast majority of the state—except for a few eastern mission villages—remained unsettled.[65] Moreover, while San Antonio was the furthest and most developed settlement

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58. *See id.* at 156.

59. *See id.* at 164.

60. *See* Gibbs v. Jackson, 990 S.W.2d 745, 747–78 (Tex. 1999) (explaining that Texas courts have arrived at various opinions for controlling stray livestock).

61. *See id.*

62. *See id.*

63. Harriett Denise Joseph & Donald E. Chipman, *Spanish Texas*, TEX. ST. HIST. ASS'N, https://tshaonline.org/handbook/online/articles/nps01 (last visited May 30, 2020).

64. *See Where Is San Antonio, TX?*, WORLDATLAS, https://www.worldatlas.com/na/us/tx/where-is-san-antonio.html (last visited May 30, 2020) ("Located in southern Texas, San Antonio is the gateway to the American Southwest . . . .").

65. Arnoldo De León, *Mexican Texas*, TEX. ST. HIST. ASS'N, https://tshaonline.org/handbook/online/articles/npm01 (last visited May 30, 2020).

in Coahuila y Tejas, very little settlement between San Antonio and the Rio Grande existed.[66]

The lack of Mexican citizens willing to settle Coahuila y Tejas prompted the Mexican government to open its borders to Anglo American settlers in hopes that new colonists would be willing to settle the Coahuila y Tejas frontier, thereby developing land that would otherwise be unproductive wilderness.[67] The Anglo-American settlers flocked to Coahuila y Tejas, and when they arrived, they found miles upon miles of untouched fertile land ideal for agricultural production, in stark contrast to the rapidly urbanizing Eastern Seaboard and Appalachian region of the United States or the largely urbanized European nations.[68] The settlers created their own local governments under Mexican authority,[69] and many passed local rules declaring their respective territories to be open range, thereby locally adopting the civil law rule that Mexico inherited from Spain.[70]

2. Developments During the Republic of Texas Era

After the Texas Revolution, the Texas Republic enacted a statute declaring all of Texas as open range.[71] That legislation clearly stated that animals would be permitted to roam at large and no landowner could sue for trespass in response to another's animals entering or damaging his property, unless he constructed a proper fence in an attempt to repel such animals.[72] Similar to the local rules implemented during the pre-revolution era, this law stemmed from an acknowledgment that livestock production was essential to the economy.[73] Additionally, there was no need to require fences in a nation of wide open spaces and a sparse population, particularly in light of the costs that would be associated with building fences large enough to enclose the expansive tracts of land used for cattle production at the time.[74]

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66. *See* Joseph & Chipman, *supra* note 63.

67. *See* De León, *supra* note 65.

68. *See id.*

69. *See id.*

70. Nathan L. Hecht, *The Legacy of Professor Joseph Webb Knight*, 71 SMU L. REV. 7, 11 (2018).

71. Act approved Feb. 5, 1840, 4th Cong., R.S., § 2, 1840 Repub. Tex. Laws 179, 180, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 353, 354 (Austin, Gammel Book Co. 1898).

72. Gibbs v. Jackson, 990 S.W.2d 745, 747 n.2 (Tex. 1999).

73. Pace v. Potter, 22 S.W. 300, 301 (Tex. 1893) ("It is not contended that the rule of the common law, making it the duty of the owner of cattle to confine them to his own land, . . . was ever in force in this state. It is inapplicable to our situation and the customs and habits of the early settlers of the country, and inconsistent with our legislation in regard to fences and stock.").

74. *Id.*

3. The Post-Civil War Era and Development of the Common Law Open Range Doctrine Still in Effect Today

Like all other former Confederate states following the Civil War, Texas ratified a new state constitution.[75] The Texas Constitution of 1876, which remains in effect today, contains two provisions related to fence law.[76] Article 16, § 22 of the Constitution states: "The Legislature shall have the power to pass such fence laws, applicable to any sub-division of the State, or counties, as may be needed to meet the wants of the people."[77] Article 16, § 23 provides:

> The Legislature may pass laws for the regulation of live stock and the protection of stock raisers in the stock raising portion of the State, and exempt from the operation of such laws other portions, sections, or counties; and shall have power to pass general and special laws for the inspection of cattle, stock and hides and for the regulation of brands; provided, that any local law thus passed shall be submitted to the [freeholders] of the section to be affected thereby, and approved by them, before it shall go into effect.[78]

Courts have interpreted these provisions to empower the legislature to eliminate Texas's open range status and replace it with a fence-in law.[79] Nonetheless, the post-Civil War legislatures did not take action to close the open range, leading post-Civil War courts to recognize the common law open range as the general law of the state.[80] The constructs of the doctrine that those early courts developed has remained virtually unchanged up to present day.[81] The courts determined that, within the open range, a livestock owner had no duty to build a fence to confine his animals to his property, and if a landowner desired to keep others' animals off of his property, then he had the duty to build a proper fence to repel them.[82]

The open range doctrine, however, does not give the livestock owner an unfettered right to allow any and all of their animals to roam at large.[83] First, if a landowner does build a proper fence, the livestock owner is liable if their animal breaches that fence and trespasses on the landowner's property.[84] Second, a livestock owner may not intentionally drive his livestock onto another's property.[85] Third, a livestock owner may not knowingly permit a

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75. *See Gibbs*, 990 S.W.2d at 748.
76. TEX. CONST. art. XVI.
77. *Id.* § 22 (repealed Nov. 26, 2001).
78. *Id.* § 23.
79. *See Gibbs*, 990 S.W.2d at 748.
80. *Id.*
81. *See id.* at 747.
82. Clarendon Land, Inv. & Agency Co. v. McClelland, 23 S.W. 576, 577 (Tex. 1893).
83. *See id.* at 578.
84. *Id.*
85. *Id.*

diseased animal to roam at large.[86] Fourth, a livestock owner may not knowingly permit a vicious animal to roam at large.[87] Finally, a livestock owner may not knowingly permit a breachy animal to roam at large.[88] A "breachy" animal is defined as one having a propensity for breaking or jumping fences.[89] In other words, if a livestock owner intentionally drives their animals onto another's property or knowingly allows a diseased, vicious, or breachy animal to roam at large, they may be held liable for trespass and the resulting damages caused by the offending animal.[90]

4. The Legislature's Use of Its Authority Under Article 16, §§ 22 and 23

Historically, the Texas Legislature has not used its power to issue an outright prohibition of the open range; however, it has imposed some limits on the open range doctrine over time.[91] The first of those limitations came in 1935 when the legislature enacted a law prohibiting an animal to roam at large on the right-of-way of any highway with a fence built on either side of it.[92] In 1959, that statute was expanded to prohibit animal owners from allowing their animals to roam on any U.S. or state highway, regardless of whether there were any fences surrounding it.[93] However, the 1959 enactment limited animal owner liability some degree by imposing liability only on those animal owners who "knowingly" permitted their animals to roam at large.[94]

Additionally, shortly after installment of the 1876 Constitution, the legislature—under the authority granted to it in Article 16, §§ 22 and 23—began creating statutes allowing for the freeholders of any county to vote on local stock laws.[95] Under these statutes, landowners of any county could petition the county to hold an election where the landowners could vote on whether animals would be permitted to roam at large.[96] The landowners were essentially free to dictate which animals would be allowed to roam, which animals would be required to be restrained, and in which area of the county the stock laws would apply.[97] These elections have resulted in a total lack of

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. Gibbs v. Jackson, 990 S.W.2d 745, 748 (Tex. 1999).
92. *Id.* (citing Act of May 8, 1935, 44th Leg., R.S., ch. 186, § 1, 1935 Tex. Gen. Laws 467, 467).
93. *Id.* (citing Act of May 12, 1959, 56th Leg., R.S., ch. 374, § 1, 1959 Tex. Gen. Laws 835, 835).
94. *Id.*
95. *Id.* (citing Act approved Aug. 15, 1876, 15th Leg., ch. 98, §§ 1–8, 1876 Tex. Gen. Laws 150, 150–52, reprinted in 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 986, 986–88 (Austin, Gammel Book Co. 1898)).
96. *Id.*
97. *Id.*

uniformity in stock laws from county to county.[98] Nonetheless, most of the stock laws that were enacted by local counties at the turn of the twentieth century remain in effect today.[99]

Even though the Texas Legislature began allowing counties to adopt fence-in laws shortly after the 1876 Constitution was approved, the Texas Supreme Court made it clear that the open range doctrine was still the law of the land, absent a local stock law providing otherwise.[100] In 1893, the Court in *Clarendon Land, Investment & Agency Co. v. McClelland* stated:

> Neither the courts nor the legislature of this state have ever recognized the rule of the common law of England which requires every man to restrain his cattle either by tethering or by inclosure [sic]. . . . It is the right of every owner of domestic animals in this state, not known to be diseased, vicious, or "breachy," to allow them to run at large . . . .[101]

Even in more modern times, the Court has continued to uphold the open range doctrine. In 1999, the Court overruled two appellate court decisions "to the extent that they hold that a person who owns or is otherwise responsible for horses has a duty to prevent the horses from roaming onto a farm-to-market road that is free from a local stock law."[102]

5. The Status of Fence Law in Present-Day Texas

The common law open range doctrine and its exceptions have remained unchanged since the Court pronounced its limitations in *McClelland* in 1893.[103] On the other hand, the scope of the statutes allowing for counties to enact their own local stock laws has undergone periodic change throughout the years.[104] Chapter 143 of the Texas Agriculture Code codifies the current version of these laws.[105] This chapter clearly establishes two exceptions to the common law open range.[106]

First, § 143.074 allows counties to hold stock law elections to restrict the free ranging of certain classes of animals and adds that "a person may not permit any animal of the class mentioned in the proclamation to run at large in the county or area in which the election was held."[107] Section 143.072, however, expressly excludes "Andrews, Coke, Culberson, Hardin, Hemphill, Hudspeth, Jasper, Jefferson, Kenedy, Kinney, LaSalle, Loving, Motley,

98. *See* ROWE, *supra* note 36.
99. *Gibbs*, 990 S.W.2d at 749.
100. Clarendon Land, Inv. & Agency Co. v. McClelland, 23 S.W. 576, 578 (Tex. 1893).
101. *Id.* at 577–78.
102. *Gibbs*, 990 S.W.2d at 750.
103. *Id.* at 747 (citing *McClelland*, 23 S.W. at 577–78).
104. *Id.* at 748.
105. TEX. AGRIC. CODE ANN. § 143.001.
106. *Gibbs*, 990 S.W.2d at 748.
107. AGRIC. § 143.074.

Newton, Presidio, Roberts, Schleicher, Terry, Tyler, Upton, Wharton, [and] Yoakum" counties from the operation of § 143.071, meaning that those counties cannot vote to install a local stock law, which would impose a fence-in law.[108] There is no other section in Chapter 143 that operates to make those counties closed range.[109]

Second, Chapter 143 provides: "A person who owns or has responsibility for the control of a horse, mule, donkey, cow, bull, steer, hog, sheep, or goat may not knowingly permit the animal to traverse or roam at large, unattended, on the right-of-way of a highway."[110] Thus, at first glance of modern Texas fence law as a whole, it appears that: (1) the common law open range applies to all areas of the state that have not elected local stock laws;[111] (2) the twenty-two counties listed in § 143.072 cannot institute stock laws, which means they are statutorily required to remain open range;[112] and (3) even in open range areas, livestock owners cannot knowingly permit their animals to roam at large on a highway.[113]

If the three principles just mentioned were all that existed in the Agriculture Code, the application of Texas law would be simple, and this Comment could end here. Once one takes a look at Chapter 142 of the Agriculture Code, however, things becomes significantly less clear.

Chapter 142 deals with the handling of stray animals, or as the chapter calls them, "estray[s]."[114] That chapter essentially provides a process by which landowners, upon discovering a stray animal on their property, can rely on the county sheriff to remove the offending animal.[115] The sheriff, in turn, is empowered to impound the animal,[116] and if the animal's owner cannot be identified or located, or fails to claim the animal, the sheriff has the authority to sell the animal[117] or retain it for use by the county.[118] Chapter 142 makes no distinction between stray animals in fence-in counties and animals permitted to roam at large in open range areas.[119] Rather than acknowledging that a cattle owner in an open range county has the freedom to allow his cattle to roam at large unless they are intentionally driven on to the complainant's land—diseased, vicious, or breachy—the plain language of the statute seems to empower the landowner to call on a sheriff to remove any animal from his land regardless of the animal's status.[120]

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108. *Id.* § 143.072.
109. *Id.* § 143.001.
110. *Id.* § 143.102.
111. *Gibbs*, 990 S.W.2d at 746.
112. AGRIC. § 143.072.
113. *Id.* § 143.102.
114. *Id.* § 142.001.
115. *Id.* § 142.003.
116. *Id.* § 142.009.
117. *Id.* § 142.013.
118. *Id.* § 142.011.
119. *Id.* § 142.001.
120. *Id.* § 142.003.

III. THE OPEN RANGE DOCTRINE SHOULD REMAIN IN EFFECT IN TEXAS, AND TEXAS'S ESTRAY STATUTE SHOULD BE AMENDED TO CLARIFY THAT IT DOES NOT ABROGATE THE OPEN RANGE DOCTRINE

The current status of Texas fence law leaves both cattle ranchers and local law enforcement to face a crucial question: Does Chapter 142 operate to finally abrogate the common law open range doctrine, thereby making all previously open range counties now fence-in counties? The answer to that question remains unclear as Texas courts have not yet had the opportunity to address it.[121] The current version of Chapter 142 can arguably be interpreted to finally close the open range, but as previously explained, that was never the purpose of Chapter 142 and the statute should be amended to make clear that it does not close the open range.[122] Particularly, § 142.003 should be amended to include the following language:

> *(e) This subsection shall not apply to cattle roaming at large in counties that have not elected local stock laws prohibiting cattle from roaming at large pursuant to § 143.071 or in counties that are prohibited from electing such local stock laws pursuant to § 143.072 unless the offending animal:*
>
> *(1) breached a legal fence enclosing the complainant's property;*
>
> *(2) was intentionally driven onto the complainant's property by its owner; or*
>
> *(3) is diseased or vicious.*

This amendment would make it clear that the estray statute only applies in those counties that have held local elections in which the freeholders of that county voted to institute stock laws to eliminate the open range doctrine. As explained below, this was the legislature's intent when it enacted the estray law. The legislature simply failed to articulate clearly that intent in the language of § 142.003.

A. In Counties That Have Chosen to Permit Cattle to Roam at Large Under § 143.071, Enforcing § 142.003 Based on the Literal Construction of Its Language Produces Absurd Results Justifying Deviation from Its Literal Meaning

When construing the meaning of a statute, courts will generally give effect to the literal language used by the legislature.[123] While courts are hesitant to deviate from the literal text of the statute, they frequently do so

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121. *See id.*

122. *See infra* Part III.B (explaining that the Texas Legislature did not intend to eliminate the open range doctrine).

123. Bd. of Ins. Comm'rs of Tex. v. Guardian Life Ins. Co. of Tex., 180 S.W.2d 906, 909 (Tex. 1944).

when adhering to the literal meaning would result in absurd consequences.[124] Courts will always avoid giving a statute an absurd meaning if there is any colorable way to frame the terms of the statute in a more sensible light[125] based on the presumption that the legislature will never intend to create a nonsensical law.[126]

Section 142.003 provides: "If an estray, *without being herded with other livestock*, roams about the property of a person without that person's permission . . . the owner of the private property . . . shall . . . report the presence of the estray to the sheriff of the county in which the estray is discovered."[127] If one reads the text literally, it would appear, by virtue of the phrase "without being herded with other livestock," that it applies only to single animals that have broken away from their herd and roamed onto another's property.[128] The Court will not presume that the legislature included superfluous language in the statute; so the Court will not simply ignore the phrase, and it will automatically apply the statute to a group of animals that are herded.[129] This raises the question: Is a property owner not allowed to report to the sheriff if a whole herd manages to roam onto his property? This restrictive language is not particularly troublesome in a closed range county where no animal is allowed to roam at large regardless of whether it is alone or in a group.[130] By operation of the county's stock law, the landowner is empowered to eject a whole herd or one lonely cow regardless of whether § 142.003 exists or not.[131] But in an open range county, nothing outside of § 142.003 prevents a whole herd from roaming free.[132]

This seems to create a situation where § 142.003 gives the landowner recourse to remove a stray cow that has broken away from the herd, but leaves the landowner powerless when a full herd of cattle decide to enter his property because no stock law exists to address a trespassing group as opposed to a single animal.[133] Because the statute is silent on the definition of a herd,[134] one cow may be subject to removal under the statute, but perhaps three or four cattle are not strays and are instead a herd entitled to roam as they please without fear of ejectment.[135] Surely such a result is absurd enough to call for deviation from the literal meaning of § 142.003.

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124. Silguero v. CSL Plasma, Inc., 579 S.W.3d 53, 59 (Tex. 2019).
125. Staples v. State, 245 S.W. 639, 642 (Tex. 1922).
126. Dovalina v. Albert, 409 S.W.2d 616, 621 (Tex. App.—Amarillo 1966, writ ref'd n.r.e.).
127. TEX. AGRIC. CODE ANN. § 142.003 (emphasis added).
128. *Id.* § 142.003(a).
129. Empire Gas & Fuel Co. v. State, 47 S.W.2d 265, 271–72 (Tex. 1932).
130. AGRIC. §§ 143.021–.082 (discussing stock laws that can be used to modify the law of a specific location from open range to closed range).
131. *See* Gibbs v. Jackson, 990 S.W.2d 745, 749 (Tex. 1999).
132. *See id.*
133. *See id.*
134. AGRIC. § 142.001.
135. *Id.*

If the statute is modified to exclude open range counties from § 142.003's effect, the absurd result evaporates and the statute can be readily applied to closed range counties, thereby giving a process for enforcing the stock laws elected in those counties. But such a modification would leave a landowner in an open range county completely without recourse unless one of three exceptions applies.[136] Perhaps that was the intent all along. If the literal language of § 142.003 does not give full recourse to landowners in open range counties, thereby creating its absurd effect, it is because § 142.003 was never intended to apply to open range counties in the first place.[137] A closer look at the legislature's intent underlying Chapter 142 and 143 is illustrative.

B. The Legislature Did Not Intend for § 142.003 to Eliminate the Open Range Doctrine

The ultimate goal in construing a statute is to conform to the intent of the legislature.[138] In doing so, a court must consider the larger intent of the chapter or act, not just a single provision.[139] The intent underlying Chapters 142 and 143 was, among other things, for the legislature to leave the open range status of the counties undisturbed unless the counties chose to alter it themselves.[140] In § 143.071, the legislature gave the counties the power to vote to determine whether they will be open range or free range.[141] That section and its predecessors predate § 142.003.[142] If the legislature intended to make Texas a closed range state by enacting § 142.003, they had an opportunity to repeal § 143.071 when enacting § 142.003.[143] While it is possible for a later statute to implicitly repeal an earlier statute, courts highly disfavor the idea of implicit repeal and will only support it when the intent of two statutes are obviously and completely irreconcilable.[144]

The absurdity in the literal language of § 142.003 could be eliminated by applying it in a way that renders all open range areas closed, but that would require striking the language limiting the statute's effect to only single animals. Moreover, interpreting § 142.003 as eliminating the open range

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136. *See supra* notes 108–110 and accompanying text (discussing the three limitations to an open range county).

137. S. COMM. ON NAT. RES., BILL ANALYSIS, Tex. S.B. 20, 70th Leg., R.S. (1987) (codified at AGRIC. § 142.003).

138. Runnels v. Belden, 51 Tex. 48, 50 (1879).

139. Consumers' Gas & Fuel Co. v. Erwin, 243 S.W. 500, 504 (Tex. App.—Fort Worth 1922, writ ref'd).

140. AGRIC. § 143.071.

141. *Id.*

142. Gibbs v. Jackson, 990 S.W.2d 745, 748 (Tex. 1999).

143. *See* S. COMM. ON NAT. RES., BILL ANALYSIS, Tex. S.B. 20, 70th Leg., R.S. (1987) (codified at AGRIC. § 142.003) (explaining that § 142.003 does not explicitly repeal § 143.071).

144. Conley v. Daughters of the Republic, 156 S.W. 197, 201 (Tex. 1913).

doctrine altogether is contrary to the apparent intent of the legislature.[145] If the legislature wanted to close the ranges of Texas, they could have done so by repealing § 143.071 or simply drafting § 142.003 to apply to all animals whether they are in a herd or otherwise. They chose not to.[146] It is more logical to read § 142.003 as simply applying to open range counties only under limited circumstances, and much less uncertainty would result if § 142.003 is amended to that effect.

The enactment of § 143.072 subsequent to § 142.003 also forecloses the notion that the legislature intended for § 142.003 to make Texas a closed range state.[147] Section 143.072 prohibits twenty-two specific counties from voting on local stock laws.[148] This law has effectively preserved open range status in those counties because they do not have the ability to change their own status, and the legislature has not taken action to do so either.[149] Section 142.003, or at least its substance, has been on the books in one form or another since 1975,[150] while § 143.072 was not enacted until 1981.[151] Therefore, the legislature created § 143.072 preserving open range status in specific counties with knowledge of § 142.003's existence.[152]

The legislature had no reason to enact § 143.072 if it intended for § 142.003 to apply to open range counties. A blanket application of § 142.003 strictly as written would make every county closed range.[153] If the legislature had already eliminated the open range doctrine, subsequently enacting a law prohibiting a county from voting to close its range would be meaningless.[154] The courts will presume that the legislature did not create an unnecessary statute when enacting § 143.072.[155] The purpose must have been to preserve open range status in some counties.[156] If the legislature felt it necessary to keep the open range alive through § 143.072, then logic dictates that the legislature believed the open range was not dead even with § 142.003 in effect.[157] The legislature intended for the open range to survive § 142.003,

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145. *See* S. COMM. ON NAT. RES., BILL ANALYSIS, Tex. S.B. 20, 70th Leg., R.S. (1987) (demonstrating the legislative history behind § 142.003, making it more apparent that the open range doctrine and § 142.003 could be compatible).

146. *See id.*

147. *See infra* notes 148–156 and accompanying text (explaining that the two sections in question, while appearing to contradict each other, are actually reconcilable).

148. TEX. AGRIC. CODE. ANN. § 143.072.

149. *See* Marks, *supra* note 1.

150. Act of June 19, 1975, 64th Leg., R.S., ch. 630, § 4(a), (b), 1975 Tex. Gen. Laws 1930, 1931 (repealed 1981).

151. Act of June 10, 1981, 67th Leg., R.S., ch. 388, § 1, 1981 Tex. Gen. Laws 1012, 1348 (codified at AGRIC. § 143.072).

152. *See* AGRIC. §§ 142.003, 143.072.

153. *Id.* § 142.003.

154. *See id.* §§ 142.003, 143.072.

155. *See* Tex. Lottery Comm'n v. First State Bank of DeQueen, 325 S.W.3d 628, 635 (Tex. 2010).

156. *See supra* notes 151–153 and accompanying text (explaining why § 143.072 does not create closed ranges in all Texas counties).

157. *See* AGRIC. §§ 142.003, 143.072.

and without amendment to that section, its literal effect contradicts the legislature's intent.[158]

C. Application of the Current Version of § 142.003 to Open Range Counties Creates New Tort and Criminal Liability for Cattle Owners

In open range counties, the cattle owner has no duty to confine his cattle or restrain them from roaming at large on roadways.[159] Any duty to do so originates only by statute.[160] Section 143.102 prohibits any livestock owner from knowingly permitting his livestock to roam on "the right-of-way of a highway."[161] The statute, however, does not consider county roads and farm-to-market roads to be highways.[162] The Court has previously held that in open range counties, no duty exists to prevent animals from roaming at large on public roadways that are not highways, finding that such duty only exists in counties that have elected to be closed range.[163]

If § 142.003 is not modified to exclude its operation in open range counties, all counties could be viewed as closed range just as if all the county's voters had elected stock laws, and the duty to prevent cattle from roaming at large on all roadways would arise.[164] Typically, evidence that an animal escaped its enclosure unbeknownst to its owner is the only evidence that effectively rebuts knowledge.[165] Every cattle owner that knowingly allowed his livestock to roam mistakenly believing that he lives in an open range county would be liable for negligence.[166] The open range cattle rancher knowingly permits his cattle to roam at large; he cannot blame faulty fences for his cattle's escape.[167] When his cow is struck by a car traveling on a rural road, he will be liable for the damage.[168] If § 142.003's effect was excluded from open range counties, that same rancher, under the same circumstances, would not be liable.[169]

The current version of § 142.003 also exposes open range cattle ranchers to new liability for property damage caused by their roaming

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158. *See supra* notes 145–155 and accompanying text (explaining that the Texas Legislature did not intend to end open range status in Texas).

159. Billelo v. SLC McKinney Partners, L.P., 336 S.W.3d 852, 854 (Tex. App.—Dallas 2011, no pet.).

160. *Id.*

161. AGRIC. § 143.102.

162. Gibbs v. Jackson, 990 S.W.2d 745, 749 (Tex. 1999).

163. *Id.*

164. AGRIC. § 142.003 (making no distinction between counties that are open range or those with stock laws).

165. *Gibbs*, 990 S.W.2d at 746.

166. *See* AGRIC. § 142.003.

167. *Gibbs*, 990 S.W.2d at 746.

168. *See id.*

169. Billelo v. SLC McKinney Partners, L.P., 336 S.W.3d 852, 854 (Tex. App.—Dallas 2011, no pet.).

cattle.[170] In an open range county, no duty exists to erect fences to confine livestock and a livestock owner is generally not liable for property damage caused by his livestock.[171] In these counties, if a property owner wishes to exclude another's animals from his property, the property owner has the duty of erecting his own fence to secure his property.[172] A landowner's failure to build a fence to protect his own property generally leaves him without legal remedy in the event that another's livestock enters his property and causes damage.[173] In contrast, it is the livestock owner that has the duty to build a fence to confine his livestock in a closed range county.[174] If the closed range cattle rancher fails to build or maintain a proper fence and allows his cattle to escape on another's property, he may be liable under a negligence or trespass theory for property damage caused by his cattle.[175] In that scenario, the cattle rancher may also be exposed to criminal liability.[176]

Under § 142.003, open range cattle ranchers are currently exposed to these liabilities just as if they were operating in a stock law county.[177] Going back to intent, it seems unlikely that the legislature intended to create tort liability for cattle owners in every county, while also enacting a law to preserve open range—and presumably its lower standard of care—in several counties. Imposing these new tort liabilities, the immunity to which being one of the benefits of the open range concept, is simply contradictory to the purpose of preserving open range in some counties, and it is difficult, if not impossible, to see how these new liabilities and the open range can coexist.[178] While creating such new liabilities increases the costs and risks for previously open range cattle ranchers, simultaneously increasing their accountability to their neighbors and the public at large is not necessarily a bad thing. But until § 142.003 is amended, the risk of exposure to liability is uncertain for open range cattle owners and their insurers.

Under the current status of the law, cattle ranchers in open range counties are operating under the presumption that they are immune from tort liability in those circumstances where their unrestrained cattle cause a vehicle collision on a rural road that does not qualify as a highway under § 143.102.[179] If § 142.003 is interpreted as eliminating the open range doctrine, those ranchers are unknowingly exposing themselves to the

170. *Gibbs*, 990 S.W.2d at 746.
171. *Id.*
172. TEX. AGRIC. CODE ANN. § 143.001.
173. *Gibbs*, 990 S.W.2d at 747–50.
174. AGRIC. § 143.001.
175. *See Gibbs*, 990 S.W.2d at 745.
176. AGRIC. § 143.082.
177. *Id.* § 143.001.
178. Goode v. Bauer, 109 S.W.3d 788, 791 (Tex. App.—Corpus Christi 2003, pet. denied) (noting that neither the courts nor the legislature have created a duty).
179. *Gibbs*, 990 S.W.2d at 747–48.

substantial risk of being hauled into court over a negligence claim.[180] Yet, it is not certain that the open range has, in fact, been eliminated.[181] So even if a rancher is aware of the *potential* tort risk he faces, he is in the lose-lose position of having to decide whether to forgo building a fence and hope that in the event he is hauled into court, the judge will construe the statutes in his favor, or whether to undertake the significant cost of building a fence to protect himself and run the risk of wasting money on a protection he does not need.[182] Simply amending § 142.003 as proposed will eliminate this conundrum and clearly define the full extent of the rancher's and the motorist's rights and exposure to liability.

D. Amending § 142.003 Will Supplement, Rather Than Deprive, Protection of Landowners' Rights in Open Range Counties

Excluding open range counties from the effect of § 142.003 does not mean that landowners are defenseless against all invasions of their property by stray animals. Under common law in open range counties, cattle owners can be held liable for trespass if they intentionally drive their cattle onto another's property.[183] Cattle owners can also be liable if they permit diseased or breachy (prone to jumping fences) cattle to run at large.[184] Furthermore, if landowners in an open range county build a proper fence to protect their property from livestock, cattle owners may be liable for damage if their cattle breach the fence.[185] These rules adequately compensate for injury to Texas landowners' generally recognized property rights.[186]

The problem is that these protections provide for damages to the injured landowner, but do not provide the landowner any method of mitigating damage by an ongoing intrusion.[187] The original stated purpose of Chapter 142 was "for finally disposing of an estray."[188] This purpose suggests the estray statute was intended to provide a process to stop an ongoing injury, focusing more on prevention than compensation.[189] At the same time, there is no evidence of intent for that option to completely abrogate the common law and its damages available after an injury has already been incurred.[190] The intent of the statute can be effectuated without eliminating the open range

180. *See* AGRIC. § 143.001.
181. *Id*.
182. *See Gibbs*, 990 S.W.2d at 747–48 (noting the duty to confine when stock laws apply, but no duty applies when the county is open range).
183. Clarendon Land, Inv. & Agency Co. v. McClelland, 23 S.W. 576, 577 (Tex. 1893).
184. *Id.*
185. *See* AGRIC. § 143.001 (requiring gardeners and farmers to maintain a sufficient fence).
186. *Clarendon*, 23 S.W. at 577.
187. AGRIC. § 142.006.
188. Tex. S.B. 20, 70th Leg., R.S. (1987). The legislative purpose was not codified in the final statute. *See id.*
189. *E.g.*, AGRIC. § 142.009 (outlining the process for impoundment of an estray).
190. *See id.* § 142.004.

by amending § 142.001 to exclude § 142.003's effect in open range counties except for when those intrusions prohibited by the common law actively impact a landowner.[191]

Under the amendment proposed by this Comment, § 142.003 should have no effect when healthy cattle roam onto unfenced property by their own volition in an open range county.[192] But if those same cattle are intentionally driven onto another's property by their owner, are diseased or have jumped a fence to get onto the property, then the landowner can rely on the process provided in § 142.003 to remove the cattle, preventing further property damage.[193] This approach provides the more proactive protection to landowners intended by the statute and simultaneously harmonizes the statute and the common law effectively protecting the interests and rights of both the landowner and the cattle owner.

While a statute ordinarily preempts a conflicting common law rule,[194] preemption is unnecessary in the absence of express or implicit abrogation of the common law by statute.[195] As previously stated, it is not clear that § 142.003 abrogates the common law's open range doctrine.[196] Therefore, from a statutory construction standpoint, no reason exists why the statute cannot be simply construed by the court to allow coexistence without the need for an amendment. The proposed amendment, however, more clearly expresses the legislative intent to provide additional protection for landowners in all counties rather than to eliminate the open range doctrine in all counties.

E. Policy Consideration: Preserving the Open Range Is More Economically Efficient for Cattle Ranchers and Law Enforcement

Many cattle ranchers in open range counties rely on open range status to maintain the profitability of their businesses.[197] In open range Presidio County, for example, water and vegetation are scarce.[198] For those ranchers who are unable to purchase thousands of acres of land, running a profitable cattle operation is nearly impossible because the amount of cattle they can raise is directly limited to the amount of land they have access to.[199] Even

191. *Id.* §§ 142.002–.003.

192. *Id.*

193. *Id.*

194. Forest Oil Corp. v. El Rucio Land & Cattle Co., 518 S.W.3d 422, 428 (Tex. 2017).

195. *Id.*

196. *See* Dugger v. Arredondo, 408 S.W.3d 825, 829 (Tex. 2013) (holding that courts will only modify common law when there is clear legislative intent for them to do so).

197. *See* Marks, *supra* note 1.

198. *Id.*

199. Diana Nguyen, *West Texas Wonders: How Did West Texas Ranches Get SO BIG?*, MARFA PUB. RADIO (Oct. 5, 2018), https://marfapublicradio.org/blog/west-texas-wonders/how-did-west-texas-ranches-get-so-big/.

when landowners have enough land to provide forage for their cattle, it is not a given that they will also have access to water.[200] Some ranchers rely on the open range status of their county to merely allow their cattle access to natural water sources.[201]

If the open range doctrine were eliminated, the cost of fencing imposed on cattle ranchers would be another similar economic consideration.[202] As previously mentioned, this is the primary reason other western states have refused to entirely close the open range despite growing pressure from multiple groups who have criticized the doctrine for contributing to environmental and vehicle safety problems.[203] Those states have recognized that cattle production is still a crucial component of their economies—unlike the more industrialized eastern states that have eliminated the open range doctrine[204]—and Texas should too.

The average ranch size in Texas is approximately 400 acres.[205] Imagine a hypothetical rancher who owns a perfectly square 400-acre ranch in a West Texas County that is converted from open range to closed range by the operation of § 142.003. Just one side of that ranch would be 1,391.4 feet long. Because he is no longer in an open range county, this rancher would need to build 5,565.6 feet of fence to comply with the law and shield himself—although not completely—from tort liability. If he builds a five-strand barbed wire fence at the average price of $2.03 per foot,[206] our rancher can expect to spend about $11,288.17. Maybe that number does not strike the reader as insurmountable but consider the stocking rate in West Texas.[207] At one cow per twenty-five acres, a liberal stocking rate for West Texas,[208] his 400-acre ranch can only support sixteen cows. If the rancher is lucky or proficient enough to achieve a 100% calf crop of sixteen calves sold at 500 pounds each at the current market price of $123.52 per hundred pounds,[209] the rancher will bring in a gross revenue of $9,881.60. Even assuming that the cattle are not financed and without deducting all the other costs associated with producing the calf crop, such as breeding costs, feeding costs, insurance, freight, and sales commission to name a few, there is no profit left over to pay for the fence.

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200. *See* Marks, *supra* note 1.

201. *Id.*

202. *See infra* notes 204–207 and accompanying text (giving a hypothetical regarding the cost of fencing for a cattle rancher if the open range doctrine were eliminated).

203. *See supra* Part II.B (discussing the history of American fence law).

204. *See* Dolan, *supra* note 38, at 164.

205. *Texas Ag. Stats*, *supra* note 32.

206. RALPH MAYER & TOM OLSEN, IOWA ST. U. ESTIMATED COSTS FOR LIVESTOCK FENCING 1 (2012), https://www.extension.iastate.edu/agdm/livestock/pdf/b1-75.pdf.

207. *See* Brian H. Hurd, L. Allen Torell & Kirk C. McDaniel, N.M. ST. U., PERSPECTIVES ON RANGELAND MGMT., (2007), http://aces.nmsu.edu/pubs/research/livestock_range/RR7591.pdf.

208. *See id.*

209. *Custom Market Report Thursday, October 31, 2019*, PRODUCERS LIVESTOCK AUCTION CO., (Nov. 1, 2019), http://www.producersandcargile.com/storage/UserFileFolder/10.31.19.pdf.

Of course, building a fence is a long-term investment, so perhaps the construction cost can be distributed over the average twenty-year lifespan of a barbed wire fence.[210] But for the rancher who already operates on a razor thin margin, the chances of surviving just the first of those years would decrease dramatically. And let's not forget that with the closing of the range comes its inherent imposition of tort liability for escaped cattle that collide with a vehicle on a rural road, another potential cost that did not exist for the rancher before.[211] In other words, if § 142.003 is not amended so as to preserve the open range, it may result in several ranchers going out of business. This means removing a portion of the economy in an already scarcely populated county. When the effect of the statute is unclear, it would be against Texas's public policy of encouraging agricultural industry to construe § 142.003 in a manner that eliminates the open range.[212] That public policy would be better served by amending the statute to avoid the possibility of such construction altogether.

Because sheriff departments are tasked with enforcing § 142.003,[213] one must also consider how they will be affected by the demands that come with shifting from open range to closed range. In 2015, the Delta County Sheriff's Department reported that approximately 25% of the calls it responded to were for loose livestock.[214] Fortunately for that sheriff, Delta County encompasses only 278 square miles.[215] But consider Presidio County consisting of 3,856 square miles[216] and a sheriff's department made up of one sheriff and five deputies.[217] If § 142.003 was interpreted to eliminate the open range doctrine, the amount of time and resources expended on responding to loose animal complaints may increase exponentially, thus unnecessarily draining public resources.

Sheriff departments in open range counties remain concerned about the possibility of exposing themselves to liability for wrongfully impounding or disposing of estray livestock.[218] Obviously, the current version of § 142.003 has caused confusion as to whether a sheriff can legally confiscate a stray

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210. Jeff Caldwell, *What Will a New Fence Cost This Year?*, SUCCESSFUL FARMING (Feb. 29, 2012), https://www.agriculture.com/news/livestock/what-will-a-new-fence-cost-this-year_3-ar22518.

211. *See* Marks, *supra* note 1.

212. *See supra* notes 195–199 and accompanying text (explaining that the intended effect of the statute is to modify the open range doctrine rather than completely rejecting it, which would have significant repercussions on some cattle ranchers).

213. TEX. AGRIC. CODE ANN. § 143.001.

214. Cindy Roller, *Open Range Leading Topic for County Meeting*, KETR (May 21, 2015), https://www.ketr.org/post/open-range-leading-topic-county-meeting.

215. *Delta County Profile*, TEX. ASS'N COUNTIES, https://txcip.org/tac/census/profile.php?FIPS=48119 (last updated Apr. 29, 2015).

216. *Presidio County Profile*, TEX. ASS'N COUNTIES, https://txcip.org/tac/census/profile.php?FIPS=48377 (last updated Apr. 29, 2015).

217. PRESIDIO COUNTY SHERIFF'S OFF., https://www.presidiocountysheriff.com/staff.html (last visited May 30, 2020).

218. *See* Marks, *supra* note 1.

animal in an open range county.[219] By adopting the proposed amendment to § 142.003, the legislature can end this confusion. With the addition of one sentence, § 142.003 can be modified to make it clear that in an open range county, a sheriff is not authorized to confiscate stray cattle unless the animal is sick, breachy, jumped a legal fence, or was intentionally driven on the complainant's property by its owner.

IV. CONCLUSION

The cattle industry is still an important contributor to Texas's economy.[220] It has been recognized as such by the courts and the legislature, and for that reason, has received favorable legal treatment that predates the statehood of Texas itself. The uncertainty that is brought on by the current language in § 142.003 threatens to change that tradition as the statute could be interpreted as a mechanism that essentially operates to eliminate the open range doctrine. However, such an interpretation would be contrary to the legislative intent behind the statute and would result in absurd results where the statute would apply in some limited situations, but would be entirely ineffective in common situations that were intended to fall under the statutes purview but managed to escape because of the poor wording of the statute itself.

These considerations suggest that an amendment to § 142.003 to better express the legislature's intent and make the enforceability of the statute more practical. Moreover, by amending the statute so that it works in conjunction with the open range doctrine rather than against it, cattle owners will be shielded from tort liability to which they have been customarily immune and will avoid incurring new expenses that may cause significant damage to the cattle industry, and consequently, the Texas economy. Landowners in open range counties will be afforded greater protection against harmful intrusions on their property, which will allow them to take proactive steps to remove certain cattle before damage is done, rather than being forced to first absorb the damage and then seek a legal remedy. Finally, local law enforcement will receive the benefit of having their duties regarding stray cattle more clearly defined, which will help them avoid potential tort risks and prevent them from mistakenly taking on further responsibilities that would only add to the strain on their resources.

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219. *Id.*

220. *See Texas Ag. Stats*, *supra* note 32.