

1-2002

## Searching for the Montana Open Range: A Judicial and Legislative Struggle to Balance Tradition and Modernization in an Evolving West

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### Recommended Citation

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: <https://scholarship.law.umt.edu/mlr/vol63/iss1/5>

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# NOTE

## **SEARCHING FOR THE MONTANA OPEN RANGE: A JUDICIAL AND LEGISLATIVE STRUGGLE TO BALANCE TRADITION AND MODERNIZATION IN AN EVOLVING WEST**

**Ryan M. Archer\***

### INTRODUCTION

On January 16, 2001, the Montana House of Representatives Committee on Agriculture convened to hear testimony on a bill proposing to clarify the reach of the Montana open range. On the table was House Bill 246, which sought to exempt livestock owners from any liability for damages caused by motor vehicle accidents with livestock wandering public roads.<sup>1</sup> Ultimately, amended legislation provided that a livestock owner is not liable for livestock-vehicle collisions unless “grossly negligent or engaging in intentional misconduct.”<sup>2</sup> On March 1, 2001, House Bill 246 was signed into law, and later codified under Title 27, Chapter 1, Section 7 of the

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\* B.A. Montana State University, 1998; expected J.D. University of Montana, 2003. Special thanks to Montana rancher Jim Brady for asking the questions that started this project — sorry it took so long to answer.

1. Initial draft of H.B. 246, 57th Leg. Sess. (Mont. 2001) (Introduced Bill, authorized print version LC 999).

2. MONT. CODE ANN. § 27-1-724 (2001).

Montana Code Annotated.

This legislation was a rapid and direct response to the holding of the Montana Supreme Court in *Larson Murphy v. Steiner*, and significantly lessened the impact of the court's broad scale re-interpretation of Montana's open range law.<sup>3</sup> The legislation, however, had a limited scope that only addressed the civil liability statutes imposed on livestock owner-motorist relationships by *Larson-Murphy*.<sup>4</sup> Much broader in scope, *Larson-Murphy* focused on clarifying the intent and purposes of the Open Range Doctrine embodied in the "no duty rule" of the open range, and its application to herding districts and the legal fence statute.<sup>5</sup> Thus, although the Legislature altered the court's ultimate holding, its interpretation of open range law remains pertinent to Montana practitioners dealing with modern range issues. For these reasons, this note is divided into two sections: the first section covers the facts, background, holding, reasoning and analysis of the *Larson-Murphy* decision; the second section focuses on the legislative reaction to the decision, comments on its possible implementation through a series of hypotheticals, and compares the outcome with other western states.

## I. LARSON-MURPHY V. STEINER

In *Larson-Murphy v. Steiner*, the Montana Supreme Court overturned a 33-year-old precedent and redefined the meaning of the "open range doctrine" embodied in the Montana "Containment of Livestock" statutes.<sup>6</sup> The court held that while the law of the open range doctrine remains the law of this state,<sup>7</sup> the "no duty rule" described by the doctrine does not apply to the relationship between livestock owners and motorists traveling Montana highways used by the public.<sup>8</sup> Weaving a web of seeming contradiction and refined interpretation, the Montana

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3. See *Larson-Murphy v. Steiner*, 2000 MT 334, 303 Mont. 96, 15 P.3d 1205; See also *Clarify Liability for Damages to Property Caused by Livestock on Highways: Hearing on H.B. 246 Before House Comm. on Agric.*, 57th Leg. Sess. 3 (2001) (statement of Rep. Keith Bales, "the reason for addressing HB 246 is the recent Montana Supreme Court decision which reversed some long standing precedence of the open range law").

4. *Larson-Murphy*, ¶¶ 92-93, 98.

5. *Id.* ¶¶ 25-26.

6. *Id.* ¶ 79. See generally MONT. CODE ANN. §§ 81-4-101 to -621 (2001) (comprising the Montana containment of livestock statutes).

7. *Larson-Murphy*, ¶ 27 (citing *State ex. rel. Martin v. Finley*, 227 Mont. 242, 245, 738 P.2d 497, 499 (1987)).

8. *Id.* ¶ 26.

court unraveled a legal history characterized by confusion, emotion and mythical western stereotypes. In its struggle to rectify past errors, the court uncovered inherent weaknesses in the twenty-first century application of nineteenth century law, but ultimately created a rule of law that was significantly altered by subsequent legislation, and would have been difficult to implement consistently throughout the state.

### A. *Facts*

Just after 11:30 p.m. May 8, 1993, Plaintiff Mary Larson-Murphy (Larson-Murphy) was traveling southbound on Hoskin Road outside Billings, Montana. As she crested a small rise created by a culvert, Larson-Murphy struck a bull in the middle of the paved, two-lane county road.<sup>9</sup> The bull rolled onto the hood of Larson-Murphy's car and through the windshield, causing her life threatening injuries that required an immediate tracheotomy due to swelling and multiple fractures. The accident broke significant portions of Larson-Murphy's mid-face and mandible, and caused permanent damage to her eyesight, sense of taste and smell.<sup>10</sup>

At the time of the accident, it is unquestionable that Larson-Murphy had been driving in a lawful manner, and a highway patrolman estimated her speed at just over 34 miles per hour. The patrol officer indicated that under the circumstances, the accident was unavoidable and any driver on the road at that time would have struck the bull.<sup>11</sup>

On the evening of the accident, the bull was in a triangular fenced pasture located within a larger fenced pasture, and escaped through two fences to access the county road. The pastures were within a statutory herd district leased by Defendants Edwin and Violet Steiner (Steiner) from Defendant Dr. August Zancanella. In their lease agreement, the Steiners assumed responsibility for fence maintenance and carried liability insurance for damages caused by escaped livestock. The highway patrolman and Defendant Darin Steiner, the bull's owner, inspected the fence the night of the accident and the following morning, but found no signs of damage.<sup>12</sup>

At trial, Larson-Murphy suggested the bull escaped through

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9. *Id.* ¶¶ 5, 8.

10. Appellant's Brief at 5, *Larson-Murphy* (No. 98-441).

11. *Larson-Murphy*, ¶ 7.

12. *Id.* ¶¶ 9-10.

a gap between the fence and an irrigation ditch adjacent to Hoskin Road. She claimed the Steiners and Zancanellas negligently failed to uphold their duty to control livestock within a herd district and maintain the fence in accord with statutory requirements.<sup>13</sup> Larson-Murphy also argued the open range doctrine is “anachronistic,” and the Montana court should seize the opportunity to overrule its application to motorist and livestock owner relationships.<sup>14</sup> Although the Steiners admitted the bull was capable of jumping the fence,<sup>15</sup> they asserted that Montana remains an open range state and livestock owners owe no duty to motorists to prevent livestock from accessing or wandering county roads.<sup>16</sup>

Before trial both Zancanella and Steiner were denied summary judgment, but upon request for reconsideration the district court granted Zancanella’s motion. Nearly one year after their initial motion, the court denied the Steiners’ second motion for summary judgment. The district court determined an issue of fact remained as to whether a county road in a herd district constitutes open range.<sup>17</sup> Subsequently, the Montana Supreme Court denied the Steiners’ motion for a writ of supervisory control. At the close of Larson-Murphy’s case, the court denied the Steiners’ request for a directed verdict. However, after four witnesses testified on behalf of the Steiners, and Larson-Murphy moved for a mistrial, the court reversed its prior order and granted a directed verdict in favor of the Steiners. The court issued no opinion explaining its reasoning.<sup>18</sup>

### B. Holding

The Montana Supreme Court concluded that the “no duty” rule under the open range doctrine does not apply to the legal relationship between livestock owners and motorists traveling Montana highways.<sup>19</sup> However, the court subsequently

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13. *Id.* ¶¶ 11, 13-14. See MONT. CODE ANN. § 81-4-101 (2001) (defining a legal fence).

14. Appellant’s brief at 54, *Larson-Murphy* (No. 98-441).

15. *Larson-Murphy*, ¶ 12.

16. Response Brief of Respondents/Cross-Appellants Steiner at 7, *Larson-Murphy* (No. 98-441) (citing *Martin*, 227 Mont. at 244, 738 P.2d at 498, which held that Montana has been an open range state since before entrance into the Union).

17. *Larson-Murphy* ¶¶ 15-17. See also Appellant’s Brief at 3, *Larson-Murphy* (No. 98-441).

18. Appellant’s Brief at 4, *Larson-Murphy* (No. 98-441). See also *Larson-Murphy*, ¶ 18.

19. *Larson-Murphy*, ¶ 26.

determined that “the law of the open range remains the law of this state,” and open range includes all highways outside private enclosures and used by the public.<sup>20</sup>

To arrive at this rule, the court concluded the open range doctrine has little or nothing to do with the legal relationship between livestock owners and motorists under a theory of negligence.<sup>21</sup> Instead, the open range doctrine purely expresses that livestock owners owe no legal duty to other *landowners* to prevent accidental livestock trespass on unfenced property.<sup>22</sup> The main thrust of *Larson-Murphy* thus concludes that the open range doctrine was never about controlling conflict between livestock owners and motorists, but was a burden-shifting statute concerning who was required to fence property to protect it from wandering livestock.<sup>23</sup>

According to this decision, both a livestock owner and a motorist have a legal right to occupy a highway in the open range, but each owes the other “a legal duty to use such roads so as not to injuriously interfere with the other’s right of use.”<sup>24</sup> Thus, both the motorist and livestock owner must act in a “reasonable manner” when lawfully using a public highway—failing to do so may impose liability for negligence.<sup>25</sup> In this way, the law of the open range remains the law of this state, and cattle may lawfully wander public roadways in the open range. Livestock owners, however, are subject to a subsequent standard of reasonable care toward motorists and other lawful occupants of the highway.<sup>26</sup> Whether such a duty is imposed is a fact

20. *Id.* ¶ 27 (quoting *Martin*, 227 Mont. at 245, 738 P.2d at 499). See also MONT. CODE ANN. § 81-4-203 (2001) (stating “all highways outside of private enclosures and used by the public whether or not the same have been formally dedicated to the public” are part of the open range). But see MONT. CODE ANN. § 81-4-306 (2001) (stating an exception to Section 81-4-203 of the Montana Code Annotated when a herd district has been implemented); MONT. CODE ANN. § 60-7-201 (2001) (stating an exception to Section 81-4-203 of the Montana Code Annotated concerning highways designated part of the national system of interstate and defense highways and federal-aid primary system).

21. *Larson-Murphy*, ¶ 28.

22. *Id.* ¶ 29.

23. Personal Interview with Justice James C. Nelson, Montana Supreme Court, in Missoula, Mont. (Feb. 9, 2001).

24. *Larson-Murphy*, ¶ 96. But see exceptions cited *supra* note 20.

25. *Larson-Murphy*, ¶ 98.

26. *Larson-Murphy* ¶¶ 79, 96-98 (in reaching this conclusion, the court overruled *Bartsch v. Irvine Co.*, 149 Mont. 405, 427 P.2d 302 (1967); *Williams v. Selstad*, 235 Mont. 137, 766 P.2d 247 (1988); *Yager v. Deane*, 258 Mont. 453, 853 P.2d 1214 (1993); *Martin*, 227 Mont. 242, 738 P.2d 497; *Siegfried v. Atchison*, 219 Mont. 14, 709 P.2d 1006 (1985); *Ambrogini v. Todd*, 197 Mont. 111, 642 P.2d 1013 (1982); *Jenkins v. Valley Garden Ranch, Inc.*, 151 Mont. 463, 443 P.2d 753 (1968), to the extent they held that a livestock

driven question unique to the circumstances of the particular incident.<sup>27</sup> This duty is governed by Section 27-1-701 of the Montana Code Annotated which states everyone is responsible for using “ordinary care or skill in the management of his property or person.”<sup>28</sup>

Ultimately the court arrived at this holding to remedy the problematic history of Montana’s interpretation of the Containment of Livestock statutes so it could address the issues specific to this case.<sup>29</sup> In addressing case specific issues, the court additionally held: highways within a herd district are not open range, and livestock owners may not allow their animals to “run at large” on any public roadways in the district;<sup>30</sup> and the legal fence statute does not create a statutory duty for livestock owners to “fence in” their cattle, but only applies to landowners establishing an action for trespass by fencing cattle out.<sup>31</sup> Thus, the court constructed a consistent foundation from which it developed a more finite structure pertinent to the specific issues in *Larson-Murphy*.

### C. Background

“The inroad from the east was a new and sudden outbreaking of a people” celebrated James Fennimore Cooper<sup>32</sup> and his fellow romantics when they discovered the vast open spaces of the North American great plains and ignited a cultural migration toward the West. So intense was this migration that historian Walter Prescott Webb declared that men, cattle, and horses “held almost undisputed possession of the region” constituting an “empire of grass” by the 1860s and 1870s.<sup>33</sup> The exodus toward cattle country led Montana Senator Mike Mansfield to reflect that “[w]hile some dug into Montana’s earth

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owner owes no duty to motorists driving public highways in open range areas).

27. *Larson-Murphy*, ¶ 96.

28. MONT. CODE ANN. § 27-1-701 (2001).

29. *Larson-Murphy*, ¶¶ 29, 32-33.

30. *Id.* ¶ 61. Here the court overruled *Williams*, 235 Mont. 137, 766 P.2d 247, to the extent it held the “no duty” rule applied to livestock owners and motorists within a herd district.

31. *Larson-Murphy*, ¶ 85. Here the court overruled *Indendi v. Workman*, 272 Mont. 64, 899 P.2d 1085 (1995), to the extent it held failure to comply with the legal fence statute may provide a basis to find negligence. See MONT. CODE ANN. § 81-4-101 (2001) (defining a legal fence).

32. See JAMES FENNIMORE COOPER, *THE PRAIRIE 10* (Airmont Publ’g Co. 1964) (1827).

33. WALTER PRESCOTT WEBB, *THE GREAT PLAINS* 225 (1959).

for wealth, others sought it from what grew out of the earth. Stockmen filled the rolling grass-covered High Plains of central and eastern Montana with cattle and sheep.”<sup>34</sup> Like all western booms, the enthusiasm for Montana rangeland brought the cattlemen in force with their belief that “to be downright honest about it, Montana’s a hell of a lot better stock country. . .Y’see you got more grass, more everything.”<sup>35</sup>

To fairly govern such a massive influx of cattlemen, Montana and other western territories were forced to address legal relationships between ranchers, their neighbors, and the lawful use of public lands.<sup>36</sup> Traditionally, English common law imposed a duty upon livestock owners to prevent their cattle from running at large and held owners strictly liable for trespass on private land whether fenced or not.<sup>37</sup> Most jurisdictions throughout the eastern United States implemented this common law tradition.<sup>38</sup> The arid western landscape, however, demanded a much larger area to graze cattle than eastern states, and vast tracts of public land combined with sparse population to make the western ranching ideal incompatible with common law traditions.<sup>39</sup>

Recognizing these unique circumstances, Congress commissioned Major John Wesley Powell to survey western lands, and he published his report in 1879.<sup>40</sup> To create better land division practices, Powell suggested a method of dividing

34. Mike Mansfield, special collection 1237, ts., Montana Historical Society, Helena, Mont.

35. J.K. Ralston, oral history #49, “Montana History,” Montana Historical Society, Helena, Mont.

36. See, e.g., Valerie Weeks Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 MONT.L.REV. 155, 178-181 (1967).

37. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*211 (stating a cattle owner is liable for damages resulting from trespass when he negligently allows cattle to stray “and they tread down his neighbors herbage”). See also, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1197 n.22 (William D. Lewis ed., Rees Welsh & Co. 1900) (stating “At common law, the owner of cattle is required to take care of them. If they trespass on a neighbors land, he is responsible, though there is no fence”); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 76, at 539 (5th ed. 1984) (stating “it remains the common law in most jurisdictions that the keeper of animals of a kind likely to roam and do damage is strictly liable for their trespasses”).

38. See Roy H. Andes, *A Triumph of Myth Over Principle: The Saga of the Montana Open-Range*, 56 MONT.L.REV 485, 486 (1995) (citing RESTATEMENT (SECOND) OF TORTS § 504 cmt. f (1977)). See also BLACKSTONE, *supra* note 37, at 1197 n.22.

39. See, e.g., Andes, *supra* note 38, at 486. See generally JOHN WESLEY POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES (Harv. Univ. Press 1962) (1879).

40. See generally WALLACE STEGNER, BEYOND THE HUNDREDTH MERIDIAN (1992).



land according to topographical districts surrounding river drainages.<sup>41</sup> Congress did not act upon these suggestions,<sup>42</sup> and the general belief was that open spaces should be freely used to support the livestock industry since “[t]he commons are now owned principally by the State and by the general government, and if the grasses which grow thereon are not depastured, they will waste and decay.”<sup>43</sup> Thus, the open range doctrine was born in the West.

The open range doctrine was not statutorily codified until after it had been practiced in the West as a matter of custom and culture. In 1890, the United States Supreme Court first recognized the existence of the open range doctrine and stated:

[T]here 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 unenclosed, and no act of government forbids this use.<sup>44</sup>

In 1865, Montana’s First Territorial Legislature at Bannack codified the custom of the open range doctrine.<sup>45</sup> In this statute, the Territorial Legislature provided double damages for livestock trespassing on another’s land, but only if a “lawful fence” enclosed the property.<sup>46</sup> Thus, the Legislature statutorily immunized livestock owners from liability for stock wandering on another’s land unless there was a “legal fence” around it. This immunization established the rule that a livestock owner has “no duty” to fence livestock in or prevent them from wandering the range. Although the Legislature has implemented many additions to the “Containment of Livestock Statutes” over the years, the essence of this statute remains preserved in the current Montana Code Annotated.<sup>47</sup> Significantly, the Legislature never specifically included public roadways or byways as a part of the open range doctrine “no

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41. See POWELL, *supra* note 39.

42. See STEGNER, *supra* note 40, at 334-338.

43. *Morris v. Fraker*, 5 Colo. 425, 429 (1880), *quoted in* Scott, *supra* note 36, at 179.

44. *Buford v. Houtz*, 133 U.S. 320, 326 (1890).

45. ACTS RESOLUTIONS AND MEMORIALS OF THE TERRITORY OF MONTANA § 1, at 351-352 (Bannack 1864) [hereinafter ACTS].

46. *Id.*

47. Compare MONT. CODE ANN. § 81-4-215 (2001) with ACTS, *supra* note 45.

duty” rule. Thus, the Montana Legislature never addressed the common law rule of mutual forbearance between livestock and highway occupants in the Containment of Livestock statutes.<sup>48</sup>

As the West grew, both the courts and Legislature recognized the need to further limit the application of the open range doctrine. The United States Supreme Court began the evolution of the open range doctrine when it limited its application to strictly *accidental* trespass in *Lazarus v. Phelps*.<sup>49</sup> Subsequently, in 1897 Congress passed legislation requiring grazing leases on federal forest preserves. Fourteen years later, the United States Supreme Court held the open range doctrine had no application to land within these preserves.<sup>50</sup> By 1900, every western state except Colorado, Montana and Wyoming had passed legislation enabling herd districts to exempt designated areas from the open range.<sup>51</sup> As western society continued to develop, many states were faced with increasing conflicts between highway users and livestock owners. As a result, legislation barring livestock from wandering certain highways further restricted the open range.<sup>52</sup> If livestock wandered restricted highways, courts occasionally imposed ordinary negligence standards on livestock owners.<sup>53</sup>

Initially, the Montana judiciary embraced the statutory open range doctrine and provided for its fullest application. In *Smith v. Williams*, the Montana Supreme Court concluded a plaintiff was required to completely enclose land with a legal fence in order to bring a trespass action.<sup>54</sup> Subsequently, the court upheld a jury instruction immunizing a livestock owner from herding cattle on another’s land unless done with malice.<sup>55</sup> Like other areas around the country, Montana also felt the

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48. *Larson-Murphy v. Steiner*, 2000 MT 334, ¶ 88, 303 Mont. 96, ¶ 88, 15 P.3d 1205, ¶ 88 (2000).

49. 152 U.S. 81, 85 (1894).

50. *Light v. United States*, 220 U.S. 525, 537 (1911). This was a precursor to the Taylor Grazing Act passed in 1934. See generally CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN*, 93 (1992) (describing the history of the Taylor Grazing Act).

51. *Scott*, *supra* note 36, at 180.

52. See, e.g., OR. REV. STAT. §§ 607.505-607.527 (1999) (limiting open range on certain local and federal-aid highways); COLO. REV. STAT. § 35-46-111 (2001) (requiring fencing adjacent to federal-aid highways in agricultural zones); WYO. STAT. ANN. § 11-24-108 (Michie 2001) (prohibiting wandering livestock on fenced highways).

53. See generally James L. Rigelhaupt, Jr., Annotation, *Liability of Owner of Animal for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting From Collision with Domestic Animal at Large in Street or Highway*, 29 A.L.R. 4th 431 (1984).

54. 2 Mont. 195, 201 (1874).

55. *Fant v. Lyman*, 9 Mont. 61, 22 P. 120 (1889).

changing western landscape. In 1900, Montana was the first state court to follow *Lazarus* and limit the open range doctrine to accidental trespass.<sup>56</sup> Further, the Montana Legislature adopted herd district statutes in 1917,<sup>57</sup> and restricted certain animals from “running at large.”<sup>58</sup> Additional limitations removed municipal areas<sup>59</sup> and state and federal highway right-of-ways from the open range.<sup>60</sup>

From 1900 to 1967, the Montana Supreme Court developed a consistent open range jurisprudence specifically limiting its scope to cases involving accidental trespass.<sup>61</sup> This changed in 1967 when the court first applied the “no duty” rule to livestock wandering public highways in *Bartsch v. Irvine Co.*<sup>62</sup> The court built upon this precedent<sup>63</sup> and ultimately found the open range doctrine no duty rule applicable to motorists using highways within herd districts in *Williams v. Selstad*.<sup>64</sup> Finally, in *Indendi v. Workman*, the court analyzed the primary state and federal highway exclusion and expanded application of the legal fence statute to require stock owners to fence stock off highways.<sup>65</sup>

Thus, the open range doctrine grew from the unique custom and culture of the American West, and evolved by judicial interpretation and legislative initiative throughout the

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56. See *Monroe v. Cannon*, 24 Mont. 316, 61 P. 863 (1900).

57. 1917 Mont. Laws 102 (current version at MONT. CODE ANN. §§ 81-4-304 to – 328 (2001)).

58. See MONT. CODE ANN. §§ 81-4-201, 202, 204, 210 (2001) (limiting swine, sheep, llamas, alpacas, bison, ostriches, rheas, emus, goats, male equine and non-purebred bulls from wandering the public range).

59. MONT. CODE ANN. § 81-4-401 (2001).

60. MONT. CODE ANN. § 60-7-201 (2001). The precursor to this statute was enacted in 1951.

61. See, e.g., *Thompson v. Mattuschek*, 134 Mont. 500, 333 P.2d 1022 (1959); *Hill v. Chappel Bros. Inc.*, 93 Mont. 92, 18 P.2d 1106 (1932); *Herness v. McCann*, 90 Mont. 95, 300 P. 257 (1931); *Long v. Davis*, 68 Mont. 85, 217 P. 667 (1923); *Dorman v. Erie*, 63 Mont. 579, 208 P. 908 (1922); *Chilcott v. Rea*, 52 Mont. 134, 155 P. 1114 (1916); *Herrin v. Sieben*, 46 Mont. 226, 127 P. 323 (1912); *Musselshell Cattle Co. v. Woolfolk*, 34 Mont. 126, 85 P. 874 (1906); *Beinhorn v. Griswold*, 27 Mont. 79, 69 P. 557 (1902); *Monroe*, 24 Mont. 316, 61 P. 863.

62. 149 Mont. 405, 427 P.2d 302 (1967).

63. *Williams*, 235 Mont. 137, 766 P.2d 247; *Indendi v. Workman*, 272 Mont. 64, 899 P.2d 1085 (1994); *Yager v. Deane*, 258 Mont. 453, 853 P.2d 1214 (1993); *State ex rel. Martin v. Finley*, 227 Mont. 242, 738 P.2d 497 (1987); *Siegfried v. Atchison*, 219 Mont. 14, 709 P.2d 1006 (1985); *Ambrogini v. Todd*, 197 Mont. 111, 642 P.2d 1013 (1982); *Sanders v. Mount Haggin Livestock Co.*, 160 Mont. 73, 500 P.2d 397 (1972); *Jenkins v. Valley Garden Ranch, Inc.*, 151 Mont. 463, 443 P.2d 753 (1968).

64. 235 Mont. at 141, 766 P.2d at 249.

65. 272 Mont. at 73, 899 P.2d at 1090.

twentieth century. Although the present statutory open range doctrine retains basic language passed down from the 1865 statute, legislative amendments and case law greatly altered its application. *Bartsch* and *Williams* judicially expanded the modern application of the open range doctrine, while the Legislature restricted it in legally defined areas. Additionally, *Indendi* broadened the legal fence statute as it relates to the open range doctrine. In *Larson-Murphy* the court explicitly overturned each of these judicial expansions.

#### D. Reasoning

Much like the background of the open range doctrine described in this discussion, *Larson-Murphy* traced the origins of the doctrine in order to interpret its present day application. Based on this history, the court concluded the original purpose of the open range doctrine was “to determine the rights and remedies arising from the relationship of livestock owners and landowners in actions involving the accidental trespass on private property of livestock lawfully occupying the open range.”<sup>66</sup> The court found this interpretation of the open range doctrine received consistent application from its origin in the 1874 *Smith* decision until the 1967 *Bartsch* decision.<sup>67</sup>

A case of first impression in Montana, *Bartsch* initiated a new era in the application of the open range doctrine “no duty” rule. Specifically, *Bartsch* concluded Montana is open range country, and since a livestock owner has no duty to prevent stock from wandering open range “he cannot be said to be negligent if the livestock do wander—even if such wandering takes them onto a highway right of way. . . .”<sup>68</sup> *Larson-Murphy* rejected this reasoning as inconsistent with the historically narrow application of the open range doctrine, and criticized *Bartsch* for broadcasting the doctrine’s scope beyond statutory authority.<sup>69</sup>

In support of its reasoning, the Montana Supreme Court examined the extensive case history of the open range doctrine’s application and its limitation to trespass actions on “another’s

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66. *Larson-Murphy v. Steiner*, 2000 MT 334, ¶ 69, 303 Mont. 96, ¶ 69, 15 P.3d 1205, ¶ 69 (2000).

67. *Id.* See also, *Andes*, *supra* note 38.

68. *Bartsch v. Irvine Co.*, 149 Mont. 405, 409, 427 P.2d 302, 305 (1967).

69. *Larson-Murphy*, ¶¶ 74-78.

unenclosed land.”<sup>70</sup> The court reasoned that this limited application should remain the extent of the open range doctrine because the Legislature has not addressed the common law duty between livestock owners and highway users.<sup>71</sup> The court was unmoved by the argument that Section 60-7-201 of the Montana Code Annotated, or any other modification to the open range doctrine statutes, were enacted to “balance the costs of imposing a duty on livestock owners with the damages suffered others due to wandering livestock.”<sup>72</sup>

Based on this historical analysis and a strict interpretation of the open range doctrine, the court concluded that any assertion of legal duties arising from the relationship between livestock owners and motorists is beyond the scope of Montana’s statutory open range doctrine.<sup>73</sup> This reasoning rejects the argument that the *Larson-Murphy* holding modifies current statutory law. Instead, it places the interpretive error on *Bartsch* for “ignoring the fundamental purpose of Montana’s open range doctrine by taking a statutory body of law that pertains to one particular legal relationship and applying it to another.”<sup>74</sup>

Upon reaching this conclusion, the court refocused its analysis on rights bestowed motorists and livestock owners lawfully occupying Montana highways. Once again the court found the historical evolution of English common law throughout the West determinative of the rights and duties owed to highway users. Specifically, the court inspected the common law rule that unless an animal was of “unruly disposition” the “mutual respect and forbearance rule” should apply; thus, “[t]he motorists must put up with the farmer’s cattle: the farmer must endure the motorist.”<sup>75</sup>

Contrary to other western states, the court found Montana has not statutorily affirmed or modified the common law rule

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70. *Id.* ¶¶ 34-45, 74 (citing *Montgomery v. Gehring*, 145 Mont. 278, 400 P.2d 403 (1965); *Thompson*, 134 Mont. 500, 333 P.2d 1022; *Shreiner v. Deep Creek Stock Ass’n*, 68 Mont. 104, 217 P. 663 (1923); *Beinhorn*, 27 Mont. 79, 69 P. 557; *Smith*, 2 Mont. 195).

71. *Larson-Murphy*, ¶ 69.

72. *Amicus Curiae* Brief of David Baum, Barbara Baum, and Baum Ranch, LLC at 10, *Larson-Murphy* (No. 98-441). See also *Larson-Murphy*, ¶¶ 132-133 (Gray, J., dissenting).

73. *Larson-Murphy*, ¶ 70 (overruling *Bartsch*, 149 Mont. 405, 427 P.2d 302, and following cases, see *supra* note 29).

74. *Id.* ¶ 78.

75. *Id.* ¶ 86 (quoting *Searle v. Wallbank*, 1 L.R.App.Cas 341, 361 (1947) (L. du Parq, concurring)).

governing the legal relationship between livestock owners and motorists as equal, lawful users of the highway.<sup>76</sup> Instead, Montana's only limitation on the common law prohibits certain types of animals from "running at large" on the roadways, and exempts certain roadways and herd districts from common law application.<sup>77</sup> Thus, in the absence of specific statutory guidelines determining the rights and duties of highway users and livestock owners, the Montana court implemented Sections 27-1-701 and 28-1-201 of the Montana Code to govern such relationships.<sup>78</sup>

Once the court laid the foundation determining rights and duties of highway users and the limitations of the open range doctrine, the door was open to address case specific issues interpreting herd district and legal fence statutes. The court began its reasoning by implementing the historic definition of the open range doctrine and finding the "no-duty" rule cannot apply to livestock owners and motorists within a herd district.<sup>79</sup> The court further defined a herd district as an area that restricts any application of the open range doctrine. As such, livestock may not run at large, and livestock owners may not intentionally allow cattle to wander highways within a district. This essentially creates a duty for livestock owners to contain their cattle within a herd district, and rejects any application of the open range doctrine therein.<sup>80</sup>

Similarly, the court relied on the open range doctrine's traditional definition to determine the extent of the legal fence statute. Because livestock owners owe no duty to keep cattle from wandering the open range, the legal fence statute defines

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76. *Id.* ¶ 88. *See, e.g.*, IDAHO CODE § 25-2118 (Michie 2000) (stating that "no person owning. . .any domestic animal running on open range, shall have the duty to keep such animal off any highway. . .and shall not be liable for damage to any vehicle or for any injury to any person riding therein, caused by the collision between the vehicle and the animal"); NEV. REV. STAT. § 568.360(1) (1999); N.M. STAT. ANN. § 66-7-363(C) (Michie 2000).

77. *See supra* note 58; *see also supra* note 20.

78. *Larson-Murphy*, ¶¶ 92-93, 98. *See also* MONT. CODE ANN. § 27-1-701 (2001); MONT. CODE ANN. § 28-1-201 (2001) (stating everyone is bound to refrain from injuring another's person or property).

79. *Larson-Murphy*, ¶ 61.

80. *Id.* (overruling *Williams v. Selstad*, 235 Mont. 137, 766 P.2d 247 (1988); *see supra* note 26). Significantly, the herd district statutes make no mention of fencing, so court does not impose a duty to fence cattle in. However, House Bill 418 was passed by the 2001 Montana Legislature and places an affirmative duty on herd district members to fence property according to the legal fence statute. The H.B. 418 amendment to the herd district statute is now codified at MONT. CODE ANN. § 81-4-310 to -311 (2001).

the standard required by a landowner to sustain an action against trespassing cattle by fencing them *out*.<sup>81</sup> The legal fence statute never applied to confining livestock, and cannot be used to define a standard of reasonable care required to fence livestock off a public highway.<sup>82</sup> Rather, standards of reasonable care are fact-specific questions,<sup>83</sup> not measured by conformance to the legal fence statute.

### *E. Analysis*

Adeptly unraveling the confusion surrounding the open range doctrine, the Montana court accurately delineated its limited historical application as a burden shifting statute between landowners and fencing responsibilities.<sup>84</sup> Likewise, the court necessarily concluded the legal fence statutes do not create a duty to fence in cattle, but only apply to landowners striving to establish a condition precedent for a trespass action by fencing cattle out.<sup>85</sup> However, the court prematurely dismissed legislative modifications that manifest an effort to address livestock owner-motorist relationships. Additionally, the court's reasoning failed to address a conundrum latent within a practical application of its holding. As a result, *Larson-Murphy* toppled a house of cards constructed on decades of semi-stable legislation and precedent, but created a rule of law that would have been difficult to implement.

The inherent problem within a twenty-first century application of an open range doctrine retaining nineteenth century characteristics stems from a legal lineage both pre- and post-*Bartsch*. Specifically, all cases regarding the open range preceding *Bartsch* were strictly landowner trespass actions.<sup>86</sup> Thus, *Bartsch* first attempted to balance two competing doctrines: (1) the legal mandate that every person is responsible

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81. *Larson-Murphy*, ¶¶ 42-43, 84.

82. *Id.* ¶ 85 (overruling *Indendi v. Workman*, 272 Mont. 64, 899 P.2d 1085 (1995); see *supra* note 31).

83. *Id.* ¶ 96.

84. See *Fant v. Lyman*, 9 Mont. 61, 62, 22 P. 120, 121 (1889) (holding an early statutory provision to immunize livestock owners when their animals “stray on unenclosed lands in quest of food or pasturage”).

85. See *Beinhorn v. Griswold*, 27 Mont. 79, 89, 69 P. 557, 558 (1902) (stating that a livestock owner did not owe a landowner “the duty to fence his cattle in”).

86. See *Amicus Curiae* Brief of Montana Trial Lawyers Ass’n at 10, *Larson-Murphy* (No. 98-441) (stating that “[b]efore *Bartsch*, all cases of this Court interpreting the open range doctrine involved disputes between owners of livestock and neighboring property owners”).

to act with reasonable care in the management of his or her property, and (2) the rule that livestock owners have no duty to prevent livestock from wandering open range including public highways. To choose the former over the latter would seemingly reduce the latter to mere words since a livestock owner would perceivably have a duty to keep stock off the road in certain circumstances. To choose the latter over the former would reduce the former to mere words when relating to livestock owners and motorists. Lacking legislative direction, *Bartsch* protected the livestock owner's privilege to allow stock to wander the open range.<sup>87</sup> It should be noted that Justice Harrison specially concurred in the opinion and concluded that this matter "warrants the utmost consideration by our Legislature."<sup>88</sup> This concurrence indicates that the court realized the conundrum between competing principles, but lacked the appropriate legislative direction to restrict the application of the statutory open range doctrine.

After the *Bartsch* opinion, the Montana Legislature was not silent about the legal relationship between motorist and livestock owner, and enacted Sections 60-7-101 through 103 of the Montana Code Annotated in 1974.<sup>89</sup> In fact, as stated in Justice Gray's dissent in *Larson-Murphy*, the next legislative session immediately following *Bartsch* enacted statutes relating to the conundrum faced by the court.<sup>90</sup> Although the Legislature has not specifically addressed or modified the statutory open range doctrine itself, Section 60-7-101 of the Code provides that:

"It is the purpose of 60-7-101 through 103 to balance the tradition of the open range and the economic and geographic problems of raising livestock with the need for safer highways."<sup>91</sup>

In all respects, Sections 60-7-101 through 103 of the Code appear to be a legislative attempt to balance the two competing doctrines first addressed in *Bartsch*.<sup>92</sup> However, *Larson-Murphy* simply refused to speculate about whether the Legislature

87. *Bartsch v. Irvine Co.*, 149 Mont. 405, 409, 427 P.2d 302, 305 (1967).

88. *Bartsch*, 149 Mont. at 410, 427 P.2d at 305.

89. MONT. CODE ANN. § 60-7-103 (2001) provides fencing requirements for state highways.

90. *Larson-Murphy v. Steiner*, 2000 MT 334, ¶ 133, 303 Mont. 96, ¶ 133, 15 P.3d 1205, ¶ 133 (2000). (Gray, J., dissenting) (citing 1969 Mont. Laws Ch. 311, Sec.1).

91. MONT. CODE ANN. § 60-7-101 (2001).

92. See *Martin v. Finley*, 227 Mont. 242, 245, 738 P.2d 497, 499 (1987) (stating "[t]he law of the open range remains the law of this state. The exceptions enacted by the Legislature have been carefully crafted").



intended this statute as a potential modification to the open range doctrine. Instead, the court strictly relied upon the historical origin of the open range doctrine and the failure of the Legislature to explicitly modify language within its statutory construction.<sup>93</sup>

To avoid the *Bartsch* conundrum, the court shrewdly granted the motorist and livestock owner equal rights to highway use, but imposed a subsequent duty on each.<sup>94</sup> Thus, the seeming conflict between a general duty of care and a livestock owner's right to run cattle at large on the open range is balanced by requiring each user to "exercise a degree of care commensurate with the danger of the agency that he himself is using,"<sup>95</sup> measured on a "case-to-case basis."<sup>96</sup> This conclusion works well in theory because it balances the rights of each party by applying the open range doctrine as it was initially intended, and maintaining a cause of action for an injured motorist.

This conclusion, however, will be much more difficult to implement in rural Montana courts where the open range doctrine is most applicable. According to *Larson-Murphy*, the rancher has no statutory duty to fence livestock in or keep them off the road, and the motorist has no other duty than to be a conscientious, lawful driver. Instead, liability for damages is a factual question addressed by a jury of peers. To answer this question, the jury may look to many factors to give form to an otherwise nebulous legal guideline. Such factors may include the population, habits and culture of the area, prior behavior and/or warnings to the rancher, or the reasonableness of fencing otherwise open range. Based on these factors, different standards would likely apply to different areas of the state. Perhaps juries would require more diligent fence maintenance in urban-interface rangeland than rural Montana where such a duty would be unreasonable and overly burdensome. Development of such a rule could make liability commensurate with the threat of injury. Although this may be an appropriate way to apportion liability, the inconsistent method by which it will be attained leaves both ranchers and motorists wondering

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93. See *Larson-Murphy*, ¶ 69.

94. *Id.* ¶ 96.

95. *Id.* ¶ 93. Traditionally, the court was reluctant to implement a foreign statute bearing on the open range doctrine, see *Martin*, 227 Mont. at 245, 738 P.2d at 499 (commenting that "[t]he use of a statute, external from the statutory livestock chapter, to impose an additional duty upon livestock owners is suspect").

96. *Larson-Murphy*, ¶ 30.

what their rights and duties really are.

Twenty three of Montana's fifty six counties, nearly half Montana's total geographic area, are designated "frontier" with less than two persons per square mile.<sup>97</sup> This defines a large portion of Montana that will face an identical hypothetical: a conscientious motorist lawfully driving a rural county road through a private open range pasture, cresting a hill and sustaining injuries from impact with a cow lawfully grazing the range. These competing rights to the roadway will ultimately reach an impasse, and the individual juror will be left to decide whose is the greater right. Even if judicial theory evades the conundrum of competing rights, it will lurk in the shadows of *Larson-Murphy's* application.

## II. LEGISLATIVE RESPONSE TO *LARSON-MURPHY*

### A. *House Bill 246*

The December 15, 2000, *Larson-Murphy* decision became an item of first priority for the House of Representatives Committee on Agriculture when the 57th Legislature convened in January 2001. During Conference, Representative Keith Bales stated that "this supreme court decision has caused much turmoil and concern."<sup>98</sup> The committee received letters from ranchers, county commissioners, insurance agents and stock growing organizations around the state expressing concern over the court ruling. Concerns addressed issues of increased insurance rates unduly burdening ranching operations, and the excessive costs required to fence miles of remote open range county roads. Further apprehension related to the infinite number of ways fences can be damaged, the impossibility of diligent fence repair before cattle escape, and the need to keep roads unfenced to allow stock to graze and water efficiently.<sup>99</sup>

In response to these concerns, the initial draft of House Bill 246 sought to "put back into effect what the court history

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97. Brief of *Amicus Curiae* Montana Stock Growers Ass'n at 8, *Larson-Murphy* (No. 98-441) (citing data from Montana Department of Commerce, Census and Economic Information Center).

98. See *Clarify Liability for Damages to Property Caused by Livestock on Highways: Hearing on H.B. 246 Before House Comm. on Agric.*, 57th Leg. Sess. 3 (Mont. 2001) [hereinafter *House Hearing*].

99. *Id.* at 3-8. See also *Clarify Liability for Damages to Property Caused by Livestock on Highways: Exhibits on H.B. 246 Before House Comm. on Agric.*, 57th Leg. Sess. 1-6 (Mont. 2001) [hereinafter *Exhibits*].

was..." before the *Larson-Murphy* decision.<sup>100</sup> This draft completely immunized livestock owners from any liability to motorists colliding with livestock on the roadway in open range and herd districts. The draft also extended the no duty rule to livestock and motorist relationships excepting federal aid and state primary highways under Section 60-7-201 of the Montana Code Annotated. This proposal was significant because it sought to directly amend and expand the definition of open range in the Containment of Livestock Statutes.<sup>101</sup> However, during the committee meeting, several concerns were raised regarding such broad immunity. These concerns focused mainly on the immunity of irresponsible livestock owners and the need for a balance protecting lawful motorists and responsible livestock owners, while allowing liability for unsafe and irresponsible ranching practices.<sup>102</sup> Striving to achieve this compromise, the House Committee on Agriculture amended the bill to "raise the bar from [the] standard of ordinary negligence," to gross negligence and intentional behavior.<sup>103</sup>

On March 1, 2001, House Bill 246 was signed into law to be codified under Title 27, Chapter 1, part 7 of the Montana Code Annotated. Unlike its initial draft, the bill did not make any direct amendment to the open range doctrine as codified in the Containment of Livestock Statutes. Instead, the bill clarified the duty owed between livestock owners and motorists, and altered the common law duties between highway users and livestock owners relied on by *Larson-Murphy*.<sup>104</sup> Specifically, the statute provided that unless the road qualifies as a highway per Section 60-7-201, a livestock owner has:

no duty to keep livestock from wandering on highways and is not subject to liability for damages to any property or for injury to a person caused by an accident involving a motor vehicle and livestock unless the owner of the livestock. . . was grossly negligent

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100. *House Hearing, supra* note 98, at 15.

101. Initial draft of H.B. 246, 57th Leg. Sess. (Mont. 2001) (Introduced Bill, authorized print version LC 999).

102. *House Hearing, supra* note 98, at 8-10; *see also Exhibits, supra* note 99, at 7-8.

103. *House Hearing, supra* note 98, at 13; *see also Clarify Liability for Damages to Property Caused by Livestock on Highways: Executive Action on H.B. 246 Before House Comm. on Agric., 57th Leg. Sess. 3* (Mont. 2001) [hereinafter *Executive Action*].

104. *See* MONT. CODE ANN § 27-1-724 (2001); *see also Larson-Murphy v. Steiner*, 2000 MT 334, ¶¶ 86-88, 303 Mont. 96, ¶¶ 86-88, 15 P.3d 1205, ¶¶ 86-88 (2000) (explaining the common law duties).

or engaged in intentional misconduct.<sup>105</sup>

### B. Application of House Bill 246

As amended and signed by the governor, House Bill 246 does not change either the open range or herd district statutes codified in the Containment of Livestock provisions. Instead, the bill creates a new limited liability under Montana's Title 27 liability statutes.<sup>106</sup> The practical effect of this legislation leaves the reasoning and interpretation of the *Larson-Murphy* decision untouched as it relates to the open range, herd district and legal fence statutes. The bill does, however, change the result of the court's decision by defining the relationship between livestock owner and motorist, and by imposing liability only if there is intentional misconduct or gross negligence.

While this legislative standard further defines the rights and duties between livestock owners and motorists, it remains unclear what exactly constitutes "gross negligence." As passed by the House Committee on Agriculture, the term was understood to be "not exercising even slight care," whereas negligence is a simple lack of ordinary care. As an example, the House Committee analogized gross negligence to that of a property owner's liability for a fallen tree: if a property owner was aware that a tree was in a weakened condition, had been told the tree was going to fall down and did not act, gross negligence may apply if the tree fell and was struck by a motorist.<sup>107</sup> Similarly, the Senate Committee understood that gross negligence may apply to a situation where livestock occupied the road seven times in three months after being warned by police and neighbors to keep them off the roadway.<sup>108</sup> Although this provides no judicial or statutory guideline as to when gross negligence may impose liability upon a rancher, it illustrates how the Legislature understood the term upon referring the bill to the Governor.

Although the gross negligent standard is liberally scattered throughout the Montana Code Annotated limited liability

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105. MONT. CODE ANN. § 27-1-724 (2001).

106. See, e.g., *Executive Action*, *supra* note 103, at 2.

107. See *Executive Action*, *supra* note 103, at 3.

108. *Clarify Liability for Damages to Property Caused by Livestock on Highways: Hearing on H.B. 246 Before Senate Comm. on Agric., Livestock and Irrigation*, 57th Leg. Sess. 4 (Mont. 2001) (statement in response to a question by Senator John Tester) [hereinafter *Senate Hearing*].

statutes,<sup>109</sup> it remains unclear what exactly constitutes gross negligence in a limited liability setting. The Montana court has addressed this heightened negligence standard many times, but has failed to clarify its meaning beyond a vague test determined on a case by case factual analysis.<sup>110</sup> In *Rusk v. Skillman*, the court acknowledged scholarly criticism of the difficulties involved in the attempt to create “degrees” of negligence. The court eventually held the proper standard for gross negligence is “failure to use slight care,” and “something more than negligence.”<sup>111</sup> The court noted, however, that distinguishing ordinary from gross negligence “places the task upon the courts to define the indefinable.”<sup>112</sup> Defined by the Restatement (Second) of Torts, gross negligence used in statutes may be “construed as equivalent to reckless disregard.”<sup>113</sup> Prosser and Keeton acknowledge that gross negligence is “somewhat nebulous in concept.” They note that some courts have equated gross negligence with reckless disregard, but most courts traditionally hold it “short of a reckless disregard for consequences. . . [differing]. . . from ordinary negligence only in degree, not in kind.” Prosser and Keeton conclude that there is no ultimate definition of the term, but that it may be considered “more than ordinary inadvertence or inattention.”<sup>114</sup>

None of these definitions help establish a clear guideline determining when liability may be imposed upon a livestock owner for managing livestock in a grossly negligent manner. Perhaps the best direction afforded is the legislative intent indicating that a rancher must know of some inherent or repeated problem with livestock on the roadway and fail to remedy that problem before a collision.<sup>115</sup> However, even this

109. See, e.g., MONT. CODE ANN. § 27-1-714(1) (2001) (limiting good Samaritan liability in the care for others to damages caused only by gross negligence); MONT. CODE ANN. § 27-1-721 (2001) (hunter safety instructors are not liable for conduct, acts or omissions of a student handling firearms unless exhibiting gross negligence giving rise to causation of damages); MONT. CODE ANN. § 27-1-736 (2001) (limiting liability of health care providers and dental hygienists to damages caused by gross negligence in specified situations when providing services without compensation and the patient has been notified of the limited liability).

110. See, e.g., *Ratzburg v. Foster*, 144 Mont. 521, 525-526, 398 P.2d 458, 460-461 (1965); *Nangle v. Northern Pac. R.R.*, 96 Mont. 512, 521-522, 32 P.2d 11, 13 (1934).

111. *Rusk v. Skillman*, 162 Mont. 436, 440-441, 514 P.2d 587, 589-590 (1973).

112. *Id.*

113. RESTATEMENT (SECOND) OF TORTS § 282e(5) (1965).

114. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS §§ 34, 212 (5th ed. 1984).

115. See *Executive Action*, *supra* note 103, at 3; see also *Senate Hearing*, *supra* note

standard fails to address the many situations where a public road runs through private unfenced open range pastures. Thus, although the Legislature developed a more discernable line guiding the livestock owner and motorist relationship, the extent of the rights and duties of both parties will depend on the facts and circumstances surrounding each incident. In essence, this standard provides no clearer view of the rights and duties of livestock owners and motorists than *Larson-Murphy's* application of an ordinary negligence standard.

### *C. Applying the Gross Negligence Standard*

When analyzing a dispute between a motorist and a livestock owner in open range country, the first step should be to determine the type of road upon which the incident occurred. Such a determination can establish duties between the parties, and the standard of culpability required. If the collision giving rise to the conflict occurred on a state highway designated as part of the national system of interstate and defense highways, or on a state highway designated as part of the federal-aid primary system, a general negligence standard will apply.<sup>116</sup> Note that highways defined by Title 60, Chapter 7, Part 2 are the only specific exception from the gross negligence standard established in Section 27-1-724.

Another significant consideration is the date when the road was constructed or reconstructed. If constructed before 1969, and designated as an area where livestock present a hazard to motorists, the state may have a statutory duty to fence the roadway.<sup>117</sup> Other factors of consideration include whether the incident occurred in a herd district or a municipal area pursuant to the Containment of Livestock statutes.<sup>118</sup> While, presumably, none of these classifications will change the gross negligent standard of liability,<sup>119</sup> they will be important in considering

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108, at 4.

116. MONT. CODE ANN. § 60-7-201 (2001). See also *Ambrogini v. Todd*, 197 Mont. 111, 121, 642 P.2d 1013, 1019 (1982) (stating that a cattle owner has a legal duty to exercise due care to prevent livestock from wandering onto a highway falling under the statutory definition of Title 60, Chapter 7, Section 201). See also *Larson-Murphy*, ¶ 65.

117. MONT. CODE ANN. § 60-7-103 (2001). See also *Ambrogini*, 197 Mont. at 117, 642 P.2d at 1017.

118. See MONT. CODE ANN. §§ 81-4-401 to -410 (2001) (statutory limitations on livestock in municipal areas); MONT. CODE ANN. §§ 81-4-301 to -328 (2001) (Montana herd district statutes).

119. Only MONT. CODE ANN. §§ 60-7-201 to -204 (2001) is excepted from the limited liability enunciated in MONT. CODE ANN. § 27-1-724 (2001).

whether there is a duty to fence livestock *in*. As a result, such classifications will be an important factor in the overall factual analysis determining whether gross negligence exists.

To begin a gross negligence analysis once the roadway is properly classified, remember that gross negligence differs from ordinary negligence only by degree and not kind.<sup>120</sup> Thus, an ordinary negligence analysis, including the elements of duty, breach, causation, scope of liability and damages, should be relevant to determine gross negligence. In ordinary negligence, each person has a duty to exercise “ordinary skill in the management of his property or person.”<sup>121</sup> Duty is breached if the tortfeasor’s act creates both a foreseeable and unreasonable risk of harm. An unreasonable risk of harm can be measured by weighing the “likelihood of harm, the seriousness of injury and the value of the interest to be sacrificed.”<sup>122</sup> Additional factors taken into account when determining whether a risk of harm is unreasonable include “the customs of the community, or of others under like circumstances.”<sup>123</sup>

Section 27-1-724 of the Montana Code Annotated explicitly exempts livestock owners from a duty to exercise “ordinary skill” to keep livestock from wandering highways. By imposing a gross negligence standard, however, there is an inferred duty that a livestock owner cannot act with intentional misconduct or gross negligence when allowing livestock to wander. Determining whether such a duty is breached perceptibly creates a stepped up analysis requiring the tortfeasor’s act to create both a foreseeable and *grossly* unreasonable risk of harm. Presumably, the likelihood of harm, seriousness of injury, value of the interest sacrificed, and local community customs may still be applied to this stepped up analysis. Additionally, legislative intent should factor into the analysis since gross negligence is a legislatively limited liability per Section 27-1-724 of the Montana Code Annotated.

Consider the following hypotheticals that apply a gross negligence analysis to relationships between motorists and livestock owners. For purposes of this illustration, assume that none of the special highway classifications discussed above apply to the following situations.

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120. See PROSSER, *supra* note 114.

121. MONT. CODE ANN. § 27-1-701 (2001).

122. Mang v. Eliasson, 153 Mont. 431, 436-37, 458 P.2d 777, 781 (1969).

123. RESTATEMENT (SECOND) OF TORTS § 295A (1965).

**HYPOTHETICAL 1:** A rancher in Petroleum County, Montana, grazes livestock on several thousand acres of rangeland. Seasonal grazing patterns include rotating the cattle between several large pastures divided according to water sources and rangeland productivity. The summer pasture, located far from any development, consists of over 1500 acres of land fenced from adjoining pastures. An unfenced road accessible to the public runs through the middle of this pasture, but is controlled at the perimeter fence line by a cattle guard. One summer evening, a fisherman wanders off the main county road leading to Fort Peck. While driving attentively at a reasonable speed, the driver crests a hill and collides with a heard of cows crossing the road. The driver is seriously injured and evacuated to a Billings hospital.

This hypothetical represents a classic open range issue that may occur in rural Montana counties devoted primarily to agriculture. The issue presented here is whether the rancher acted with gross negligence or intentional misconduct by not fencing the road through his pasture. Implementing the stepped up negligence analysis requires assessing whether the rancher created a grossly unreasonable risk of harm measured by the likelihood of the harm occurring, the seriousness of the harm, the value of the interest sacrificed, as well as community customs. Legislative intent will also be a factor since the Legislature contemplated a comparable situation before imposing the gross negligence limited liability to the general rule that livestock owners have no duty to “keep livestock from wandering.”<sup>124</sup>

To implement a gross negligence analysis in this hypothetical, significant facts may include the location of the accident with respect to population density and residential development, local community standards, and knowledge of risks posed by livestock wandering the road. In this scenario, Petroleum County has one of the lowest population totals in the state, just over 510 people,<sup>125</sup> and is devoted primarily to open range ranching activity. Although the accident occurred on a road used by the public, traffic is infrequent and the road is located far from any municipal or residential area. The outer pasture is fenced, controlled by a cattle guard and, while the road is not fenced, the fencing strategy conforms to common

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124. See MONT. CODE ANN. § 27-1-724 (2001); see also *Senate Hearing, supra* note 108 at 4 (statement in response to a question by Senator Holden).

125. 1998 county statistical data, Regional Economic Information System, <<http://govinfo.library.orst.edu>>.



community customs. Based on these facts, it is evident that the risk of the harm is not high, and the rancher demonstrated adherence to local community customs. Additionally, the value of the interest sacrificed in such a situation is quite large. Imposing liability would require every road used by the public in Petroleum County to be fenced. The costs imposed upon local ranchers and the county government in such a rural area greatly outweigh the likelihood of an accident occurring.

Legislative intent also acts to exempt the livestock owner from liability in the present situation. Specifically, when contemplating the gross negligence standard, Senator Holden asked how the standard would impact county roads with cattle guards. In response to this inquiry, Representative Bales noted the specific language in the bill that the landowner has no duty to keep stock off the road. Thus, gross negligence should not apply in rural areas where people know cattle are likely to be in the road.<sup>126</sup> This indicates that the legislature did not contemplate liability in obviously rural open range unfenced areas when they implemented the gross negligence standard.

In summary, although there remains some chance of harm, and serious injuries did result in this hypothetical, the motorist must overcome a heavy burden in order to establish a gross negligence standard. In light of these facts, it is evident that the rancher's conduct was not grossly unreasonable and no gross negligence exists. The outcome here is reasonable because a motorist in such an area should be expected to take greater precaution, while landowners should not have to protect against every hazard in remote open range areas throughout the state.

HYPOTHETICAL 2: A rancher outside of Kalispell in Flathead County, Montana, grazes a small herd of cattle on just under 1000 acres of rangeland. While the ranch used to be fairly isolated, increased residential development is beginning to encroach as neighboring land is subdivided and sold. Additionally, traffic on the county road has increased steadily due to a popular recreational site established on Flathead Lake. Despite increased traffic and residential development, the rancher has refused to maintain his fences. Neighbors continually call him to retrieve livestock from their yards and the police have even herded livestock off the road and issued reprimands to keep fences properly maintained to avoid any further conflict. One Saturday night a neighbor drives home from a day at the lake and, while

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126. See *Senate Hearing*, *supra* note 108 at 4 (statement in response to a question by Senator Holden).

driving attentively and lawfully, rounds a corner and sustains serious injuries from impacting a cow on the road.

Hypothetical 2 presents the issue of whether a livestock owner's conduct is grossly negligent when he fails to maintain fences in an area of increased residential growth and recreational traffic after repeated warnings that cattle were escaping. By applying the same analysis as Hypothetical 1, this activity seems to constitute gross negligence. First, the likelihood of harm is great since there is both increased residential traffic on the road as well as recreational traffic to Flathead Lake. Second, serious injuries resulted from the impact. Third, the interest sacrificed is low. Requiring ranchers in urban-interface areas to maintain their fences is far less a burden than requiring entire counties far from urban centers to fence every road. Fourth, in such growing residential areas, ranchers customarily maintain fences to avoid neighboring conflict and animal nuisance. Finally, legislative intent indicates that when a livestock owner was aware of the hazard, had been warned of the hazard, and failed to act, gross negligence may be established. Here, the livestock owner was aware of increased traffic, had been notified several times by neighbors that cattle were escaping, and had been reprimanded by the police. By failing to take any action to contain the livestock, this conduct may be considered grossly unreasonable, thus implying liability based on gross negligence.

**HYPOTHETICAL 3:** A livestock owner grazes 50 cows on 500 acres in Chestnut Valley just outside of Cascade, Montana. Cascade is a small town with a population of 600 people, but Chestnut Valley remains rural in nature. There are no residential subdivisions, but the land is unevenly apportioned between large cattle ranches, irrigated farmsteads and ranchettes. Traffic on the road remains mostly local. For the most part, fences on this particular 500 acres are well kept, but cows have been known to escape from one corner of the land. Thus, neighbors have occasionally had to notify the rancher that cows were wandering the roadway. Although the rancher shored up some fence posts and used baler twine to patch the trouble spot, no major re-fencing was done. One night while traveling to visit a family friend, a motorist driving lawfully on the county road strikes a cow and is rushed to the Great Falls emergency room for reconstructive surgery.

**HYPOTHETICAL 4:** A livestock owner grazes 50 cows on 400 acres in Gallatin Valley just outside of Bozeman, Montana. Bozeman is a mid-sized town and growing rapidly. While much of the Gallatin

Valley remains agricultural, residential and ranchette development is beginning to encroach upon traditionally isolated agricultural areas. Traffic on the county roads has increased slightly due to local residential growth and some tourist flow during the summer. While the livestock owner is attentive to his cattle, and fences are mostly well kept, there is a gap in one corner where the cattle repeatedly escape. Neighbors often notify the rancher that his cows are on their land or in the road. One summer evening a tourist is lawfully driving the county roads looking for a nice ranchette and sustains serious injuries from striking a cow in the road.

Hypothetical 3 and 4 present similar issues in different locales and demonstrate the difficulty of distinguishing between an ordinary negligence and gross negligence standard. In both hypotheticals the harm caused is equally severe, and the value of the interest sacrificed is similarly small. Requiring either livestock owner to re-fence a small portion of land to contain livestock is hardly a burdensome procedure when weighed against the nuisance of wandering livestock and the possibility of harm in either scenario. Additionally, the livestock owner in each hypothetical resides in a community that customarily keeps cattle fenced off the roads and out of neighboring land. A final similarity is evident in the livestock owner's knowledge that livestock escape and wander neighboring fields and roadways.

The distinguishing facts between the two hypotheticals revolve around the general locality of the landholding and the relative degree of negligence exhibited. Hypothetical 3 demonstrates a reduced likelihood of harm posed by livestock on the roadway because of its more agricultural location. The setting in a rural valley, intermixed with large ranches and irrigated farmsteads outside a small town, poses less of a traffic risk than a traditionally rural, but increasingly residential valley outside a rapidly developing mid-size community. Additionally, Hypothetical 4 demonstrates greater tourist traffic adding to an increased likelihood of harm caused by a collision with livestock on the road. Relating to the degree of negligence, Hypothetical 3 indicates that cattle only occasionally escape and the rancher at least attempted to repair the problematic sections of fence. Hypothetical 4 indicates that cattle escaped more often through a gap in the fence and, although known to the rancher, no measures were taken to constrain the cattle from wandering.

Both Hypothetical 3 and 4 probably meet an ordinary negligence standard, but distinguishing facts indicate that only

Hypothetical 4 will likely rise to the level of gross negligence. While both scenarios illustrate similar facts and circumstances, determinative differences include the frequency of escaped cattle, the locality of the land, the likelihood of the harm posed by wandering cattle, and the existence of remedial measures. Balancing these fundamental differences indicates that the evidence is most likely sufficient to distinguish between differing degrees of negligence. Thus, Hypothetical 4 is most likely an example of gross negligence, while Hypothetical 3 fails to meet such an increased standard of negligence.

In conclusion, liability for livestock wandering the highway will be an extremely fact intensive analysis based on a nebulous gross negligence standard. Since gross negligence varies from ordinary negligence only by degree, a stepped-up negligence analysis helps to conceptualize factors useful for determining when gross negligence may apply. Instrumental to this determination will be the location of the accident, the surrounding community customs, remedial measures, and prior knowledge of wandering or hazard livestock. Consideration of these factors creates good policy throughout a mostly agricultural state like Montana. Careful application of the gross negligence standard may impose some measure of liability in more heavily trafficked developing urban and residential centers, while maintaining an open range tradition in dominant agricultural counties where stringent fencing standards are less practicable.

#### *D. Livestock Owner-Motorist Relationships Around the West*

Montana is not the first state to struggle with judicial and legislative application of the open range doctrine in a changing western environment that mixes growing urban centers with traditional rural lifestyles. Other western state courts have arrived at conclusions similar to *Larson-Murphy*, while legislatures have attempted to mitigate the impact on the livestock community. A review of open range policies in some of these states provides insight into the open range developments spurred by both *Larson-Murphy* and House Bill 246. There are generally three categories western states tend to fit under 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; (2) states that apply ordinary negligence to livestock-motorist relationships by judicial interpretation; (3)

states that judicially interpreted an ordinary negligence relationship to apply, but have legislatively increased the standard from ordinary negligence.

Idaho and Nevada have both implemented legislation that exempts livestock owners from liability for damages caused by livestock wandering the highway in designated open range areas. Section 25-2118 of the Idaho Code provides that no livestock owner “shall have the duty to keep such animal off any highway on such [open] 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.”<sup>127</sup> Nevada has codified similar legislation exempting livestock owners from liability for stock wandering public roads in the open range; however, Nevada does impose liability on livestock owners negligently allowing domestic animals to enter a fenced highway right of way.<sup>128</sup> While these states have legislatively imposed immunity for livestock wandering roadways in the open range, the Oregon court has refused impose any duty upon livestock owners to control stock in the open range. In *Kendall v. Curl*, the Oregon Supreme Court held that “if cattle and horses have a right to be on the road, their owner is not negligent in allowing them on the road.”<sup>129</sup> Not unlike Montana open range development, the Idaho and Nevada statutes are similar to House Bill 246 before revision, while the holding of the Oregon court parallels the *Bartsch* holding prior to *Larson-Murphy*.<sup>130</sup>

While Nevada, Idaho and Oregon provide complete immunity for livestock on the roadway in open range, Colorado and Arizona apply general negligence standards to livestock owner-motorist relationships. In *Millard v. Smith*, the Colorado court held that the open range doctrine does not limit a motorist’s claim for liability. Specifically, the court stated that the statute does not bar a negligence action and “should not be enlarged by construction. . .to operate as such a bar.”<sup>131</sup> The Colorado court continued by clarifying that cattle on the roadway *do not* raise a presumption of negligence; instead, the plaintiff has the burden to demonstrate that the livestock owner committed a specific act of negligence to breach a duty of

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127. IDAHO CODE § 25-2118 (Michie 2000).

128. NEV. REV. STAT. ANN. 568.360(2) (Michie 2001).

129. 353 P.2d 227, 231 (Or. 1960).

130. *Bartsch v. Irvine Co.*, 149 Mont. 405, 409, 427 P.2d 302, 305 (1967).

131. 495 P.2d 234, 235 (Colo. 1972).

reasonable care.<sup>132</sup>

Similarly, in *Carrow v. Lusby*, the Arizona court held that the open range statute was developed to govern relationships between “owners and occupiers of land. . .the statute does not govern the liability of a livestock owner to a motorist injured by cattle crossing a highway.”<sup>133</sup> Upon this conclusion, the court turned to common law traditions to determine whether a livestock owner owes a duty of care to motorists traveling public roadways. Finding that common law does not impose a duty on livestock owners to keep livestock off the highway, the court interpreted this in light of the “natural and physical conditions of our state.” The court concluded that this did not preclude livestock owners from owing a subsequent duty of care to motorists in a “modern Arizona.”<sup>134</sup> While implementing a negligence standard, the court further stated that in open range country, the mere failure to fence cattle off the roadway did not establish breach of a duty of reasonable care. Instead, the plaintiff motorist must prove specific acts or omissions of the livestock owner.<sup>135</sup> In this way, while similar to Montana’s *Larson-Murphy* holding, the Arizona court provided direction defining the standard of proof required by a plaintiff motorist before liability may be imposed upon a livestock owner.

Finally, New Mexico and Montana occupy a similar category of open range development created by legislatively implementing an increased standard of negligence after a judicial decision applying ordinary negligence. In *Grubb v. Wolfe*, a New Mexico livestock owner sued a motorist for killing a cow on the road in open range country.<sup>136</sup> The motorist claimed the owner was contributorily negligent, while the owner claimed he had no duty to act reasonably to keep cattle off the roadway in open range.<sup>137</sup> In reaching its holding that the

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132. *Id.* at 235-36.

133. 804 P.2d 747, 750 (Ariz. 1990).

134. *Id.* at 751-53. In their conclusion, the Arizona court found a Ninth Circuit case implementing California law persuasive: *see Galeppi Bros. v. Bartlett*, 120 F.2d 208, 210 (9th Cir. 1941) (holding that the common law rule was made before the extensive highway and motor vehicle traffic and “changed conditions compel adoption of a different rule. There is no reason for exempting cattle owners from the same duty applicable to other people to use ‘ordinary care or skill in the management of [their] property’”). The California Legislature has also reacted to urbanization by restricting open range designation only to the few counties “devoted chiefly to grazing.” *See Shivley v. Dye Creek Cattle Co.*, 35 Cal. Rptr. 2d 238, 243 n.3 (Ct. App. 1994).

135. *Carrow*, 804 P.2d at 754.

136. 408 P.2d 756 (N.M. 1965).

137. *Id.* at 758

livestock owner owed a duty of reasonable care, the court concluded that even in open range a livestock owner has a duty to act as a reasonable person, and failing to do so may impose liability on a motorist.<sup>138</sup> Shortly after this decision, the New Mexico Legislature enacted Section 64-18-62(c)<sup>139</sup> of the New Mexico Code pursuant to an emergency clause provision.<sup>140</sup> This legislation altered the standard of care required of a livestock owner from ordinary negligence to “specific negligence other than allowing his animals to range in said pasture.”<sup>141</sup> In *Dean v. Biesecker*, the New Mexico court had an opportunity to apply this “specific negligence” legislation.<sup>142</sup> In this case, a cattle owner grazed livestock on either side of a state highway, there was water on both sides of the road, and increased traffic on the roadway caused repeated damage to both livestock and motorists.<sup>143</sup> In light of these facts, the court maintained that Section 64-18-62(c) did not require the livestock owner to fence the highway or abandon his pastures. Although the livestock owner knew accidents occurred on the highway due to wandering stock, there was no specific act outside of lawful grazing for which the livestock owner could be liable. The court thus ruled in favor of the livestock owner and dismissed the complaint.<sup>144</sup>

Although similar to the recent developments of the Montana open range law, it is not clear whether Montana’s “gross negligence” standard is comparable to New Mexico’s “specific negligence” standard. Like New Mexico’s *Grubb* opinion, the Montana court in *Larson-Murphy* established an ordinary negligence standard for livestock owners with cattle wandering the roadway on the open range. Also similar to New Mexico, the Montana Legislature almost immediately altered the standard of care. The Montana Legislature seemed to indicate that “gross negligence” would apply if a livestock owner knew cattle were continually on the roadway, causing accidents, and nothing was done to prevent it.<sup>145</sup> *Dean*, however, indicated that specific negligence required something more than just allowing cattle to

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138. *Id.* at 759.

139. Now codified at N.M. STAT. ANN. § 66-7-363(C) (Michie 2001).

140. *Dean v. Biesecker*, 534 P.2d 481, 482 (N.M. 1975).

141. N.M. STAT. ANN. § 66-7-363(C) (Michie 2001).

142. 534 P.2d 481.

143. *Id.* at 482-483.

144. *Id.*

145. See *Senate Hearing*, *supra* note 108.

wander the roadway even if the owner knew there was a good chance of collisions with motor vehicles. While similar in theory, the two tests will likely differ in application, and Montana's precise standard of care will only become apparent as it develops on a case by case basis.

When looking at western open range development as a whole, it is perhaps unfair to categorize developments that are more accurately envisioned as a continuum of change. Montana's *Larson-Murphy* decision and subsequent legislation moved Montana open range development from the first category, through the second and into the third. Other states have various applications around these central themes,<sup>146</sup> and can provide helpful information as Montana strives to define what exactly constitutes "gross negligence" and liability in the livestock owner-motorist relationship.

### CONCLUSION

The law of the open range is unique to the American West — it is a law bred for open country.<sup>147</sup> As western society began to change in the late nineteenth and early twentieth century, the law of the open range kept pace with limitations exhibited in *Lazarus v. Phelps*,<sup>148</sup> statutory herd districts and ultimately the exclusion of statutorily designated state and federal highways.<sup>149</sup> Although the Montana Legislature enacted further limitations on the open range, it failed to crystallize its intent by direct modifications to the open range doctrine statutes.<sup>150</sup> The result established an open range doctrine constructed on judicial initiative and speculative legislative intent — a confusing rule of law wiped clean by *Larson-Murphy* and returned to its original purity. This constituted a heavy blow to the ranching community that relied on 33 years of judicial protection from liability to motorists, and the bright line rule first established in

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146. See, e.g., *Estate of Shuck*, 577 N.W.2d 584, 587 (S.D. 1998) (holding that livestock owners are not liable for damages sustained by motorists unless the owner should have reasonably anticipated injury would result).

147. See Scott, *supra* note 36, at 181.

148. 152 U.S. 81, 85 (1894).

149. See *supra* note 57; see also *supra* note 60.

150. Did the Legislature rely on *Bartsch* when it developed Section 60-7-101 of the Montana Code Annotated, and did it intend this as the only provision creating a legal duty between motorists and livestock owners? Because this question is unclear, the court has refused to extend the open range doctrine to such relationships in *Larson-Murphy*.



*Bartsch*. Thus, the Legislature acted to form a limited liability for livestock owners and cattle on the roadway.

Potentially problematic, however, is that House Bill 246 is codified as a limited liability statute, not an open range amendment. Presumably, this means the statute will limit the liability of livestock owners with cattle on the roads in municipal, urban-interface, herd district and rural open range areas. While this explicitly sets forth the livestock owner-motorist relationship that *Larson-Murphy* found legislatively non-existent, it codifies the relationship wholly separate from the open range doctrine and Containment of Livestock statutes. While patching the issue at hand, just as with Section 60-7-101,<sup>151</sup> the Legislature addressed an open range problem without changing the open range statutes and expressing their true objective. Perhaps it is time to address the open range in light of a changing twenty-first century Montana, and create a flexible open range doctrine that has the ability to adapt to Montana's growing urban centers as well as traditional rural communities.<sup>152</sup>

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151. See *supra* note 91.

152. As stated earlier, a majority of Montana counties remain in "frontier status," as well as being heavily devoted to grazing. Due to a changing regional landscape, however, there is no longer a need for a "blanket" open range doctrine. Through population and traffic surveys, most of which are readily available, it would not be difficult to create standards for expansive grazing districts that maintain open range doctrine customs in established areas. Conversely, growing urban centers could be designated according to herding district standards that enforce more rigorous fencing requirements to control wandering livestock. Such a standard would promote good urban-interface ranching techniques, while maintaining the open range tradition where it is still a necessary way of life.