



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 4, 2019

The Honorable Poncho Nevárez  
Chair, Committee on Homeland Security  
and Public Safety  
Texas House of Representatives  
Post Office Box 2910  
Austin, Texas 78768-2910

Opinion No. KP-0278

Re: County authority and responsibility for  
stray livestock (RQ-0291-KP)

Dear Representative Nevárez:

You ask about county authority and responsibility for stray livestock in Presidio County.<sup>1</sup> Presidio County is an open-range area of the State, where the owners of livestock may generally allow their animals to run at large. *See* TEX. AGRIC. CODE § 143.072 (prohibiting Presidio County from opting by election to restrict cattle from running at large); *Harlow v. Hayes*, 991 S.W.2d 24, 27 (Tex. App.—Amarillo 1998, pet. denied) (observing general rule that “in the absence of statutory provisions to the contrary, an owner of domestic animals is permitted to allow them to run at large”). Chapter 142 of the Agriculture Code, titled “Estrays,” authorizes a county sheriff to, among other things, impound and hold a stray animal for disposition. TEX. AGRIC. CODE § 142.009(a). You ask for an opinion clarifying a county sheriff’s authority to enforce the estray laws in an open-range area of the State. *See* Request Letter at 1.

In Texas, livestock owners generally do not have a common-law duty to restrain their animals from running at large. *Gibbs v. Jackson*, 990 S.W.2d 745, 747–48 (Tex. 1999). In an open-range area, livestock are not trespassers wherever they roam, and with exceptions, their owners are not liable under the common law for damage the animals may cause on the property of others. *See id.*; *Clarendon Land, Inv. & Agency Co. v. McClelland*, 23 S.W. 576, 578 (Tex. 1893) (noting exception for “diseased, vicious, or ‘breachy’” animals).

The Legislature may alter open-range common law by statute. *Kennamer v. Estate of Noblitt*, 332 S.W.3d 559, 563 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (“Any duty to restrain livestock is statutory.”). “[T]he Legislature has . . . established and often revisited its own scheme for determining when duties of restraint should or should not be imposed upon livestock owners.” *Gibbs*, 990 S.W.2d at 750. While the Legislature generally may not enact local laws, the Texas Constitution specifically empowers the Legislature to authorize local-option stock laws.

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<sup>1</sup>*See* Letter from Honorable Poncho Nevárez, Chair, House Comm. on Homeland Sec. & Pub. Safety, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (June 10, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

TEX. CONST. art. III, § 56 (generally prohibiting State local laws); *id.* art. XVI, § 23 (authorizing local-option stock laws). In exercise of that authority, the Legislature enacted chapter 143 of the Agriculture Code to give a local area the option to decide by election whether to impose a duty on owners of specified classes of animals to restrain the animals from running at large within the local area. TEX. AGRIC. CODE §§ 143.021–.082 (chapter 143, subchapters B–D). Chapter 143 alters the common law in two additional respects. It prohibits owners of livestock to knowingly allow their animals to run at large on the right of way of state or federal highways whether located in an open-range area or a stock-law area. *Id.* § 143.102; *Goode v. Bauer*, 109 S.W.3d 788, 791 (Tex. App.—Corpus Christi 2003, pet. denied). The chapter also imposes a duty on certain landowners in areas that remain open range to “make a sufficient fence around cleared land in cultivation.”<sup>2</sup> TEX. AGRIC. CODE § 143.001. Thus, in stock-option areas of the State, the owners of livestock may have a duty to fence in or otherwise restrain their animals from running at large; while in open-range areas, it may be incumbent on property owners to fence out unwelcome livestock. *See Molton v. Young*, 204 S.W.2d 636, 638 (Tex. Civ. App.—Amarillo 1947, no writ) (absent controlling stock law, “if landowners desire their lands or fields protected from livestock running at large, it is their duty to place the lands or fields under fence sufficient to afford such protection against livestock of ordinary propensity”).

But while the historic common law gives livestock owners the right to allow their animals to run at large without common-law liability for damages, Texas estray statutes, which date back to the earliest days of the Republic, give real property owners and occupiers recourse against animals straying onto their land. TEX. AGRIC. CODE §§ 142.001–.015 (chapter 142, “Estrays”).<sup>3</sup> Under the current estray statutes, chapter 142 defines “estrays” as “stray livestock, stray exotic livestock, stray bison, or stray exotic fowl.” *Id.* § 142.001(1). An animal may be an estray subject to impoundment under the chapter whether its owner is known or unknown. *See id.* § 142.009(a)(1), (2), (5); *see also State v. Apel*, 14 Tex. 428, 431 (1855) (stating that a predecessor estray “statute has not drawn the distinction . . . between estrays whose owners are known and those whose owners are unknown”). Under section 142.003, an owner of private property or the custodian of public property who discovers an estray on the property initiates the estray procedure by reporting the animal’s presence to the county sheriff. TEX. AGRIC. CODE § 142.003(a). Upon receiving such information, the sheriff must report the animal’s location to its owner if the owner is known. *Id.* § 142.003(b), (c). The owner of the estray may redeem the animal from the owner

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<sup>2</sup>By erecting a sufficient fence, a cultivator preserves the right to seek damages from the owner of livestock whose animals manage to trespass upon the cultivator’s property. *See Gray v. Davis*, 792 S.W.2d 856, 857–58 (Tex. App.—Fort Worth 1991, no writ); *see also* TEX. AGRIC. CODE § 143.028(a) (providing that a fence is sufficient for purposes of chapter 143 if it meets specified standards and “is sufficient to keep out ordinary livestock permitted to run at large”).

<sup>3</sup>*See also, e.g.*, Act approved Dec. 22, 1836, 1st Cong., R.S., §§ 1–16, 1836 Repub. Tex. Laws 212, 212–15, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1272, 1272–75 (Austin, Gammel Book Co. 1898) (“An Act Regulating Estrays”); Act approved Oct. 26, 1866, 11th Leg., R.S., ch. 57, §§ 1–14, 1866 Tex. Gen. Laws 54, 54–58, *reprinted in* 5 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 972, 972–76 (Austin, Gammel Book Co. 1898) (“An Act to regulate the Estraying of Stock in the State of Texas”); Act approved Aug. 15, 1876, 15th Leg., R.S., ch. 98, §§ 1–10, 1876 Tex. Gen. Laws 150, 150–52, *reprinted in* 8 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 986, 986–88 (Austin, Gammel Book Co. 1898); Act of May 22, 1981, 67th Leg., R.S., ch. 388, §§ 1–5, (enacting the Agriculture Code as a nonsubstantive recodification and repealing Revised Civil Statutes article 6927a).

or occupant of real property by paying a redemption payment if the parties can agree on amount; otherwise, a justice court may determine the redemption amount. *Id.* §§ 142.004(a), .006(a), (c), .007. Also, the sheriff may impound the animal and hold it for disposition if:

- (1) the owner of the estray is unknown;
- (2) the sheriff or the sheriff's designee is unable to notify the owner;
- (3) the estray is dangerous to the public;
- (4) the estray is located on public property and after notification is not immediately removed by the owner; or
- (5) the estray is located on public or private property and is not redeemed not later than the fifth day after the date of notification, unless the sheriff or the sheriff's designee determines that the owner of the estray is making a good faith effort to comply with Section 142.004(a) [by paying the real property owner statutory fees and damages to redeem the animal].

*Id.* § 142.009(a). The owner may recover an impounded estray from the sheriff by paying expenses and fees as the sheriff determines. *Id.* §§ 142.005(a), .010(a)(4), (c). If the owner remains unknown or fails to redeem the animal, the sheriff may sell or otherwise dispose of the animal according to statute. *Id.* § 142.013(a), (e).

You tell us that the Presidio County Sheriff has received conflicting advice about whether the estray statutes in chapter 142 apply in an open-range county. Request Letter at 1. Chapter 142 authorizes estray procedures for an animal discovered “roam[ing] about the property of a person without that person’s permission or roam[ing] about public property” and does not distinguish between property located in an open-range area or in a stock-law area. TEX. AGRIC. CODE § 142.003(a); *see generally id.* §§ 142.001–.015. The estray statutes cannot be construed to contain an exception for open-range areas when such an exception cannot be found in the statutes’ language. *See Iliff v. Iliff*, 339 S.W.3d 74, 80–81 (Tex. 2011) (stating that courts “have no right to engraft upon the statute any conditions or provisions not placed there by the legislature”); *Pub. Util. Comm’n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988) (“A court may not write special exceptions into a statute so as to make it inapplicable under certain circumstances not mentioned in the statute.”). Moreover, the creation of local stock law beginning in 1876 did not curtail the estray statutes’ general application. Texas’s open-range common law and its estray statutes coexisted for decades before the Legislature first authorized local stock laws as an exception to the open-range common law. *Compare Clarendon*, 23 S.W. at 577–78 (discussing Texas open-range rule), *and Nichols v. State*, 30 Tex. 515, 516 (1867) (holding that the estray laws, suspended during the Civil War, were back in full force and operation beginning in 1866), *with Gibbs*, 990 S.W.2d at 748 (stating that the Legislature has “provided for local stock laws since 1876”). The stock-law statutes do not address the chapter 142 estray statutes and therefore do not restrict their application

to stock-law areas or exclude their application from open-range areas.<sup>4</sup> *See generally* TEX. AGRIC. CODE ch. 143, subchapters B–D; *see also* Tex. Att’y Gen. Op. No. MW-588 (1982) at 1–2 (stating that the sheriff’s authority to impound estrays under section 142.003 of the Agriculture Code is not dependent on a local-option stock-law election). While the venerable open-range common law controls where it applies, it cannot override the Legislature’s statutory regulation of estrays. *See Dugger v. Arredondo*, 408 S.W.3d 825, 829 (Tex. 2013) (recognizing that statutes modify common-law rules). Accordingly, a county sheriff has the authority and responsibility to enforce the estray laws of chapter 142 of the Agriculture Code whether the county has adopted a local-option stock law or remains an open-range area.

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<sup>4</sup>Until a few decades ago, chapter 143 of the Agriculture Code contained additional impoundment statutes, applicable only in stock-law areas. *See* TEX. AGRIC. CODE §§ 143.029, .031, .078, .080, *repealed by* Act of Apr. 23, 1987, 70th Leg., R.S., ch. 51, § 5, 1987 Tex. Gen. Laws 123, 128–29; *Brite v. Pfeil*, 334 S.W.2d 596, 596–98 (Tex. App.—San Antonio 1960, no writ) (discussing the impoundment statutes applicable to animals forbidden to run at large under the predecessor to chapter 143 and the separate estray statutes later codified as chapter 142); Tex. Att’y Gen. Op. No. MW-588 (1982) at 1–2 (discussing the estray statutes that require a local-option stock-law election and those that do not).

S U M M A R Y

A county sheriff has the authority and responsibility to enforce the estray laws of chapter 142 of the Agriculture Code whether the county has adopted a local-option stock law or remains an open-range area.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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