



Whose Cows are Those? A Discussion on Open Range, Herd Districts, and Fences

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What is open range?

- Idaho Code 25-2118. ANIMALS ON OPEN RANGE — NO DUTY TO KEEP FROM HIGHWAY. No person owning, or controlling the possession of, any domestic animal running on open range, shall have the duty to keep such animal off any highway on such range, and shall not be liable for damage to any vehicle or for injury to any person riding therein, caused by a collision between the vehicle and the animal. **"Open range" means all uninclosed lands outside of cities, villages and herd districts, upon which cattle by custom, license, lease, or permit, are grazed or permitted to roam.**

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What is open range?

- Idaho, along with several of its neighboring states, expressly decided over 100 years ago to disregard the British common law rule of “fence in” and adopt open range as the standard, rather than the exception.
- *Kelly v. Easton*, 35 Idaho 340, 207 P. 129 (1922); *Johnson v. Oregon Short Line Ry. Co.*, 7 Idaho 355, 63 P. 112 (1900).
- Open range discussed in *Moreland v. Adams*, 143 Idaho 687, 152 P.3d 558 (2007).
- The question of “custom, license, lease, or permit” in Idaho Code 25-2118 is resolved by reference to the dominant usage of the area in question.

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Who builds the fences?

- In open range, a landowner is required to construct fences to keep a livestock owner’s livestock off their property.
- In a herd district, cities, or villages, a livestock owner must “fence in” their cattle.

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A little bit about fences...

- Even in open range, a livestock owner can be held liable for damage caused by her livestock if the neighbor's property was enclosed by a "lawful fence."
- Idaho Code 35-102.

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Idaho Code 35-102. LAWFUL FENCES DESCRIBED. Lawful fences are described as follows:

1. If made of stone, four feet (4') high, two feet (2') base, and one foot (1') thick on top.
2. If it be a worm fence, the rails must be well laid and at least four feet (4') high.
3. If made of posts, with boards, rails or poles, the posts must be well set in the ground and not more than eight feet (8') apart, with not less than three (3) six-inch (6") boards, or rails, or poles not less than two and one-half inches (2 1/2) in diameter at the small end; if four (4) poles are used, they must not be less than two inches (2") in diameter at the small end. The top board, rail or pole must not be less than four feet (4') from the ground, the spaces well divided, and the boards, rails or poles securely fastened to the posts; if poles not less than three inches (3") in diameter at the small end are used, the posts may be set twelve feet (12') apart.
4. If wire be used in the construction of fences, the posts must not be more than twenty-four feet (24') apart, set substantially in the ground, and three (3) substantial stays must be placed at equal distances between the posts, and all wires must be securely fastened to each post and stay with not less than three (3) barbed wires, or four (4) coiled spring wires of not less than number nine (9) gauge. The bottom wire shall be not more than twenty-one inches (21") from the ground, and the other wires a proper distance apart. The wires must be well stretched and the fence not less than forty-seven inches (47") high. If all woven wire fencing is used, the top and bottom wire must be not less than number nine (9) gauge, or two (2) number thirteen (13) gauge wires twisted together, with intermediate bars not less than twelve inches (12") apart and of not less than number fourteen (14) gauge wire, and the stay wires not more than twelve inches (12") apart, and the top wire not less than forty-seven inches (47") from the ground. If woven wire less in height is used, it must be brought to the height of forty-seven inches (47") by additional barbed wires, or coiled spring wire of not less than number nine (9) gauge, and not more than twelve inches (12") between the wires: provided, that if barbed wire only is used, and the posts are not more than sixteen feet (16') apart, no stays need be used. Provided further that the minimum forty-seven inch (47") fence height specified above may be reduced to forty-two inches (42") for right-of-way fences on the state highway system when mutually agreed by the Idaho director of department of transportation and the director of the Idaho fish and game department as necessary to accommodate big game animals at major migration crossings.
5. If made in whole or in part of brush, ditch, pickets, hedge, or any other materials, the fence, to be lawful, must be equal in strength and capacity to turn stock, to the fence above described.
6. All fences in good repair, of suitable material and of every description, and all creeks, brooks, rivers, sloughs, ponds, bluffs, hills or mountains, that present a suitable obstruction to stock are deemed lawful fences.

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Damages for trespassing animals in open range?

- Idaho Code Title 25, Chapter 22.
- Special lien on trespassing animals. Idaho Code 25-2201.
- Viewers must be appointed to assess the lawful fence and damages.

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How do the rules change without open range?

- Idaho Code 25-2408. CIVIL LIABILITY. The owner of animals permitted or allowed to run at large, or herded in violation of any order made in accordance with the provisions of section 25-2404, **shall be liable to any person who shall suffer damage from the depredations or trespasses of such animals, without regard to the condition of his fence;** and the person so damaged shall have a lien upon said animals for the amount of damage done, and the cost of the proceedings to recover the same, and may take the animals into custody until all such damages are paid: provided, that the person so taking said animals into custody shall not have the right to retain the same for more than five (5) days without commencing an action against the owner thereof for such damages. Said damages may be recovered by a civil action before any court of competent jurisdiction, and no such action shall be defeated or affected by reason of any criminal action commenced or prosecuted against the same party under the provisions of the preceding section.

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Trespassing Animals in a Herd District?

- The livestock owner is responsible for damages caused by their animals regardless if the neighboring property is enclosed by a fence. Idaho Code 25-2408.
- The doctrine of *res ipsa loquitur* applies. This presumption can be rebutted or supplemented by other evidence. *Griffith v. Schmidt*, 110 Idaho 235, 715 P.2d 905 (1985).
- Any person may take the animals into custody and retain the livestock until all reasonable charges for keeping said animals are paid. Idaho Code 25-2409.

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Can a herd district be created, terminated, or modified?

- Idaho Code Title 25, Chapter 24.
- County Commissioners may create, modify or eliminate herd districts by:
 - A panel of five members in a county – two members by appointment of the county commissioners, two members by appointment of a local, county or state livestock association, and the fifth member by concurrent appointment of the other four members. A majority of the members, after a public hearing, may determine to enact a county wide ordinance to regulate the movement of livestock.
 - *See Benewah County Cattlemen's Association v. Board of County Commissioners*, 105 Idaho 209, 668 P.2d 85 (1983).

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Can a herd district be created, terminated, or modified?

- By petition of a majority of the owners of taxable real property in an area, who are also domiciled and resident of the state of Idaho. Idaho Code 25-2402.
- Upon notice and hearing, if the commissioners shall make an order established the herd district if they are satisfied that a majority of the landowners owning more than 50% of the land in the proposed herd district, who are a resident in and qualified electors of Idaho, are in favor of said creation or modification.
- A herd district may be terminated by the commissioners upon petition of a majority of the landowners, who are residents in and qualified electors of Idaho, owning more than 50% of the land in the district.

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Can a herd district be created, terminated, or terminated?

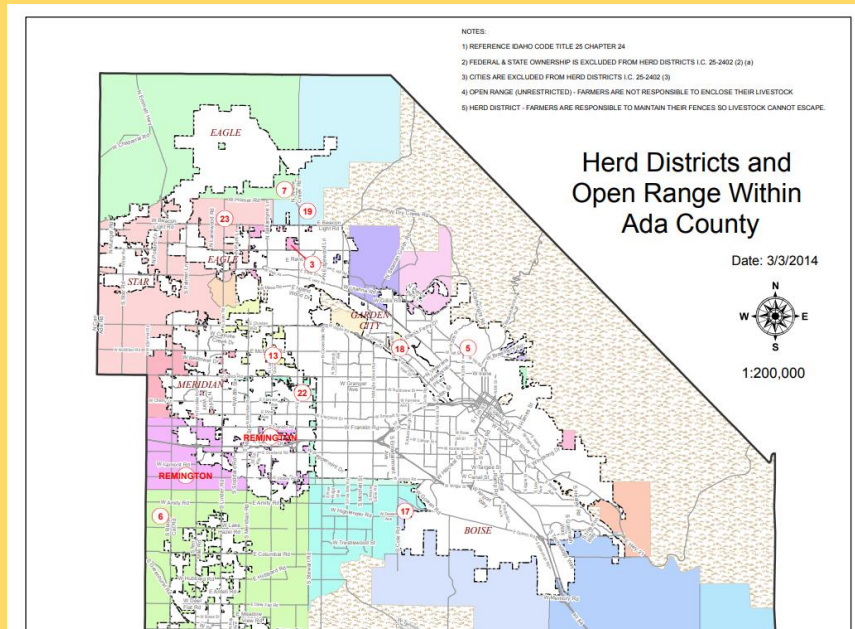
- The owners of taxable real property within a herd district shall:
 - Pay the costs of constructing and maintaining legal fences as required on the herd district's border;
 - Pay 75% of the costs of constructing legal fences required, at the time of creation or modification only, to control animals within the herd district;
 - Pay 75% of the costs of constructing cattle guards to control animals within the herd district;
 - The remaining 25% is paid by the individual landowners whose land must be fenced;
 - The County shall levy an annual 0.06% tax on taxable real property within the herd district.
- Which begs the question whether a herd district is valid if it does not comply with these statutory provisions?

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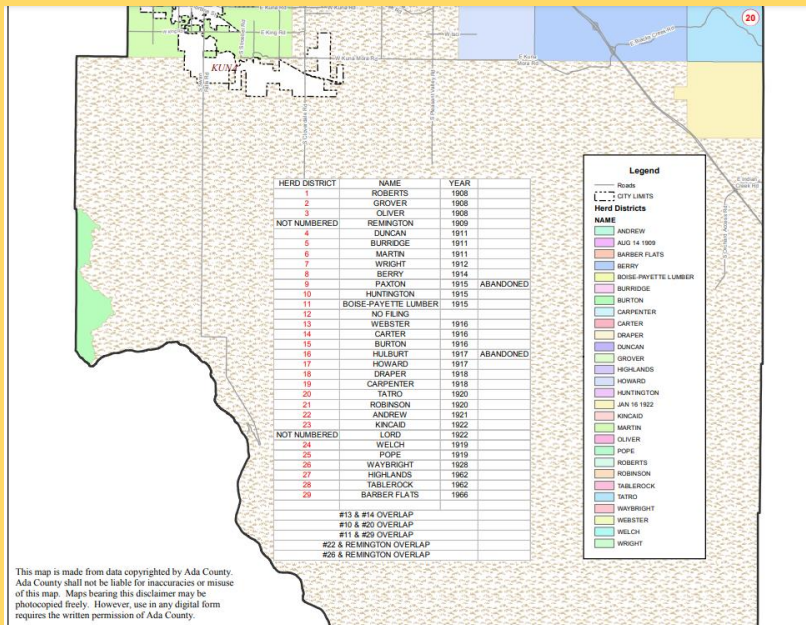
How do you find out if someone lives in a herd district?

- <https://idrango.org/ranchers/open-range/>

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A bit of case law...

- *Radford v. Orden*, 483 P.3d 344 (2021) (no Idaho reporter citation currently available) (duty to fence and trespassing of animals).
- *Whitt v. Jarnagin*, 91 Idaho 181, 418 P.2d 278 (1966) (application of res ipsa loquitur).
- *Nelson v. Holdaway Land & Cattle Co.*, 107 Idaho 550, 691 P.2d 796 (1984) (landowner was entitled to nominal damages for trespass because he failed to properly establish damage caused by livestock).
- *Macquire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978) (review of liability of livestock owner for damage caused and fencing obligations).
- *Greer v. Ellsworth*, 113 Idaho 979, 751 P.2d 675 (Idaho Ct. App. 1988) (describes the three part test to determine whether certain land is open range).
- *Easley v. Lee*, 111 Idaho 115, 721 P.2d 215 (1986) (fence, trespassing obligations, and contents of herd district order).
- *Moreland v. Adams*, 143 Idaho 687, 152 P.3d 558 (2007) (analyzes the definition of open range and burden of proving the same).
- *Miller v. Miller*, 113 Idaho 415, 745 P.2d 294 (1987) (an intentional trespass means the livestock are not “lawfully at large” and can take the form of a deliberate driving of the livestock upon the lands of another).

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Whose Cows Are Those?

By Kelly C. Stevenson, Attorney at Law, Jones Williams Fuhrman Gourley, P.A.

“Open range” is a unique Western concept, and one that every person should understand, regardless if you own livestock or not. This article will address Idaho statutes and case law relating to fence laws, herd districts, open range, and how they are interconnected.

What is open range?

Idaho, along with several of its neighboring states, expressly decided over one hundred years ago to disregard the British common law rule of “fence in” and adopt open range as the standard, instead of the exception. Idaho Code defines open range as “all uninclosed lands outside cities, villages and herd districts, upon which cattle by custom, license, lease, or permit, are grazed or permitted to roam.” Idaho Code § 25- 2118. In other words, all of Idaho is open range, except for areas within city limits or herd districts. Open range in Idaho is fiercely defended and, at times, just as fiercely opposed.

Open range is generally preferred by individuals that own livestock, primarily because of its liability protections. In Idaho, no person that owns or controls a domestic animal on open range has a duty to keep that animal off a highway, and is not liable for damage done to a vehicle or person that hits that animal. In fact, if the animal is killed or injured, the person driving the vehicle could be liable to the livestock owner for the value of the animal.

Who builds the fences?

Idaho is a “fence out” state. That means that in open range, a landowner is required to construct fences to keep livestock off their property. In areas that are not open range, such as herd districts or cities, it changes to “fence in,” which means the burden to fence shifts to the livestock owner. It becomes the livestock owner’s responsibility to fence their animals off their neighbor’s property.

What happens if livestock cause damage to another’s property in open range?

In open range, a landowner may still have a cause of action against a livestock owner for damage done to their property if they have constructed a “lawful fence.” Idaho Code provides the description and specifications for a lawful fence. In addition to wire, poles, boards and other described materials, a lawful fence can include “[a]ll fences in good repair, of suitable material and of every description, and all creeks, brooks, rivers, sloughs, ponds, bluffs, hills or mountains, that present a suitable obstruction are deemed lawful fences.” Idaho Code § 35-102(6).

If a landowner has a lawful fence that entirely surrounds a field or other enclosure, they may have a special lien upon domestic livestock that break into their field or enclosure and cause damage. This lien includes the cost of care and feeding said livestock, which the county sheriff or brand inspector must provide at a rate of not more than \$2.00 per head per day for cattle and horses. Before the landowner’s lien can attach, they must notify the owner-- if known-- the county sheriff, and brand inspector within twenty-four hours.

Within two days after the livestock are contained, three viewers are appointed to determine if the lien claimant has a lawful fence which surrounds the entirety of said enclosure. Procedurally, the lien claimant appoints one “viewer,” the owner of the livestock appoints another (if the livestock owner is unknown or refuses to appoint a viewer within three days, the sheriff will then appoint the second viewer), and the two viewers then appoint a third. If the two viewers cannot choose a third within two days of their appointment, the state brand inspector will appoint the third. The only disqualifying trait of a viewer is that he/she cannot be related up to the second degree of consanguinity to the person appointing. The three viewers must then determine within three days whether the lien claimant has a lawful fence that entirely surrounds their field or other enclosure. If there is a lawful fence the viewers must put together, within the next three days, an itemized and signed damage award. If the viewers determine that no lawful fence exists, the viewers can require that the lien claimant pay the livestock owner costs and immediately release the livestock. If the landowner does not have a lawful fence, the livestock owner is not liable for any damage to another’s property in open range.

Simply put, if a landowner does not want livestock on their land in open range, it is their responsibility to construct a lawful fence to keep them out.

How does this change in a herd district?

While herd districts change who is required to construct fences, there is an exception. If landowners within a herd district desire to outlaw the travel of livestock from open range into that herd district, the herd district must be completely enclosed by a lawful fence, including cattle guards installed on roads that cross the herd district boundary. The county where the herd district is located has the authority to levy a tax upon all taxable property (regardless whether the landowner owns livestock or not) within the county to pay for the boundary fence of the herd district, including cattle guards. Without a lawful fence and cattle guards completely enclosing the herd district, livestock can lawfully enter a herd district from open range without adverse consequences.

Livestock owners in a herd district are liable for damage done to another’s property if their livestock escape, regardless whether the damaged property is enclosed by a fence. Those that oppose open range in Idaho believe that herd districts should be the standard, or that herd districts are the default rule. Any person that owns livestock understands the inherent difficulty to control every aspect of their movements. Further, livestock owners in a herd district live with the fact that regardless of the care they take in maintaining their fences, they are presumed negligent (at fault) if their livestock escape an enclosure and cause damage.

Can a herd district be eliminated, modified, or created?

Yes, however, the processes are tedious. It became more difficult to eliminate, modify, or create herd districts after statutory revisions to Idaho Code Chapter 25 in 1990. Which were, in part, likely due to the legislature’s response to an Idaho Supreme Court decision in 1983 that effectively allowed county commissioners to create countywide de facto herd districts.

Before the movement of livestock can be regulated across the entire county, the board of county commissioners must appoint a panel of five members to determine whether to establish a county ordinance that regulates the movement of livestock. Two members are appointed by the board of county commissioners, two members by appointment of a local, county, or state livestock association, and the fifth member is appointed by concurrent appointment of the other four appointees. If the panel determines by majority vote to establish a county ordinance that regulates the movement of livestock, the board of county commissioners must pay for the construction of any fencing or cattle guards from the county funds.

The other method to create, modify, or eliminate herd districts is by petition upon the board of county commissioners by a majority of the landowners that represent a majority of the land owned within the herd district. For example, if the herd district is comprised of 50 landowners and 500 acres, the petition would need at least 25 signatures of landowners that own at least 250 acres within that proposed herd district. It may also be required that the petitioners be qualified electors, or registered voters, of Idaho depending on the action sought.

When a proposed herd district is created by petition, the owners of taxable real property within the proposed herd district must pay for the cost to construct and maintain legal fences on the herd district's border if the order attempts to restrict the travel of livestock from open range. The owners of taxable real property within the proposed herd district, whether created or modified, must pay 75% of the costs to construct fences and install cattle guards on private land within the herd district to contain livestock movements. The owner of any land which must be enclosed must pay 25% of the total cost to construct the fences.

Conclusion

It is important to keep in mind that herd districts are the exception, not the rule, in Idaho, and to remember the importance and history of open range in Idaho. In order to protect your cattle and your business, you must be aware that different rules apply within cities and herd districts. Every livestock owner should be aware whether any of their property is located within a herd district, or open range, in order to protect their livestock and themselves, and to be good neighbors.