Land & Water Law Review

Volume 29 | Issue 1 Article 3

1994

Wildlife-Private Property Damage Law - Once upon a Time in Wyoming There Was Room for Millions of Cattle and Enough Habitat for Every Species of Game to Find a Luxurious Existence - In the Aftermath of Parker, Can We All Still Get Along - Parker Land and Cattle Company v. Wyoming Game and Fish Commission

Leonard R. Carlman

Casenotes

WILDLIFE-PRIVATE PROPERTY DAMAGE LAW-Once upon a time in Wyoming there was room for millions of cattle and enough habitat for every species of game to find a luxurious existence.* In the aftermath of *Parker*, can we all still get along? *Parker Land and Cattle Company v. Wyoming Game and Fish Commission*, 845 P.2d 1040 (Wyo. 1993).

In 1830, Captain William Sublette introduced the first cattle to the land which would later become the State of Wyoming.[1] From that time to the present, livestock and the ranchers who own them have been in a problematic relationship with native wildlife species.[2] While substantial effort has gone into developing a cooperative relationship between livestock and wildlife interests,[3] the historical balance has been strongly in favor of livestock interests.[4]

A new chapter in this more than 150 year old story began to unfold in 1988, when a cow belonging to the Parker Land and Cattle

---

* Adapted from the preface to the first edition of laws for the Wyoming Territory. *See infra* note 30.

1. T.A. LARSON, HISTORY OF WYOMING 163 (2d. ed. rev. 1978). Sublette brought "five cattle, including one milch [sic] cow, to the Wind River Rendezvous in 1830." The first breeding herd arrived in 1862. *Id.* at 163-64.

2. *See* PETER MATHIESSEN, WILDLIFE IN AMERICA 135-56 (rev. 1987). Mathiessen closes his chapter Plains, Prairies, and the Shining Mountains with this quote from Francis Parkman's preface to the 1872 edition of THE OREGON TRAIL: "A time would come when those plains would be a grazing country, the buffalo give place to tame cattle, farmhouses be scattered along the water courses, and wolves, bears, and Indians be numbered among the things that were." *Id.* at 156.

3. Parker Land and Cattle Company v. Wyo. Game and Fish Comm'n, 845 P.2d 1040, 1057-58 (Wyo. 1993) [hereinafter *Parker*]. Current examples of cooperation include these Wyoming Game and Fish Department programs: the "Ask First" campaign, designed to encourage hunters to behave cooperatively with landowners, the "Landowner Newsletter," which has similar aims, and a special landowner recognition program to reward excellence in conservation stewardship. The Wyoming Stockgrower's Association, a group which represents approximately 1,500 Wyoming ranchers, is collaborating with the Game and Fish Department to advance these programs. Interview with Bob Budd, Executive Director, Wyoming Stockgrower's Association, in Cheyenne, Wyo. (Aug. 31, 1993).

4. Wildlife species in Wyoming which have suffered massive habitat loss or extinction at the hands of white settlers of European descent include grizzly bears, mountain lions, wolves, elk, bighorn sheep, bison, prairie dogs, and black-footed ferrets. Tim W. Clark & Robert D. Dorn eds., Rare and Endangered Vascular Plants and Vertebrates of Wyoming (1981)(unpublished manuscript, on file with the Northern Rockies Conservation Cooperative, Jackson, Wyo.). *See Parker*, 845 P.2d at 1054.

Company (Parker) of Dubois, Wyoming, tested positive for the disease brucellosis.[5] When, on February 2, 1989, a second cow from the same herd tested positive for brucellosis, the *Parker* herd was doomed to destruction,[6] and a four year battle between livestock and wildlife interests in Wyoming was underway.

Parker blamed the disease transmission on either elk or bison.[7] Parker asserted that "[d]uring the summer of 1988, at least nine head of buffalo were seen on the Warm Springs allotment during July."[8] In addition, the 4,800 animal Wiggins Fork Elk Herd, located near Dubois, used the Warm Springs allotment for seasonal habitat, and a small number of elk from the Jackson Elk Herd, located west of the

---

5. Brucellosis is "[a]n infectious reproductive disease from bacteria of the genus brucella. It is transmitted orally by ingestion of the bacteria from contaminated placentas or other birth products of female animals. Its major manifestations are abortions or retained placentas in females and orchitis in males." *Parker*, 845 P.2d at 1041. Brucellosis was not found in native Wyoming wildlife until a Yellowstone National Park bison tested positive in 1917. J.R. Mohler, *Abortion disease*, ANN. REP. OF THE BUREAU OF ANIMAL INDUSTRY, BUREAU OF ANIMAL INDUSTRY, WASH., D.C., 40 (1917). The next occurrence of brucellosis in wildlife came when three National Elk Refuge elk tested positive in 1930. E.A. Tunnicliff and H. Marsh, *Bang's disease in bison and elk in the Yellowstone National Park and on the National Bison Range*, 86 J. AM. VETERINARY MED. ASS'N 745-752 (1935). *See also* OLAUS J. MURIE, THE ELK OF NORTH AMERICA 175-76 (1951) (Murie was the field biologist who made the discovery in 1930). Scientists maintain that brucellosis originated in domestic livestock, and was transmitted to wildlife. Interview with Dr. E. Tom Thorne, Director of Veterinary Research, Wyoming Game and Fish Department, in Laramie, Wyo. (Sept. 9, 1993).

6. "All cattle in Wyoming lawfully found to be affected with either tuberculosis or Bang's disease [brucellosis] may be shipped or transported under the direction of the state veterinarian in accordance with federal regulations, to livestock markets and there sold for salvage and destroyed in accordance with federal regulations." WYO. STAT. § 11-19-214 (1989). After veterinary testing revealed that the Parker herd was heavily infested with brucellosis, the herd was quarantined and subsequently depopulated. These steps were taken in response to orders from the United States Department of Agriculture (USDA) and the Wyoming State Veterinarian. Brief of Appellant at 2, *Parker*, (No. 91-147) [hereinafter Brief of Appellant]. The brucellosis-free status of Wyoming has significant economic value to Wyoming ranchers. Telephone interview with Dr. Russell Burgess, Area Veterinarian in Charge, United States Department of Agriculture, Animal Plant Health Inspection Service (Sept. 20, 1993).

7. A routine USDA investigation made during the course of responding to the brucellosis outbreak supported this conclusion. The USDA found that the most probable source of the infection was either elk or buffalo, and that the infection was not caused by cattle. Brief of Appellant, supra note 6, at 2. Both elk and bison are capable of carrying brucellosis. E. Tom Thorne et al., *Bovine Brucellosis in Elk: Conflicts in the Greater Yellowstone Area*, ELK VULNERABILITY SYMPOSIUM 297 (1991). The incidence of the disease varies greatly from herd to herd, and the potential for its transmission is similarly highly variable. *Id.* at 299.

8. Parker Land and Cattle Company Damage Claim, No. FY90-119, Findings of Fact, Conclusions of Law and Order Denying Claim at 3 (Wyo. Game and Fish Comm'n, May 9, 1991). The Parker Land and Cattle Company was the grazing lessee on the approximately 19,200 acre Warm Springs Grazing Allotment. The allotment was administered by the Shoshone National Forest in western Fremont County, Wyoming. Interview with Brent Larson, U.S. Forest Service Wind River District Ranger, Shoshone National Forest, in Dubois, Wyo. (Aug. 5, 1993).

Continental Divide, may have periodically dispersed into the Warm Springs allotment.[9]

Under the State of Wyoming's wildlife damage statute,[10] Parker sought recovery of $1,136,106 in damages[11] from the Wyoming Game and Fish Commission. The statute allows a party[12] who suffers loss to property due to actions of big game or trophy game animals[13] to file a claim for recovery[14] with the Wyoming Game and Fish Department.[15] Parker filed such a claim with the Department on February 22, 1990.[16] The Department disputed the claim, and so its immediate governing body, the Wyoming Game and Fish Commission, arranged for a hearing.[17]

Following three days of proceedings, the Commission denied Parker's claim on May 9, 1991.[18] The Commission cited two grounds

---

9. Interview with Tom Toman, Wyoming Game and Fish Department District One Game Supervisor, in Jackson, Wyo. (July 25, 1993).

10. WYO. STAT. § 23-1-901 (1991) [hereinafter wildlife damage law or wildlife damage statute].

11. Parker calculated its damages as follows: feed, transportation, and other expenses caused by quarantine, $149,560; loss of market value of cattle sold because of quarantine, $ 181,008; future loss of income because of capital loss of breeding herd, $805,538. *Parker*, 845 P.2d at 1041.

12. The claimant may be "[a]ny landowner, lessee or agent." WYO. STAT. § 23-1-901(a) (1991).

13. Big game animals are defined as "antelope, bighorn sheep, deer, elk, moose, or mountain goat . . . ." WYO. STAT. § 23-1-101(a)(i) (1991). Trophy game animals are defined as "black bear, grizzly bear or mountain lion . . . ." WYO. STAT. § 23-1-101(a)(xii) (1991). Bison are classified as neither big nor trophy game animals. Instead, bison are generic "wildlife," along with "all wild mammals, birds, fish, amphibians, reptiles, crustaceans and mollusks, and wild bison . . . ." WYO. STAT. § 23-1-101(a)(xiii) (1991).

14. WYO. STAT. § 23-1-901(b) (1991).

15. [Hereinafter Department or Game and Fish Department.] The Game and Fish Commission [hereinafter Commission], consists of seven gubernatorially appointed members who serve for six year terms, and the governor, as an ex-officio member. WYO. STAT. § 23-1-302 (1991). The Commission sets broad policy, approves the budget, and generally oversees the work of the 346 permanent employees of the Department. WYO. STAT. § 23-1-201 (1991).

16. Brief of Appellant, *supra* note 6, at 9.

17. If the Department is to deny the claim, it must do so within ninety days after submission; any aggrieved party may dispute a denial by appealing to the Commission within thirty days of the denial. The Commission then must review the action at its next regular meeting. WYO. STAT. § 23-1-901(c)(d) (1991). Due to the magnitude of the Parker claim, and to guide its consideration, the Commission appointed retired Wyoming Supreme Court Justice John F. Raper as Hearing Officer. Justice Raper obtained proposed findings of fact and conclusions of law from both Parker and the Department. He adopted the Department's proposed findings and conclusions of law in making his recommendation to the Commission that Parker's claim be denied. Claim No. FY90-119, Order Overruling the Objections of Parker Land and Cattle Company to Findings of Fact, Conclusions of Law and Order Proposed by Hearing Officer, (Wyo. Game & Fish Comm'n, Jan. 22, 1991).

18. Findings of Fact, Conclusions of Law and Order Denying Claim at 27 (Wyo. Game and Fish Comm'n, May 9, 1991). The Commission received testimony from seven expert witnesses and determined there was insufficient evidence of a wildlife to cattle transmission. It also described the

for its decision: the Parker claim was not cognizable,[19] and even if the claim was cognizable, Parker had failed to link the receipt of brucellosis by its herd to transmission by wildlife.[20]

In July of 1991, Parker appealed the decision of the Commission to the Wyoming Supreme Court.[21] In a parallel and ultimately unsuccessful suit, Parker also sued the United States Government.[22]

The Wyoming Supreme Court handed down its plurality opinion on January 22, 1993.[23] Killing Parker's hopes for recovery, the court held there was insufficient evidence upon which to conclude that state owned wildlife caused the brucellosis infection in the Parker herd.[24] However, through an aggregation of opinions, three of the five justices

---

Parker brucellosis vaccination program as being below the local area standard. Parker had 25.89% of its cattle tagged as official calfhood vaccinates; the local standard was 51.8%. *Id.* at 15-16.

19. The Commission employed a strict method of statutory interpretation. The presence in WYO. STAT. § 23-1-901(c) (1991) of a list of compensable sources of harm, the absence from that list of brucellosis transmission from wildlife to cattle, and a common law prohibition against non-legislative waiver of sovereign immunity all led the Commission to find the Parker claim beyond the scope of the statute. *Id.* at 19-21.

20. *See supra* note 18.

21. The Wyoming District Court of Laramie County certified the matter directly to the Wyoming Supreme Court, per WYO. R. APP. P. 12.09. Reflecting an ideological theme of the controversy, the Mountain States Legal Foundation, a conservative, pro-mining/logging/livestock advocacy group, together with the Wyoming Stockgrower's Association, a trade group, jointly filed an amicus brief with the Wyoming Supreme Court.

22. Parker named three defendants within the Department of Interior: the National Elk Refuge, (U.S. Fish and Wildlife Service), Grand Teton National Park, and Yellowstone National Park (National Park Service). Parker based its claim on the Federal Tort Claims Act, 28 U.S.C. § 2671 (1988). For a review of the federal case, Parker Land and Cattle Co., Inc. v. United States, 796 F. Supp. 477 (D. Wyo. 1992), [hereinafter *Parker* II], *see* Robert B. Keiter and Peter H. Froelicher, *Bison, Brucellosis, and Law in the Greater Yellowstone Ecosystem,* 28 LAND & WATER L. REV. 1, 38-45 (1993). In that case, Federal District Chief Judge Clarence Brimmer found that "[t]he FWS [Fish and Wildlife Service] and NPS [National Park Service] have acted negligently in managing the wildlife, in that they each have failed to take an active role in eliminating the brucellosis problem in the elk and bison which are under their control." *Parker* II, 796 F. Supp. at 486. Nonetheless, Judge Brimmer held that Parker failed to establish that any wildlife species under the control of the defendant federal agencies had caused harm to Parker. Consequently, Parker recovered nothing from the federal government. *Id.* at 488.

23. *Parker*, 845 P.2d at 1040.

24. *Parker*, 845 P.2d at 1068. The court's ruling may have also been the death-blow to the Parker Ranch. As of 1993, five years after the first brucellosis-infected cow was identified, and four years after the herd was destroyed, Parker was running cattle on neither the 14,500 acres of deeded ranch land, nor the U.S. Forest Service Warm Springs allotment. While a livestock permittee lacks a legal property right in a grazing allotment, there is a practical and substantial monetary benefit associated with the sale of private ranch property which is tied to a federal grazing permit. If the pattern of non-use continues, by July 1, 1994, Parker will be on the verge of forfeiting its interest in the Warm Springs and Horse Creek grazing allotments, and the value of the Parker property as a cattle ranch may be significantly reduced. Interview with Brent Larson, *supra* note 8. *See also* U.S. FOREST SERVICE, U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL § 2231.7 (1991) and FOREST SERVICE HANDBOOK §§ 2209.13.16 *et seq.* and 2209.13.17 *et seq.* (1992).

held that brucellosis transmission from elk or bison to cattle is a compensable form of damage under the wildlife damage statute.[25]

This casenote briefly reviews the history of Wyoming damage compensation law as it relates to wildlife and private property, and sketches the changing socio-economic environment at play in the background of *Parker*.[26] It then discusses the methods and canons of statutory interpretation used by the two factions of the Wyoming Supreme Court.[27] The casenote finishes with an argument in favor of legislative action to expressly exclude harm to livestock from big game animals as a compensable form of claim in Wyoming.

BACKGROUND[28]

The laws of white people and the laws of wild nature first met in Wyoming in the year 1869,[29] when members of the First Territorial Legislature gathered in Cheyenne.[30] In 1890, the livestock industry made known its political strength with the inclusion of an article in the newly adopted Wyoming State Constitution which specifically directed the legislature to protect livestock interests.[31] The first statutory expression of the imbalance of power

---

25. *Parker*, 845 P.2d at 1079-83.

26. The *Parker* decision itself goes on a powerful and informative fifteen page literary tear into the legal history of livestock and wildlife in Wyoming. It describes the evolving cultural tension between wildlife and agricultural values, and sets this opinion apart from the narrowly focused genre which dominates case opinion writing in the United States. *See, e.g., Parker*, 845 P.2d at 1052-66.

27. No attempt is made to describe, much less exhaust, the massive volume of scholarly information on statutory interpretation. Rather, the casenote seeks to expose perennial themes, as articulated by the Wyoming Supreme Court and leading scholars in American jurisprudence, and place those themes in the context of *Parker*.

28. For this part of the casenote, I have drawn heavily upon the work of Justice Golden. *See supra* note 26. The best source of contextual background is Justice Golden's presentation in *Parker* itself. A minimum amount of background is furnished here to provide the reader with necessary context.

29. "As the Civil War ended, white invasion into this magnificent natural game preserve intensified." *Parker*, 845 P.2d at 1053.

30. In the preface to the first edition of laws for the Wyoming Territory, Territorial Secretary Edward M. Lee gushed at the bounty of the land, stating that:

> Wyoming can successfully compete with all the world in the matter of stock growing, and upon her plains there is room and sustenance for millions of cattle and unnumbered herds of wool-bearing animals . . . Every species of territorial game finds a home and a luxurious existence upon these comparatively unknown though grandly fertile vales.

Preface to Wyo. Laws at v-vi (1869).

31. WYO. CONST. art. 19, § 1. The provision remains a part of the State Constitution today, and reads:

> The legislature shall pass all necessary laws to provide for the protection of livestock against the introduction or spread of pleuro-pneumonia, glanders, splenetic or Texas fever, and other infectious or contagious diseases. The legislature shall also establish a system of

between livestock and wildlife interests came in 1915, when the legislature authorized game wardens to kill elk found to be damaging personal property.[32]

Wildlife Damage Statutes and Related Adjudications

The Wyoming legislature began authorizing appropriations for game animal depredations in 1925,[33] and adopted the first damage compensation law in 1929.[34] This damage compensation statute was significantly modified three times between 1929 and 1980.[35]

The 1980 modification redefined the scope of the State's liability. When the 1980 budget session of the Wyoming legislature convened, a property owner could seek compensation from the State only for "damaged land, growing cultivated crops, stored crops, seed crops, improvements, and extraordinary damage to grass."[36] An amendment initiated in the State Senate to add livestock damaged or killed by a trophy game animal[37] to the list of compensable losses succeeded.[38]

---

quarantine, or inspection, *and such other regulations as may be necessary for the protection of stock owners, and most conducive to the stock interests within the state.*

(Emphasis added.)

32. Act of Feb. 25, 1915, ch. 91, 1915 Wyo. Sess. Laws 87-88 (*repealed by* Act of Feb. 18, 1921, ch. 83 § 104) (permitting the State Game Warden and his employees to kill any elk doing damage to personal property).

33. Act of Feb. 25, 1925, ch. 90, 1925 Wyo. Sess. Laws 94-95 (appropriation to twenty-four private parties totalling $4,825). Depredations typically resulted from elk or moose returning to native winter ranges, only to find them occupied by homesteaders and void of forage but for the hay in the homesteaders' haystacks. See OLAUS J. MURIE, THE ELK OF NORTH AMERICA 313-14 (1951), and for an anecdotal version, see BERTHA CHAMBERS GILLETTE, HOMESTEADING WITH THE ELK 9 (2d ed. 1968).

34. Act of Feb. 19, 1929, ch. 85. § 1, 1929 Wyo. Sess. Laws 107 (repealed by Act of Feb. 17, 1939, ch. 65 § 95). In *Parker*, Justice Golden informs the reader of one opinion of the statute from that time period:

> In 1952, Dr. Ira N. Gabrielson, of the Wildlife Management Institute, Washington, D.C., submitted a report to the Commission after several months analyzing the Game and Fish Department's operations . . . In Dr. Gabrielson's opinion, in his previous studies of the game laws of many other states, *only in Wyoming had he found laws which gave 'so much special consideration to livestock operators at the expense of the fish and game resources' . . . .*"

Parker, 845 P.2d at 1064 (emphasis added).

35. (1) Act of Feb. 17, 1971, ch. 60 § 1, 1971 Wyo. Sess. Laws 60-62; (2) Act of Mar. 9, 1973, ch. 249 § 1, 1973 Wyo. Sess. Laws 576-78; (3) Act of Mar. 6, 1980, ch. 37 § 1, 1980 Wyo. Sess. Laws 43-44.

36. Act of Mar. 9, 1973, ch. 249, § 1 1873 Wyo. Sess. Laws 576-78; WYO. STAT. 23.1.32(a)(b) (1973).

37. S. File 019, 45th Leg., 2d Sess. at 32-34 (1980). For the definition of a trophy game animal *see supra* note 13.

38. S. File 019, 45th Leg., 2d Sess. at 32-34 (1980).

A proposed amendment in the State House of Representatives to establish state liability for damage inflicted on livestock, without the delimiting words "by a trophy game animal," failed.[39] The form in which the 1980 legislature had left the statute remained unchanged when Parker sought compensation in 1989. At that time, the Game and Fish Department was to consider claims "based upon a description of the livestock damaged or killed *by a trophy game animal.*"[40] The words "big game animal" did not appear in the relevant section.[41]

Prior to *Parker*, the Wyoming Supreme Court had four occasions to interpret the wildlife damage laws. The first opportunity arose in 1939 when "some twenty head of deer got into the garden and practically ruined the lettuce crop."[42] The damaged party received a favorable judgment in the district court, which the Game and Fish Commission challenged on appeal. The Commission's allegation of contributory negligence was defeated by the court's ruling that no duty existed to guard against "a danger not reasonably to have been apprehended."[43]

The Wyoming Supreme Court next encountered the wildlife damage laws in 1960, after "a cloud of ducks" descended on Harvey Latham's farm and allegedly ate a substantial amount of barley.[44] In holding for Latham, the court rejected the Game and Fish Commission's arguments that the district court had abused its discretion or relied upon insufficient evidence.[45] The supreme court did not interpret, or even cite, the applicable wildlife damage statute.

The Wyoming Supreme Court's third opportunity to apply the animal damage laws came in 1962, after Albert 'Ab' Cross shot two "quarrelsome moose" on his ranch a few miles west of Dubois, Wyoming.[46] The issue was whether a property owner could protect his property against depredations by game animals. Reversing the district court and ruling in Cross' favor, the Wyoming Supreme Court relied on a property owner's natural right to protect

---

39. *Id.*

40. WYO. STAT. § 23-1-901(c) (1991) (emphasis added.)

41. *Id.*

42. Van Horn v. Wyoming Game and Fish Comm'n, 92 P.2d 560, 561 (Wyo. 1939)

43. *Id.* at 562.

44. "The evidence showed . . . 'Nobody ever see [sic] that many ducks in the sky before,' 'a cloud of ducks,' 'the sky was black over his field several nights,' 'just as thick as you could see' . . . ." Wyoming Game and Fish Comm'n v. Latham, 347 P.2d 1008 (Wyo. 1960).

45. *Id.* at 1009.

46. 'Ab' Cross v. State, 370 P.2d 371, 374 (Wyo. 1962).

private property.[47] As in *Latham*, the court did not address the matter of statutory interpretation.

Prior to *Parker*, the last Wyoming Supreme Court adjudication of the wildlife damage statutes came in 1989.[48] In that case, the claimants lost a number of domestic sheep to mountain lion depredation. The Game and Fish Commission disputed the impartiality of an arbitration board which had ruled in favor of the claimants, asserted that the damage award granted by the arbitration board was too large, and complained to the Wyoming Supreme Court that no record had been made of the arbitration hearing to which the Commission had been a party.[49] The court denied all of the Commission's allegations[50] and again chose not to construe the wildlife damage statute.

Methods of Statutory Interpretation

While the wildlife damage cases prior to *Parker* did not motivate the Wyoming Supreme Court to engage in statutory interpretation, dozens of other cases have.[51] Two distinct methods of statutory interpretation[52] appear in Wyoming jurisprudence generally and in *Parker* specifically: the plain meaning approach[53] and the equitable discretion approach.[54]

---

47. In Cross, the parties stipulated to the fact that 'Ab' Cross shot two moose, and to the fact that he had, with the knowledge and consent of the Wyoming Game and Fish Department, made numerous attempts to resolve the moose-related problems. *Id.* at 372-74. While the court affirmed Cross' right to self-help, it did so in the context of Cross having reasonably exhausted his practical and administrative remedies. *Id.* at 375-78.

48. Wyoming Game and Fish Comm'n v. Smith, 773 P.2d 941 (Wyo. 1989).

49. *Id.* at 943. The role of an arbitration board is described at WYO. STAT. § 23-1-901(d) (1991).

50. *Smith*, 773 P.2d at 944.

51. The opinion of the court in *Parker* cited forty cases which directly address statutory interpretation, of which fourteen clearly describe the "plain meaning" approach. *Parker*, 845 P.2d 1040. Justice Urbigkit, in his dissent, cited nine cases and directed the reader to his concurring opinion in Allied-Signal, Inc. v. Wyoming State Board of Equalization, 813 P.2d 214, 223-34 (Wyo. 1991), where he cited forty-two cases, including twenty-eight from Wyoming, in support of a general context approach to statutory interpretation. *Parker*, 845 P.2d at 1080.

52. *See infra* notes 55-56 and accompanying text for a description of the two approaches. *See generally*, John Choon Yoo, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, YALE L.J. 1607, 1608-12 (1992) (arguing that these two potentially conflicting approaches to statutory interpretation are inherent in the design of the judicial branch of government in the United States, and are a consequence of at least three historic forces: (1) familiarity—expressed as both contempt and comfort—with English courts of equity; (2) disarray and incongruity among colonial statutes, which endeared early Americans to the equitable power of courts; and (3) fear of the potential tyranny of an unelected legal authority). For a famous exchange of scholarship on the merits and demerits of strict adherence to text versus open reference to such non-textual sources as legislative history, *see* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930), *and* James M. Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886 (1930). *But see* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 416-25 (1989) (challenging as a false oversimplification the dichotomy between plain meaning and "extratextual" analysis).

53. Adherents to this approach are often labelled textualists, literalists, or originalists. *See, e.g.*

Wyoming Supreme Court Justice Potter succinctly stated the plain meaning approach early in the court's history, writing, "If the language employed is plain and unambiguous, there is no room left for construction . . . Courts are not at liberty to depart from that meaning which is plainly declared."[55] Conversely, the equitable discretion approach involved the integration of the litigated statute with the surrounding statutory, legislative, and historical environment.[56] These two doctrines of statutory interpretation attached to two larger constitutional themes: the balance of power between the judicial and legislative branches,[57] and the consequent accountability of law givers to law receivers.[58]

Sunstein, *supra* note 52, at 416.

54. Commentators use terms such as intentionalism, extratextualism, and dynamic statutory interpretism to describe this approach to statutory interpretation. *See, e.g.*, T. Alexander Aleinkoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 22 (1988). As it is used in this casenote, the phrase "equitable discretion" most precisely conveys the idea that an assortment of interpretive techniques other than plain meaning analysis are available to jurists, and the use of these extra-textual tools may have the effect of moving the judge into the sphere of equity. *See, e.g.*, Yoo, *supra* note 52, at 1608-09.

55. Rasmussen v. Baker, 50 P. 819, 821 (1897). *See also* Druley v. Houdesheldt, 294 P.2d 351, 352 (Wyo. 1956) (providing an equally clear statement of the rule, and proving its use in Wyoming through the middle of the twentieth century). At the federal level, a classic statement of the plain meaning rule is found in Caminetti v. United States, 242 U.S. 470, 490 (1917). For an analysis of the plain meaning rule as applied in *Caminetti, see* Arthur W. Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1300 (1975) (acknowledging that an inevitable variety of circumstances calls for the selective use of plain meaning analysis, legislative intent, and "good sense" in determining the meaning of a statute). *Id.* at 1316-17.

56. Justice Urbigkit eloquently described the equitable discretion approach when he wrote:

> [a]ny individual statute is a single strand within the woven law. (Citations omitted.) The use to which it is actually put is dependent upon the surrounding statutes and the societal environment within which it is used. Like all things where change is inevitable, the environment into which the statutory provision in its specific language is applied will, from time to time, change. The responsibility of the judiciary is to assure reasonable workability of the entire law and faithfully distribute the legislators' intended burden upon that strand.

Allied-Signal, 813 P.2d at 229 (Urbigkit, J., specially concurring). For an oft-quoted version from the federal courts, *see also* Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (Learned Hand, J.).

57. "Strict adherence to our Wyoming Constitution demands that the judicial branch of government recognize that it is without discretion, nor does it have any latitude, to apply statutes contrary to legislative intent once that intent has been ascertained. Legislative intent must be ascertained initially and primarily from the words used in the statute." *Allied Signal*, 813 P.2d at 219 (Wyo. 1991). *See also* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277, 281 (1990) (articulating the federal judiciary's duty, "within constitutional limits", to defer to the intent of Congress).

58. "Debates over statutory meaning are often disputes over interpretive principles; these debates reflect broader divisions over the nature and performance of the regulatory state and, indeed, about the character of American democracy and constitutionalism as a whole." Sunstein, supra note 52, at 413. *Compare* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L. J. 281 (1989) (exploring the practical application of the legislative supremacy principle) *with* William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L. J. 319 (1989) (calling legislative supremacy a "shibboleth," encouraging careful congressional awareness of statutory interpretation,

Changing Socio-economic Environment

The *Parker* controversy occurred in the context of substantial and rapid cultural transition.[59] Just as the seemingly discrete jurisprudential debate between alternate methods of construing statutes is tied to large and powerful themes, so too, is the specific controversy of *Parker* linked to broad-scale cultural and economic trends. Where ranching was once the unquestioned king of the high Wyoming plains, in northwest Wyoming and around the West,[60] ranching had become increasingly characterized as a quaint relic,[61] a marginal economic activity,[62] and a source of environmental harm.[63]

While the specific agent of change in *Parker* appears to have been a microscopic bacteria, large economic, demographic, and political forces continue to bring about inevitable changes in the American West.[64] These changes are typically described in terms of a transition from an extractive, intensive use of land to one which emphasizes recreational land use and a resettlement of the West by people employed in the trade of information and

---

and promoting tests of fairness and justice in evaluating judicial interpretation of statutes).

59. *See* Keiter and Froelicher, *supra* note 22, at 9-12 (describing shifts in public land management policy and changes in the social and economic environment which tend to support wildlife and recreational values, and stating that "traditional extractive industries are in decline . . . .").

60. The Parker Ranch, located near Dubois, Wyoming, was tied to federal land management policies through its two federal grazing allotments on the Shoshone National Forest. Interview with Brent Larson, *see supra* note 8. The ranch and its grazing allotments were also within the Greater Yellowstone Ecosystem, an area of large wilderness tracts and growing tourist economies. *See*, Rick Reese, GREATER YELLOWSTONE 45, 89 (1984).

61. *See e.g.*, Special Issue: An Alternative to the Bumper Sticker Approach to Grazing, HIGH COUNTRY NEWS, Mar. 23, 1992, at 23, *and* Deborah Frazier, *Ranch 'Culture' Fading Away*, CASPER STAR-TRIB. Nov. 9, 1993 at C1, in which the author writes, "[T]he ranching life isn't as good as it used to be. When neighbors sell to development, subdivisions bring dogs that chase cattle, traffic, neighbors who complain about cattle smells, lawsuits over 100-year-old water rights and accusations of land rape and animal abuse."

62. *See* Michael Riley, *Beef Ranchers Say Better Times Don't Mean Security*, CASPER STAR-TRIB., Apr. 26, 1993, at A1, *and* Michael Riley, *Analysts Say [Grazing] Fee Hikes Hit Individuals, Not Economies*, CASPER STAR-TRIB., Apr. 29, 1993, at A1 (stating that while total on-farm production, including ranching, in the U.S. totals only about 2% of the Gross Domestic Product, individual ranchers in Wyoming are vulnerable to disruptions in the livestock economy). A companion to the livestock industry in Wyoming, wool production, may be pushed beyond the margin of economic viability by the congressional repeal of the 1954 Wool Act which authorized direct subsidies to wool producers. David Hackett, *Congress Votes to Kill Wool Program. Wool Growers: Most Will Be Forced Out of Business*, CASPER STAR-TRIB., Oct. 16, 1993, at A1.

63. GENERAL ACCOUNTING OFFICE, U.S. DEPT. OF COMMERCE, GAO/RCED-88-80, RANGELAND MANAGEMENT: MORE EMPHASIS NEEDED ON DECLINING AND OVERSTOCKED GRAZING ALLOTMENTS (1988) (documenting range condition in the western U.S. and calling for restoration of damaged lands).

64. *See* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 75-113, 293-306 (1992); THE EAGLE BIRD: MAPPING A NEW WEST (1992); WESTERN GOVERNORS' ASSOCIATION, BEYOND THE MYTHIC WEST (1990).

expertise.[65] As large scale cultural change proceeds, the legal relationship between wildlife and livestock interests in Wyoming is likely to experience its own set of related changes.

PRINCIPAL CASE

Parker and the Wyoming Game and Fish Commission presented the same three issues to the Wyoming Supreme Court: (1) whether there was substantial evidence to indicate nearby elk or bison transmitted brucellosis to Parker's cattle herd, (2) whether the wildlife damage statute included an invitation for disease-related claims of harm to livestock, and (3) whether the Commission's findings and its ruling were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law and should therefore be reversed.[66] Parker prevailed only on the second issue.[67]

Interpretation of the Wildlife Damage Statute

The most contentious issue of *Parker* was whether the wildlife damage statute allowed the State to consider a claim alleging harm by big game to cattle. In its review of that issue, the court split into two factions.[68] Justices Thomas, Cardine, and Urbigkit considered the Parker claim to be cognizable under the wildlife damage statute.[69] Justices Golden and Macy reached the opposite conclusion.[70] The route by which the court brought itself, the parties, and the public to this understanding of the wildlife damage statute passed through the field of statutory interpretation.

---

65. *See Boom Time in the Rockies: More jobs and fewer hassles have Americans heading for the hills*, TIME, Sept. 6, 1993, at 20. *See also* Raymond Rasker, *Rural Development, Conservation, and Public Policy in the Greater Yellowstone Ecosystem*, 6 SOC'Y AND NAT. RESOURCES 109 (1993); Thomas Michael Power, *Ecosystem Preservation and the Economy in the Greater Yellowstone Area*, CONSERVATION BIOLOGY, Sept. 1993, at 395 (describing and quantifying a cultural and economic transition from extractive, commodity-based activity to non-consumptive, service oriented activity which draws directly on the aesthetic and wilderness values of the Greater Yellowstone Ecosystem).

66. Brief of Appellant, *supra* note 6, at 1, and Brief of Appellee at 1, *Parker* (No. 91-147) [hereinafter Brief of Appellee].

67. *Parker*, 845 P.2d at 1079-83. *See infra* notes 83-103 and accompanying text.

68. Justice Golden wrote the opinion of the five member court, but was joined only by Chief Justice Macy. Justice Thomas concurred, and Justice Cardine specially concurred in the holding that Parker had failed to establish that either elk or bison had transmitted the disease to the Parker herd. Conversely, Justices Thomas, Cardine and Urbigkit dissented on the ground that claims for damages arising from disease transmission from wildlife to cattle were cognizable under WYO. STAT. § 23-1-901.

69. *Parker*, 845 P.2d at 1079 (Thomas, J., concurring in part and dissenting in part); *Id.* at 1079-80 (Cardine, J., specially concurring); *Id.* at 1080 (Urbigkit, J., dissenting).

70. *Parker*, 845 P.2d at 1066.

The opinion of Justice Golden, in which Justice Macy joined, cited a tradition of plain meaning analysis in Wyoming jurisprudence which reached from the first years of statehood to the present.[71] Justices Golden and Macy aligned themselves with that tradition.[72] The Commission had sought application of plain meaning analysis.[73] According to the Commission, subsection (c) of the damage claim statute did not authorize the Department to consider claims of harm to property caused by diseases, because diseases were not among the enumerated types of damage agents.[74]

Parker had also invoked plain meaning analysis in its argument for damage compensation. Parker argued that subsections (a) and (b) of the wildlife damage statute authorized payment for brucellosis transmission from either elk or bison to cattle.[75] Parker acknowledged that subsection (a) was devoted to damage reporting requirements, and that subsection (b) was limited to the method by which a claim was to be filed. Parker then asserted that these two sections "plainly authorize[d]" payment for harm to property inflicted by either big or trophy game animals.[76]

In their plain meaning analysis, Justices Golden and Macy noted the presence of two clearly defined terms, "big game animals" and "trophy game animals", in the wildlife damage law.[77] The absence of the word "bison" from the list of species defined as either "big game animals" or "trophy game animals" controlled their conclusion that claims arising from harmful interaction between livestock and bison could not be compensated.[78] The absence of the term "big game animals" from the subsection of the statute authorizing the Game and Fish Department to consider claims arising from harm to livestock provided Justices Golden and Macy with their basis for finding that the plain meaning of the wildlife damage law excluded claims arising from harm to livestock by elk.[79]

Justices Golden and Macy supplemented their plain meaning analysis with inferences drawn from a comprehensive review of legislative history.[80] Having drawn on both plain meaning analysis and legislative histo-

---

71. *Id.* at 1042-43.
72. *Id.*
73. Brief of Appellee, *supra* note 66, at 22.
74. *Id.* at 23.
75. Brief of Appellant, *supra* note 6, at 18-19.
76. *Id.* at 18.
77. *Parker*, 845 P.2d at 1046-47.
78. *Id.* at 1047.
79. *Id.* at 1048-49.
80. Justices Golden and Macy set the stage for their analysis of the most current legislative history by summarizing the entire history of human occupation of Wyoming. Their summary began

ry,[81] Justices Golden and Macy found that the wildlife damage statute did not permit the State to consider claims alleging harm to livestock from big game animals.[82]

Justices Thomas, Cardine, and Urbigkit found that application of the plain meaning rule would either unduly immunize the State from a reasonable form of claim or unconscionably impose on Parker the full cost of its loss.[83] Thus, Justices Thomas, Cardine, and Urbigkit found the plain meaning approach to be inappropriate.[84] Their use of the ambiguity[85] and absurdity[86] canons of statutory interpretation led them to this decision.

Justice Cardine found the wildlife damage statute to be ambiguous.[87]

---

with the arrival of the first humans approximately 11,000 years ago. It included an account of white migration and settlement alongside and often in place of native wildlife from the mid-19th century to the early 20th century, and culminated with a review of each significant statutory expression of the changing relationship between the modern human occupants of Wyoming and native wildlife. They placed particular emphasis on the revisions made to the wildlife damage law during the 1980 session of the Wyoming legislature. *Id.* at 1052-66.

81. *See generally* Wald, *supra* note 57, at 279-302 (endorsing the use of both plain meaning analysis and extrinsic material).

82. *Parker*, 845 P.2d at 1066.

83. *Id.* at 1079-83.

84. Justice Cardine wrote, "I cannot buy into a construction of our game and fish legislation that results in the Game and Fish ducking responsibility for damage it caused and the rancher going bankrupt." *Id.* at 1079. Justice Urbigkit characterized the statutory interpretation of Justice Golden as one which "cramps the plain meaning of the English language . . . [is a] cramped and illogical construction . . . [and is flawed by a] legalistic fallacy." *Id.* at 1082. Justice Urbigkit relied on statements by the U.S. Supreme Court in United States v. American Trucking Associations, 310 U.S. 534 (1940), which appear to "repudiate" the plain meaning rule. *Allied Signal*, 813 P.2d at 228. For an interpretation of *American Trucking* which is at odds with Justice Urbigkit's interpretation, *see* Murphy, *supra* note 55, at 1301. For an acknowledgement of a resurgence of the plain meaning rule in the U.S. Supreme Court, *see* Wald, *supra* note 57, at 280-81.

85. "If a statute is ambiguous . . . we will resort to general principles of statutory construction in the effort to ascertain legislative intent. (Citation omitted.) A statute which is uncertain and susceptible of more than one meaning is ambiguous." Story v. State, 755 P.2d 228, 231 (Wyo. 1988), citing McArtor v. State, 699 P.2d 288 (Wyo. 1985)). Long ago a legal scholar remarked on the ubiquitous and potentially pernicious presence of ambiguity in the law, writing, "in the use of language uncertainty and ambiguity are sure to occur . . . The imperfection of language is a serious evil when it occurs in those legislative commands on which the repose, discipline, and well being of society depend." THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 190 (2d ed. 1884). See also Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 YALE L.J. 527, 528 (1947) (finding the dilemma of statutory construction rooted in the fact that words are merely "inexact symbols" of ideas).

86. "[A] statute should not be construed . . . in a manner producing absurd results." *Story*, 755 P.2d at 231. The canon of statutory interpretation which addresses the problem of absurdity is described at 2A NORMAN J. SINGER, SUTHERLAND STAT. CONST. § 45.12 (5th ed. 1992).

87. Justice Cardine wrote that, "the statute is ambiguous concerning any intent to limit a claim based on the types of damages or the type of game animal." *Parker*, 845 P.2d at 1079 (Cardine, J., specially concurring). The derivation of meaning from both the specific, operative words of a statute and the surrounding text was endorsed long ago by Chief Justice Marshall, who wrote that "[w]here

He used as his basis for finding ambiguity in the wildlife damage statute "the inconsistent placement of terms such as 'trophy game animals' and 'big game animals' within the subsections of [the wildlife damage statute]."[88] He concluded that the Game and Fish Department was liable for all damage to property caused by any species of wildlife which is "claimed, owned, protected by or licensed for hunting and taking by the Game and Fish."[89]

Justice Urbigkit characterized the risk of harm to livestock from brucellosis as "a Typhoid Annie danger."[90] That the presence of brucellosis might be "an acceptable risk" to livestock operators, he found "hard to believe."[91] This was tantamount to a finding of absurdity.[92] Thus, Justice Urbigkit construed the wildlife damage statute as creating a cause of action for livestock owners who claim to have suffered harm to their livestock due to wildlife sponsored disease transmission.[93]

Having used the ambiguity and absurdity canons of statutory interpretation to reject plain meaning analysis, Justices Cardine and Urbigkit applied a total of six additional methods of statutory interpretation to find the *Parker* claim cognizable.[94] Justice Cardine's two additional methods of statutory interpretation were looking to the general context of the statute,[95] and examining legislative intent.[96] Parker had also urged the Wyoming Supreme Court to look beyond the literal meaning of the words to the overall purpose of the statute.[97]

---

the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ." United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

88. *Parker*, 845 P.2d at 1079. Subsections (a) and (b) of WYO. STAT. § 23-1-901 (1991) refer to "big or trophy game animals," but subsection (c) refers only to damage from a "trophy game animal."

89. *Parker*, 845 P.2d at 1079 (Urbigkit, J., dissenting).

90. *Id.* at 1080.

91. *Id.* at 1080-81.

92. Justices Golden and Macy acknowledged the absurd result canon, and were aware of the consequences of their decision not to employ it. However, they did not find that application of the plain meaning rule would lead to an absurd result. *Id.* at 1050.

93. *Id.* at 1079-83.

94. The six methods involved examination of: (1) general context, (2) legislative intent, (3) general policy, (4) history, (5) constitutional provisions, and (6) analogous situations. *Id.* at 1079-83. It is the sum of these six methods of statutory interpretation to which this casenote applies the phrase "equitable discretion." *See supra* note 54.

95. Justice Cardine referred to the "in pari materia" canon of statutory interpretation. This canon encourages its user to examine how a specific statute, or part of a statute, fits into the larger surrounding statutory context. *Parker*, 845 P.2d at 1079.

96. Justice Cardine said that legislative intent "ought to be determined by conditions as they exist today in our society." *Id.*

97. Brief of Appellant, *supra* note 6, at 20-21. Parker made five additional arguments: (1) harm to livestock is "no different than injuring or killing an animal by combative actions which have been compensated," (2) because the Wyoming Game and Fish Department controls elk and bison

As a preface to his analysis, Justice Urbigkit invited the reader to review a variety of established principles of statutory construction.[98] He used four additional and distinct tools of statutory interpretation: policy,[99] historical analysis,[100] constitutional demand,[101] and analogy.[102] Justice Urbigkit's use of these four tools led him to include harm to livestock by elk or bison within the scope of the wildlife damage statute.[103]

---

hunting, and is legally responsible for wildlife management in Wyoming, it should be financially responsible for damages elk or bison cause to livestock, (3) loss in property value caused by actions of "state-managed wildlife" is compensable under the takings provisions of both the state and federal constitutions, (4) nothing in the damage claim law expressly precludes compensation when the source of harm is disease, and (5) the Game and Fish Department knew of the danger of brucellosis transmission and breached its duty to adequately warn Parker of the threat. *Id.* at 21-23.

98. *Parker*, 845 P.2d at 1080, inviting the reader to see *Allied-Signal*, 813 P.2d 214 (Wyo. 1991)(Urbigkit, J., specially concurring). In that case, Justice Urbigkit conducted his own exhaustive and scholarly analysis on the subject of statutory construction. He stated his low opinion of the "plain English" method when he wrote, "I believe literalists or originalists are essentially result-oriented adjudicators . . . ." *Id.* at 231. Justice Urbigkit closed his special concurrence in *Allied-Signal* with an extensive quote from Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 213-215 (1983), the last two sentences of which read as follows:

> Even judges who recognize the theoretical possibility of plain meaning concede that it must yield where it produces an absurd result. The uncertain boundaries of absurdity counsel against ever finding language 'plain,' and the impossibility of a formal definition of absurdity casts doubt on even the logical possibility of any formal plain meaning.

Allied Signal, 813 P.2d at 214 n. 8.

99. Justice Urbigkit argued that, "The Game and Fish Commission *should be* financially responsible for the results of their management of wildlife which, by negligence or inattention, spreads contagious livestock diseases." (Emphasis added.) *Parker*, 845 P.2d at 1080.

100. Justice Urbigkit provides his historical analysis in one brief paragraph, in which he discounts Justice Golden's "exhaustive research" as unnecessary. *Id.*

101. *Id.* at 1081-83. Justice Urbigkit drew upon WYO. CONST. art. 1, § 33, which reads, "[p]rivate property shall not be taken or damaged for public or private use without just compensation." Interestingly, appellant dedicated only one sentence to this argument in its brief. Brief of Appellant, *supra* note 6, at 23. Amici Wyoming Stockgrower's Association and Mountain States Legal Foundation did not make this argument at all.

102. Justice Urbigkit wrote:

> Within a result-defined comparison, there is little difference between the predatory characteristics of some kinds of wildlife who kill the animals of a rancher for food or otherwise or the bacilli, bacteria or virus which are nurtured by the wildlife and spread into the cattle herds with an equally damaging conclusion.

Id. at 1081.

103. *Id.* at 1083.

Role of the Doctrine of Sovereign Immunity[104]

Both the litigants and Justices Golden and Macy engaged the doctrine of sovereign immunity in *Parker*.[105] The Commission had argued that the wildlife damage law gave only a limited waiver of immunity, and asserted that "[s]overeign immunity is the rule and waiver is the exception."[106] Conversely, Parker had asserted that the State of Wyoming had waived governmental immunity by enacting the wildlife damage law.[107] Justices Golden and Macy searched the wildlife damage law for an "unequivocal and textual" invitation from the State to potential claimants whose livestock may have been harmed by big game, and found none.[108]

Justices Cardine, Thomas, and Urbigkit did not directly acknowledge the doctrine of sovereign immunity.[109] Indeed, Justice Urbigkit turned the doctrine on its head. He suggested that there should be a presumption in favor of state liability when a livestock operator links the presence of disease in his herd to transmission from wildlife, and he denied the existence of any countervailing policy.[110]

---

104. For a comprehensive overview in two parts, *see* David Minge, *Governmental Immunity From Damage Actions in Wyoming*, 7 LAND & WATER L. REV. 229, 617 (1972). For a more recent review which includes an argument for complete legislative abrogation of the doctrine of sovereign immunity, *see* Algirdas Mykolas Liepas, Comment, *The Doctrine of Sovereign Immunity in Wyoming: Current Status of the Doctrine and Arguments for Abrogation*, 20 LAND & WATER L. REV. 220 (1985).

105. The sovereign immunity canon of statutory interpretation states that any law which permits claims against the state is to be construed according to its most limited potential meaning. *Parker*, 845 P.2d at 1044-45 (citing Harrison v. Wyoming Liquor Comm'n, 177 P.2d 397, 399 (1947); *accord* Retail Clerks Local 187 v. Univ. of Wyoming, 531 P.2d 884, 886 (Wyo. 1975)). A related canon states that where ambiguity is present in a statute which voids sovereign immunity, the most plausible resolution in favor of the state is to be selected. *See* Liepas, *supra* note 104, at 226. These canons are fortified by the democratic notion that:

> [Sovereignty] consists of the power and right existing in the people and the persons to whom this power has been delegated. The people are regarded as the beneficiaries of the immunity that accrues to their agencies of government . . . Therefore, the rule exempting the sovereign from the operation of the general provisions of a statute is premised on a policy of preserving for the public the efficient, unimpaired function of government.

3 Singer, *supra* note 86, at § 62.01.

106. Brief of Appellee, *supra* note 66, at 29.

107. Brief of Appellant, *supra* note 6, at 17.

108. *Parker*, 845 P.2d at 1044, 1066.

109. In his specially concurring opinion, Justice Cardine began with a conclusory approach to resolving the question of whether the State was immune from liability, writing, "I proceed from the premise that the Game and Fish Commission is liable for all damages (whether from disease, killing, clawing, injury or otherwise) to the livestock and property of citizens caused by [wildlife]." *Parker*, 845 P.2d at 1079. His subsequent use of four specific tools of statutory interpretation to reach the same conclusion is discussed *supra* at notes 87-102 and accompanying text.

110. *Id.* at 1080.

Causal Link Between Wildlife and Harm to Parker Herd

In addition to its detailed review of whether the Parker claim was cognizable, the Wyoming Supreme Court also considered the practical question of causation. Specifically, the court examined whether substantial evidence supported the Commission's holding that Parker had failed to establish a causal connection between the presence of brucellosis in its herd and the alleged presence of brucellosis in nearby elk or bison.[111]

The Commission had urged the court to rely upon the weight of evidence developed during its own administrative proceedings.[112] Parker, however, had asserted that the testimony of experts whose opinions were favorable to Parker was sufficient to establish a causal link between the presence of brucellosis in elk and bison and its presence in the Parker herd.[113]

Four of the justices affirmed the Commission's finding that Parker failed to establish a causal connection.[114] In reaching this conclusion, Justices Golden, Macy, Thomas, and Cardine all applied the agency deference statute.[115] This statute restricts an appellate court's power to reverse conclusions of an agency hearing record which are supported by substantial evidence.[116]

The threshold question before the Wyoming Supreme Court, when it reviewed the factual findings of the Game and Fish Commission, was whether the Commission's findings were supported by "substantial evidence."[117] In their analysis, Justices Golden and Macy first defined the term "substantial evidence."[118] They then cast the hearing record as a battle of experts and found the three experts who sided with the Commission to be sufficiently well qualified and persuasive to render the Commission's order adequately supported by the evidence.[119]

This statutorily encouraged deference to legally adequate agency proceedings might have ended the appellate court's review.[120] However, Justices

---

111. *See infra* note 118.

112. Brief of Appellee, *supra* note 66, at 11-16.

113. Brief of Appellant, *supra* note 6, at 15-16.

114. *Parker*, 845 P.2d at 1067-68, 1079-80.

115. WYO. STAT. § 16-3-114(c)(ii)(E) (1992) [hereinafter the agency deference statute]. *Parker*, 845 P.2d at 1066-68, 1079-80.

116. WYO. STAT. § 16-3-114(c)(ii)(E) (1992).

117. *Parker*, 845 P.2d at 1066.

118. *Id.*, defining substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

119. *Id.* at 1067.

120. Justice Cardine did indeed draw the line here. He wrote:

> [w]ere I deciding this case in the first instance, I might be inclined toward appellant. However, on appeal the question presented is one of substantial evidence to support the findings

Golden and Macy went on to assess the evidence for themselves. They found the probability of disease transmission from elk to one or more of the Parker herd animals to be remote,[121] and, in three quick paragraphs, similarly discounted the likelihood of a bison transmission.[122] Thus Justices Golden and Macy determined that, even if the claim was cognizable, Parker had failed to meet its burden of proof.[123]

Only Justice Urbigkit found that the Commission's action denying the Parker claim was unsupported by substantial evidence.[124] Justice Urbigkit determined that "[i]n reality, the agency was just protecting itself from damage payment obligation."[125] Based on his review of the agency hearing record, Justice Urbigkit found a legally sufficient causal link between the potential transmission of brucellosis from either elk or bison and the receipt of brucellosis by the Parker herd.[126] Justice Urbigkit was the only one of the five justices who would have awarded damages to Parker.[127]

ANALYSIS

The *Parker* case called upon the Wyoming Supreme Court to resolve two concerns: what methods should the court use to interpret the wildlife damage statute,[128] and who should bear the loss when the forces of wildlife

---

> of the hearing officer and the decision of the commission . . . I can agree that the Game and Fish Commission did not abuse its discretion in denying appellant's claim and will, with some reservation, concur.

Id. at 1080. Justice Thomas also agreed with the court on the matter of substantial evidence, stating that "substantial evidence supports the ruling that Parker Land & Cattle Co. failed to establish the source of the brucellosis." *Id.* at 1079.

121. *Id.* at 1067. Tom Toman, the District One Game Supervisor responsible for management of the Jackson Elk Herd, and Bruce Smith, Biologist for the National Elk Refuge, were each expert witnesses in the respective state and federal cases. They were adamant that the probability of a transmission from a Jackson Elk Herd animal to one of the Parker cows—as Parker alleged had occurred—was made remote by the combination of rugged, snow-bound terrain, the availability of secure and much more convenient calving grounds west of the Continental Divide, and the secretive calving behavior of elk. Interview with Toman, Jackson, Wyo. (July 23, 1993). Interview with Smith, Jackson, Wyo. (Aug. 2, 1993). The Wyoming Stockgrower's Association's Bob Budd was equally adamant about the low probability of cattle to cattle transmission. His confidence is rooted in the cattle industry's increasingly successful record in eradicating brucellosis. Interview with Bob Budd, Executive Director, Wyoming Stockgrower's Association, in Cheyenne, Wyo. (Aug. 31, 1993).

122. *Parker*, 845 P.2d. at 1068.

123. *Id.* at 1067-68.

124. *Id.* at 1083.

125. *Id.*

126. *Id.*

127. *Id.*

128. The discretion enjoyed by the Wyoming Supreme Court to choose among methods of statutory interpretation is considered a plenary power of the judicial branch, and is at the heart of the judicial function. *See* Yoo, *supra* note 49, at 1630. Suspicions persist throughout the legal communi-

and agriculture collide. While the court rendered a decision in which Parker is a clear loser, it is difficult to find a clear winner. After the ink has dried in the case reporters, the attorney fees have been paid, and the volumes of legal documents have been stored away, the Wyoming citizenry, the ultimate losing party, is left with increased liability created by the fractured precedent of a divided court.[129]

The singular precedential highlight of the decision in *Parker* was the Wyoming Supreme Court's adherence to the guidelines of the agency deference statute.[130] In its application of this statute, the court determined that there was substantial evidence to support the agency's factual findings.[131] In so doing, the court deferred to the expertise of the Wyoming Game and Fish Commission and to the due process afforded all parties in the fact-intensive phase of the dispute. This offers hope that the Wyoming Supreme Court will in the future again give serious consideration to the factual findings of the Commission.

Statutory Interpretation and Sovereign Immunity

Parker's only success came in the finding by Justices Thomas, Cardine, and Urbigkit that harm to livestock from *big game* animals is a compensable form of damage claim.[132] Parker achieved this despite three significant statu-

---

ty, from law students through Wyoming Supreme Court justices, that the choice of method is reached only after a justice decides on a choice among a variety of possible outcomes. This so-called "outcome-determinative" jurisprudence is in virtually universal disrepute, yet the possibility that it remains in steady use is acknowledged by the unremitting protestations to the contrary. *See, e.g., Allied-Signal,* 813 P.2d at 231 (Urbigkit, J., specially concurring).

129. The Wyoming Game and Fish Department, in an effort which offers some hope to both the livestock industry and wildlife interests, is moving ahead with its own response to the long-term problem of brucellosis in elk and bison. In cooperation with other wildlife and agriculture agencies from Wyoming, Montana, and Idaho, the Department has in mind two forward-looking goals: (1) protect and enhance the free-ranging elk and bison herds of the Greater Yellowstone Area; and (2) protect and enhance the interests and economic viability of the livestock industry in the same three states. To achieve these goals, the responsible agencies propose to eradicate brucellosis from wildlife in the Greater Yellowstone Area by the year 2010. Lauren McKeever, *Task force goal: Rid park of brucellosis. Wyoming, Idaho, Montana set 2010 as target date*, CASPER STAR-TRIB. Aug. 27, 1993, at B1. Achievement of these goals, however admirable, is made daunting by the fact of widely dispersed and highly elusive individual wild animals, whose numbers are considered substantial. Interview with Bruce Smith, Biologist for the National Elk Refuge, Jackson, Wyo. (Aug. 2, 1993).

130. *See supra* text accompanying notes 115-19.

131. *Parker*, 845 P.2d at 1067-68, 1079-80. *See supra* notes 114-23 and accompanying text.

132. This success may have been short-lived. The *Parker* court no longer exists, as the Wyoming electorate removed Justice Walter Urbigkit from office in November, 1992. He was replaced by Justice William Taylor. Interestingly, Justice Taylor joined Justices Golden, Macy, and Thomas for the majority in the first case to use *Parker* as precedent, Wyoming Game and Fish Comm'n v. J.R. Thornock, 851 P.2d 1300 (Wyo. 1993). In that case Justice Thomas wrote the court's opinion. He cited with approval the *Parker* holding that WYO. STAT. § 23-1-901 "is not ambiguous." *Thornock*, 851 P.2d at 1304. But it was only by finding the statute was ambiguous in *Parker* that Justice Thom-

tory considerations: (1) the seemingly preclusive clarity of the definitions of big and trophy game animals,[133] (2) the legislature's functional placement of those definitions at the beginning of the title and chapter of the Wyoming code in which the wildlife damage laws are found, and (3) the absence of the words "big game" in the portion of the statute which authorizes the Department to consider claims seeking compensation for harm to livestock.[134]

The expansive reading of the wildlife damage law by Justices Thomas, Cardine, and Urbigkit also came at the expense of the plain meaning rule of statutory interpretation and the public interest principles which underlie the doctrine of sovereign immunity. A final casualty of their jurisprudence is the constitutionally significant notion of separate judicial and legislative functions.[135]

At the time Parker filed its claim, the Game and Fish Department could only consider harm to livestock caused by trophy game animals.[136] The wildlife damage statute did not permit the Game and Fish Department to award damages if the harm was wrought by elk, because elk were not defined as trophy game animals.[137] Bison were neither defined as trophy nor big game animals;[138] therefore, the Department could not consider claims for any damage caused by bison. Nonetheless, Parker pursued its claim based on a theory of brucellosis transmission from either elk or bison.

---

as, in his concurrence with Justice Cardine and Urbigkit, was able to find the state potentially liable for damages caused by elk or bison. *Parker*, 845 P.2d at 1079. *See supra* note 87 and accompanying text.

133. Neither elk nor bison were defined as "trophy game animals", and the wildlife damage law directed the Game and Fish Department only to "consider the claims based upon a description of the livestock damaged or killed by a trophy game animal." WYO. STAT. 23-1-901(c) (1991). *See supra* note 13. For the maxim that "technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import," *see* In Re Dragoni, 79 P.2d 465, 467 (Wyo. 1938).

134. WYO. STAT. § 23-1-901(c) (1991). A canon of statutory interpretation which apparently failed to impress Justices Thomas, Cardine, and Urbigkit states:

> Where the legislature has specifically used a word or term in certain places within a statute and excluded it in another place, the court should not read that term into the section from which it was excluded . . . The omission of words from a statute must be considered intentional on the part of the legislature . . . Words may not be supplied in a statute where the statute is intelligible without the addition of the alleged omission . . . This court will not supply omissions in a statute and redress is with the legislature.

In re Adoption of Voss, 550 P.2d 481, 485 (Wyo. 1976).

135. A common view of the judicial function in statutory interpretation places the courts in the role of agents, and the legislature in the role of principal. Justice Oliver Wendell Holmes, a notable proponent of this view, wrote, "if my fellow citizens want to go to Hell I will help them. It's my job." Sunstein, *supra* note 52, at 415 (citing 1 HOLMES-LASKI LETTERS 249 (M. Howe ed. 1953)).

136. WYO. STAT. § 23-1-901(c) (1991).

137. *Id. See supra* note 13.

138. *See supra* note 13.

Justices Golden and Macy read the wildlife damage statute and found it unambiguous.[139] To them, the term "trophy game animal" limited claims of harm to livestock to those alleging "tooth and claw" damage by grizzly bears, black bears, or mountain lions.[140] The other three justices read the same statute and found that it was ambiguous.[141]

Justices Golden and Macy considered the consequences of their reading on both Parker and the general public; they deemed the anticipated results of their jurisprudence not to be absurd.[142] The other three justices, aware of the same consequences to the litigant and the public, deemed the allocation of the loss to Parker and the preservation of sovereign immunity to be absurd.[143] In their interpretation of the wildlife damage statute, the five justices collectively rendered the meaning of the word ambiguous absurd, while simultaneously rendering the meaning of the word absurd ambiguous. The court's internal conflict over the application of these important concepts leaves the public with little to do but wonder and pray.[144]

When Justices Golden and Macy engaged in their review of legislative history, yet another dilemma inherent in statutory interpretation arose. In finding that the legislature did not intend to remove sovereign immunity for damage claims arising from harm inflicted to livestock by big game animals, Justices Golden and Macy relied upon a crucial inference from the legislative history.[145] Their inference is plausible; however, without the strong support provided by their plain meaning analysis, their reliance upon the legislative history would be tenuous. The 1980 session of the Wyoming Legislature amended the wildlife damage statute to create state liability for damage to livestock or other property caused by trophy game animals.[146] The legislature rejected an amendment which would have implied state liability for any wildlife-induced harm to livestock without regard to big game or trophy game classifications.[147]

---

139. *See supra* text accompanying notes 77-82.

140. *Parker*, 845 P.2d at 1050.

141. *See supra* text accompanying notes 87-89.

142. *See supra* text accompanying note 92.

143. *See supra* text accompanying notes 84, 90-93.

144. *Cf.* Landis, *supra* note 52, at 886. Professor Landis passed on another connection between jurisprudence and prayer when he wrote, "A passing acquaintance with the literature of statutory interpretation evokes sympathy with the eminent judge who remarked that books on spiritualism and statutory interpretation were two types of literary ebullitions that he had not learned to read." Justice Urbigkit put an intriguing spin on the role of ambiguity in jurisprudence when he wrote in *Allied Signal*, 813 P.2d at 223, "[I] do not agree with a closed-end and cramped adaptation just like I do not agree that because jurists may differ in the interpretation of a contract, such disagreement necessarily makes the contract ambiguous. *We may be the ambiguity.*" (Emphasis added).

145. *See supra* notes 80-82 and accompanying text.

146. *Id.*

147. S. File 019, 45th Leg., 2d Sess. at 32-34 (1980). *See supra* notes 36-41 and accompanying

In reviewing this legislative rejection, Justices Golden and Macy inferred that the legislature did not want to expose the state to liability from claims arising from big game damage to livestock.[148] Three reasons suggest the possibility of an opposite or nugatory inference: (1) the legislature may have thought the amendment redundant or superfluous and therefore inappropriate for passage; (2) there are no public records explaining why the Wyoming Legislature acted as it did; and (3) the motives of individual legislators are routinely complex, often involve such vote-trading practices as log-rolling, and are universally not fully disclosed.[149]

These factors suggest that legislative intentions are inscrutable and may only be surmised.[150] The availability of a reasonable inference opposite the one drawn by Justices Golden and Macy warns against direct reliance upon legislative history in interpreting statutes. Where the legislative history tends to bolster plain meaning analysis, as was true in *Parker*, its use adds depth to the jurisprudence.[151]

Justices Thomas, Cardine, and Urbigkit did not assess the legislative history of the wildlife damage law.[152] Their decisions not to use legislative history, combined with their avoidance of the obvious conclusions of plain meaning analysis, raise the prospect that the substantive outcome of this controversy dominated their adjudication. While judicial motives are in the abstract as inscrutable as legislative intentions, the possibility that their jurisprudence amounted to a judicially-engineered interest group transfer[153] cannot be discounted.

---

text. *See generally* William H. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69 (1988) (includes analysis of "the 'rejected proposal rule,' which posits that proposals rejected by Congress are an indication that the statute cannot be interpreted to resemble the rejected proposals").

148. Justices Golden and Macy determined that "[t]his legislative action unmistakably reveals a clear intention to limit the claim coverage to livestock damaged or killed by a trophy game animal, viz., black bear, grizzly bear, and mountain lion." *Parker*, 845 P.2d at 1065-66. A big game animal is defined as an antelope, bighorn sheep, deer, elk, moose, or mountain goat. WYO. STAT. § 23-1-101(a)(i) (1991).

149. The potentially pointless nature of the search for legislative intent was described by a commentator who wrote, "There are a hundred ways a bill can die . . . [a]n abortive attempt to enact a bill has no effect. Often proposals with wide support fail of enactment because the legislature lacks the time to enact them or because agreed-on bills become pawns in larger struggles." Frank H. Easterbrook, Statutes' Domains, 50 U. CHI. L. REV. 533, 538-39 (1983). *See also* Peter C. Schanck, *An Essay on the Role of Legislative Histories in Statutory Interpretation*, 80 LAW. LIBR. J. 391, 401 nn. 54-57 (1988).

150. Easterbrook, *supra* note 149, at 547.

151. Use of plain meaning analysis and legislative history may be characterized, albeit atypically, as result-oriented adjudication. In this context, the desired result appears to be literal adherence to statutory language and judicial deference to the legislature. However, a fair analysis cannot rule out motives rooted in a preference for the substantive outcome of limited state liability.

152. In one sentence, Justice Urbigkit dismissed the legislative history. *Parker*, 845 P.2d at 1080. Justice Cardine made no mention of it.

153. Although the Wyoming Constitution explicitly encourages passage of legislation to benefit

The doctrine of sovereign immunity and its related canon of statutory interpretation were hit hard in *Parker*.[154] Justices Thomas, Cardine, and Urbigkit used their judicial power to increase the scope of the State's liability. Even assuming, *arguendo*, that the wildlife damage law was ambiguous, the doctrine of sovereign immunity suggests finding in favor of the State.[155] The public interest principle which underlies the doctrine of sovereign immunity—that public funds should only be made available to private parties after legislative deliberation[156]—appears to have been unpersuasive to Justices Thomas, Cardine, and Urbigkit.

The narrow interpretation of the wildlife damage statute by Justices Golden and Macy kept faith with the notion of judicial restraint where two important factors were present: clear legislative policy was stated in explicitly defined terms, and the putatively disadvantaged group, the livestock industry, had a reasonable prospect of accessing and influencing the legislative process.[157] Both of these factors were present in *Parker*.

Public Policy Implications

In *Parker*, the State is a long term loser.[158] Its liability to damage claims has grown. A consequence of this expanded state liability is that future claimants for compensation may be lured into expensive and probably fruitless battles against circumstances beyond their control.[159] While the State might appear to have the upper hand in fending off future claims for brucellosis-related compensation, it is no victory for the State or its citizens to spend the considerable amount of time and energy required to defend a suit.[160] Given the ultimately unpredictable nature of litigation,

---

the livestock industry, that constitutional provision is explicitly and exclusively addressed to the legislature. *See supra* note 30. *See also* Sunstein, *supra* note 49, at 471 (encouraging courts to "narrowly construe statutes that embody mere interest group deals"). For a superb analysis of the current state of the separation of powers doctrine, *see* Burt Neuborne, *In Praise of Seventh-Grade Civics: A Plea for Stricter Adherence to Separation of Powers*, 26 LAND & WATER L. REV. 385 (1991).

154. *See supra* notes 104-110 and accompanying text.

155. *See supra* note 105 and accompanying text.

156. *Id.*

157. *See, e.g.*, United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

158. In the short term, the State avoided an adverse judgment of potentially more than one million dollars, as well as the negative precedential value such an award might have had. Interview with Dr. E. Tom Thorne, Director of Veterinary Research, Wyoming Game and Fish Department, in Laramie, Wyo. (Sept. 9, 1993).

159. Future owners of diseased livestock will inevitably face burden of proof problems similar to those of Parker. These problems may include imperfect vaccination rates, multiple potential sources of transmission, absence of direct evidence of wildlife-borne transmission, and uncertain infection rates among mobile and elusive big game animals.

160. The *Parker* precedent ensures that the State's liability is not certain. If it were, one might anticipate the smooth functioning of the administrative remedy provided in the wildlife damage statute

losses by the State and consequent payment of large sums in adverse judgments represents an undesirable form of contingent liability.

It is in the better long term interest of Wyoming ranchers and the Wyoming citizenry that ranchers not be invited to waste time and money in a conflict with the State. Here, the *Parker* case is an object-lesson. Parker failed to recover anything from the State. Compounding its misery, Parker also found itself adrift, with no livestock and absent the money spent in litigation, in a vast sea of cultural and economic changes.[161]

The livestock industry, as an interest group, remains a potent political force in Wyoming.[162] Nonetheless, its days of overwhelming political dominance[163] appear to have passed.[164] This is particularly true with regard to federal land management policies, especially in the area of the Greater Yellowstone Ecosystem.[165]

---

and prediction of future litigation would seem unfounded. However, in the event of a future outbreak of brucellosis in a Wyoming cattle herd, the confused outcome of *Parker* offers fertile ground for aggressive attorneys and substantially harmed clients. In light of this, the State may be expected to defend itself against future claims, all at more expense to Wyoming citizens.

161. In addition to the ever-present variables of changing consumer dietary choices, regional competition, shifting interest rates, and foul weather, at least four forces are making livestock ranching in the region around the Parker Ranch an increasingly precarious venture: (1) Federal grazing fees are likely to rise in the near future. A. P., *[Interior Secretary] Babbitt Threatens Higher Grazing Fees if Deal Fails. Opponents May Hit Back with Filibuster,* CASPER STAR-TRIB., Oct. 16, 1993, at B1. (2) Federal Endangered Species Act Protection and related regulations, in the summer of 1993, forced ranchers whose cattle graze immediately west of the Parker's Warm Springs Allotment to suffer the loss and related damage recovery hassles of more than twenty-five cattle to grizzly bears. The official government response was, "We will not go into [critical grizzly bear habitat] and trap and remove bears that are depredating livestock on public lands." Chris Servheen, Interagency Grizzly Bear Study Team Member, U.S. Fish and Wildlife Service, *quoted in* Angus M. Thuermer, Jr., *Togwotee Griz Gets a Reprieve,* JACKSON HOLE NEWS, Oct. 13, 1993, at 1A. (3) Loss of neighboring ranches to residential subdivision is reducing the supply of qualified labor, and cowboy wages are generally too low to attract new entrants. *See also supra* note 61. (4) The rise in recreational use of federal lands periodically puts users such as mountain bike riders and backpackers in conflict with cattle, expressed through displacement of cattle from desired ranges and political antipathy against public land livestock grazing. *See also supra* text accompanying notes 59-65.

162. If political power were purely a reflection of economic importance, the livestock industry would be a bit player in Wyoming. Agricultural services (including ranching, forestry, and fisheries) accounted for just 4.16% of the total gross Wyoming State product in 1988. BUCK MCVEIGH, SENIOR ECONOMIST, & JOHN SARLES, ECONOMIST, DEPARTMENT OF ADMIN. & INFORMATION, WYOMING GROSS STATE PRODUCT REPORT 12 (1991). However, in the 1993-94 Wyoming State Legislature, 40% of the Senators and 30% of the Representatives came from an agricultural background. WYOMING TRUCKING ASS'N, INC., LAWMAKERS OF WYOMING, FIFTY-SECOND WYOMING STATE LEGISLATURE 1993-94, (1993), and interview with Matilda Hansen, State Representative HD 13, in Laramie, Wyo. (Oct. 25, 1993). *See also* Candy Moulton, *Watt: Westerners are 'learning to fear our government'*, CASPER STAR-TRIB., Nov. 15, 1993, at A1 (attributing to former U.S. Dep't of Interior Secretary James Watt the remark, "Wyoming's wealth comes from the state's minerals, but 'our values come from agriculture'").

163. *See supra* notes 30-31 and accompanying text.

164. *See supra* notes 59-65 and accompanying text.

165. *See* Robert B. Keiter and Mark S. Boyce, *Greater Yellowstone's Future: Ecosystem Man-*

In light of the livestock industry's long term political vulnerability, the Game and Fish Department's desire to work cooperatively with ranchers, and the broad public interest in maintaining both ranching and free ranging wildlife, a damage claim structure which pits livestock interests directly against wildlife interests promises pain for all.[166] Further, such a structure raises the specter not of cooperative efforts to eradicate or minimize the spread of brucellosis, but of the elimination of cattle from federal land grazing allotments.[167] Lost access to these grazing allotments would render deeded land less valuable for ranching, and would hasten its conversion to residential or other non-agricultural use. Thus the judicial expansion of the State's liability in *Parker* appears to be a Pyrrhic victory for the livestock industry.

In the presence of powerful socio-economic factors which appear to be adverse to long term livestock interests in Wyoming, and considering the negative effects of State liability to suit,[168] a legislative endorsement of

---

agement in a Wilderness Environment, in THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA'S WILDERNESS HERITAGE 379-409 (R. Keiter & M. Boyce eds., 1991). *See also supra* note 57. *Cf.* John M. Good, *Don't move bears,* JACKSON HOLE NEWS, Oct. 20, 1993, at 4A (Good wrote:

> [R]anching is an integral part of Jackson Hole, and [rancher Paul] Walton is certainly one of the best land stewards in the state. This said, I cannot agree with his opinion that [grizzly] bears should be trapped in [critical] habitat and moved out. As for his observation that other ranchers might be less tolerant than he, I hope they would realize that head-on confrontation with the Endangered Species Act would not be in their best interests").

166. According to Dr. Thorne, ranchers could potentially claim that numerous harmful diseases might have been transmitted to cattle by wildlife. State liability for damages arising from disease-related claims could cost millions of dollars and threaten the financial integrity of the Game and Fish Department. In addition, such liability would create an incentive to keep cattle off of public lands and wildlife off of private lands. Big game animals in Wyoming need to use private lands, which are often crucial for their survival during harsh winters months. The Game and Fish Department strongly prefers a peaceful and cooperative co-existence with livestock interests. Interview with Dr. E. Tom Thorne, Director of Veterinary Research, Wyoming Game and Fish Department, in Laramie, Wyo., (Sept. 9, 1993). *See also* Tom Morton, *Spokesman: G & F Seeks Reform of Wildlife Damage Compensation,* CASPER STAR-TRIB., June 8, 1993, at C1 (stating the Game and Fish Department wants to shift the burden of proving harm to landowners, refine the appeals process for claims, and more fairly distribute compensation funds). Loss prevention and an alternate damage compensation program should be used in lieu of additional legal wrangling between livestock and wildlife interests, (*e.g.* Calf-hood vaccination rates at or above the Dubois area standard of 51.8% may hold promise. *See supra* note 18. In addition, WYO. STAT. § 11-19-106 (1993) provides for state compensation of owners of diseased livestock, as long as the livestock owner complies with proper slaughter procedures and orders, and as long as the livestock were not improperly imported into Wyoming or reasonably known to have been infected with disease prior to their arrival in Wyoming).

167. A.P., *Jackson Hole Ranchers Side with U.S. in Brucellosis Case,* CASPER STAR-TRIB., Jan. 20, 1992 at B1, (quoting former Wyoming Governor and U.S. Senator Cliff Hansen as saying:

> the concern we have is that if, indeed, the federal government were to lose this suit [*Parker II*], it would certainly give the federal government ample opportunity, a real reason, to come in and say, 'why should we continue to permit grazing if ranchers are going to turn around and sue us for situations such as Mr. Parker is faced with over there?'").

168. *See supra* notes 158-61 and accompanying text.

the analysis and conclusions of Justices Golden and Macy is appropriate. Legislative action affirming the State's immunity from damage claims arising from harm to livestock by big game animals would achieve an appropriate balance between the State's interest in fiscal solvency and the livestock industry's need for political and economic viability.[169]

Such legislative action would also prevent the State from acting as an unwitting accomplice in the undesirable demise of ranching in northwest Wyoming.[170] Finally, a legislative correction of the finding of cognizability in *Parker* would restore the proper balance of power between the legislative and judicial branches of government.

CONCLUSION

Given the presence of explicit technical terms, informative legislative history, and a legislature whose job it is to write statutes and balance complex interests, the substitution of judicial policy in *Parker* for the plain meaning of the statutory text upsets the basic balance between the judicial and legislative branches of government.[171]

In several important ways, the approach used by Justices Golden and Macy differs from and is superior to the method applied by Justices Thomas, Cardine and Urbigkit. Justices Golden and Macy gave binding force to the written words of the statute.[172] In so doing they fulfilled the constitutionally significant goal of judicial deference to the legislative branch. They also recognized the benefits of and the court's proper role

169. *Cf.* WYO. STAT. § 1-39-120 (1991) (carefully tailored waiver of sovereign immunity for certain kinds of State negligence in the maintenance of the State highway system keeps damage claims to an affordable level, and imposes the cost of loss compensation, i.e. private insurance, on all the beneficiaries of State roads). *See also supra* notes 166-67.

170. C. Luther Propst, III, of the Sonoran Institute of Tucson, Arizona, conducted a public goal setting exercise in Dubois, Wyoming, on November 20 and 21, 1992. It attracted more than 120 citizens, including 19 ranchers, 28 business-people, 10 education-related workers, 16 retirees, 27 self-employed people, and 8 government workers. They gave both ranching and wildlife conservation their strong support, and forged a vision statement which reads, "Dubois will be a community which celebrates its western heritage, natural resources, open spaces and strong community character, and enhances these values through responsible planning." CITY OF DUBOIS, WHAT COURSE FOR DUBOIS? A REPORT ON THE SUCCESSFUL COMMUNITIES WORKSHOP (1992) (available at the Dubois, Wyoming, Town Hall).

171. "If judges . . . will play fast and loose with 'plain meanings' on which substantial judicial authorities can not themselves agree, if they will impute imaginary intentions to fictitious entities, if they will arbitrarily select purposes and equally arbitrarily forecast consequences, they can not hope to convince laymen that they are acting rationally or usefully." Radin, *supra* note 52, at 885.

172. The value of this approach was neatly put by Frank H. Easterbrook, who wrote, "if statutes' words do not convey meaning and bind judges, why should judges' words bind or even interest the rest of us?" Easterbrook, *supra* note 149, at 534, n. 2.

in adjudicating the doctrine of sovereign immunity. In addition, the opinion of Justices Golden and Macy would have rendered a clear decision, both for the parties to the dispute and for the broader community of interested people who must live with, and may in the future be affected by, the precedent of *Parker*. Unfortunately, in *Parker* these benefits are lost to the citizens of Wyoming, as only two of five justices saw fit to promote them.

Parker also creates bad public policy. The inescapable practical problem of linking any future brucellosis outbreak in livestock with the endemic presence of brucellosis in nearby elk or bison counsels strongly against the finding of cognizability achieved in *Parker*. Both the need for cooperation among wildlife and livestock interests, and the increased potential for high-stakes conflict which now exists, call for legislative action.

Native wildlife and their relatively recently arrived bovine companions will continue to coexist in Wyoming for the foreseeable future, although the terms of their coexistence appear to be changing. Similarly, the wildlife damage laws and their related adjudications which govern a part of the relationship between wildlife and livestock will also continue to evolve. As they do, one can only hope that the methods of statutory interpretation and the relationship between the judicial and legislative branches of government may one day be as finely tuned as were the balances of nature on that fateful day in 1830, when Captain William Sublette moved the first five cattle into the land destined to become Wyoming.[173]

LEONARD R. CARLMAN

173. *See supra* note 1 and accompanying text.