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## When Ferae Naturae Attack: Public Policy Implications and Concerns for the Public and State Regarding the Classification of Indigenous Wildlife as Interpreted Under State Immunity Statutes

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**When *Ferae Naturae* Attack: Public Policy Implications and  
Concerns for the Public and State regarding the Classification  
of Indigenous Wildlife as Interpreted Under State Immunity  
Statutes**

*L. Reagan Florence*<sup>1</sup>

“All meanings, we know, depend on the key of  
interpretation”  
—George Eliot<sup>2</sup>

**I. INTRODUCTION**

On a family campout an 11-year-old boy is stolen, still in his sleeping bag—dragged in the middle of the night from his tent by a wild black bear—the boy is mauled to death.<sup>3</sup> This gruesome and tragic incident sparked a recent perplexing court decision that has unhinged the very notion of municipal and governmental liability under respective immunity statute.<sup>4</sup> The decision proved that there are contrasting opinions and public policy concerns on whether a state government can be held liable for a black bear dismembering a small boy, and on whether a black bear should fall under a State’s

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<sup>2</sup> GEORGE ELLIOT, DANIEL DERONDA (1876).

<sup>3</sup> Israelsen, *see infra* text accompanying note 9.

<sup>4</sup> *See generally* Francis v. State, Utah Div. of Wildlife Res., No. 20111027, 2013 UT 65 (Utah 2013).

waiver of immunity exceptions as a “natural condition” on the land.<sup>5</sup>

State Immunity Acts generally preclude suits against the State in certain narrow situations by providing exceptions for States in regard to municipal tort liability.<sup>6</sup> Under these statutes the state can assert immunity with respect to the recreational use of property, or with respect to conditions on particular unimproved properties.<sup>7</sup> For example, under many municipal immunity statutes there is an exception of a “natural condition” on the land, which holds the State immune to suit if an individual is injured as a result of such condition.<sup>8</sup> This article examines the state of Utah’s Immunity Act (and exceptions), and the policy implications facing the public and State stemming from the statutory interpretation by the Utah Supreme Court in the recent case, *Francis v. State (Francis)*.

The purpose of this article is to show that the Utah Supreme Court came to the wrong decision in *Francis*, by excluding a black bear from the “natural condition” exception under Utah’s Immunity Act, and thereby opening the State to liability. Further this article will show that indigenous wildlife is a condition of the natural land. And for strong public policy reasons, Immunity Acts should be broadly interpreted to include indigenous wildlife within the

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<sup>5</sup> *Id.*

<sup>6</sup> Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 804-05 (2007) (Only the State of Washington has enacted particular legislation that holds governmental defendants liable under tort law similarly to private situations and private tortfeasors, while all other states have statutory measures of limiting such liability under tort law).

<sup>7</sup> 63 C.J.S. MUNICIPAL CORPORATIONS § 1051 (West).

<sup>8</sup> Rosenthal, *supra* note 6, at 808, (stating that jurisdictions typically treat these specific particular immunity sections under either the condition of property/facilities used for recreational purposes, or that of unimproved public property); *see also* Rosenthal at 805-809 (discussing other types of general state immunity statutes that include: immunity for injuries caused by reliance on statutes or other enactments; specified intentional torts of public employees; immunity from particular punitive damages; immunity for the failure to provide adequate police service or protection; a failure to provide adequate firefighting or other emergency services, and medical care, etc).

“natural condition” exception, and alternatively should be drafted to expressly include indigenous wildlife within these exceptions.

First, Section II of this article introduces the tragic 2007 incident of young boy, Samuel Ives, who was tragically mauled, and killed by a black bear in a Utah campground. Litigation from the tragic incident against both the United States and the State of Utah is then introduced, and a history for the Utah case is presented in Section III. Section IV demonstrates the main issue of the article and specifically examines the recent controversial decision by the Utah Supreme Court in the case against the State of Utah, *Francis v. State (Francis)*—where the court excluded a black bear as a “natural condition” on the land, under Utah’s Immunity Act, which opened State to liability.

Section V of the article examines the befuddling reasoning of the Utah Supreme Court’s (majority) holding in *Francis*, that wildlife is excluded as a “natural condition” under both Utah case law and the Immunity Act. Then, Section VI contrastingly displays the paradoxical nature of the majority’s holding under both Utah case law and statutory interpretation, and displays the more appropriate reasoning behind the opinion of the *Francis* dissent. This section further displays that under proper interpretation of both the Immunity Act and Utah case law, indigenous wildlife is a “natural condition”.

Next Section VII displays other jurisdictions and cases where courts have held that indigenous wildlife is a “natural condition”, or condition on the land under Immunity Acts. Following, Section VIII examines specific language of selected Immunity Acts under particular analysis of case law interpretations where wildlife was considered a “natural condition”. This section then offers express suggestions to Utah lawmakers to change the current Immunity Act, as to include wildlife under the “natural condition” exception.

Section IX contemplates the policy considerations under the opinion of the *Francis* majority, and contrastingly presents the negative tax, public, economic, and environmental ramifications of the majority’s decision. Lastly, Section X concludes that the majority’s decision in *Francis* was unfounded and incorrect, and

that a more proper decision would have reflected that of the opinion of the dissent, under proper interpretation of Utah case law and the Immunity Act. This section also reiterates the potential negative public policy concerns and considerations by excluding indigenous wildlife as a “natural condition” under Immunity Act exceptions, and the decision in *Francis*. Further this section restates that Immunity Statutes should be construed broadly to include wildlife, but that to avoid decisions like *Francis* lawmakers should change current Immunity Acts to include wildlife as a “natural condition”.

## II. DISCUSSION OF UTAH INCIDENT

For the state of Utah, June 2007 avowed a tragic news headline, “Boy killed by bear—the 11 year old was pulled from his tent”.<sup>9</sup> Even more unsettling were the details that began to emerge hour by hour with the updated reports. The boy, Samuel Ives, was sleeping in a tent with his family (the Mulveys) at the State-run Timpooneke Campground when in the middle of the night a black bear dragged Ives from the tent in his sleeping bag and killed him.<sup>10</sup> Reports surfaced that during the incident Ives’ family could hear his screams of terror, but could not locate him outside of the tent; the family filed an abduction report after their unsuccessful searching.<sup>11</sup> Several hours later however, officers successfully found Ives’ young and lifeless body approximately 400 yards from the family’s tent.<sup>12</sup> The following day the bear, which weighed approximately 250-300 pounds, was located by the extensive tracking of five houndsmen, and 26 dogs.<sup>13</sup> The black bear was captured, killed, and was confirmed by DNA testing to be the same bear that killed Ives.<sup>14</sup>

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<sup>9</sup> Sara Israelsen, *Boy killed by bear—The 11-year-old was pulled from his tent*, DESERET NEWS (June 19, 2007, 12:35 AM), <http://www.deseretnews.com/article/665194896/Boy-killed-by-bear.html?pg=all>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

It was later revealed that the same black bear that killed Ives had previously raided Timpooneke Campground, and had attacked another camper.<sup>15</sup> At the earlier incident, the camper, with the aide of his friends, successfully chased off the black bear.<sup>16</sup> The camper notified Utah Highway Patrol, which then notified the Utah Division of Wildlife Resources (DWR). DWR then went on a search to track and destroy the bear - the DWR's policy when dealing with an aggressive 'Level Three' black bear.<sup>17</sup> However, the search proved fruitless, and DWS did not find or capture the bear.<sup>18</sup> The agents decided to return in the morning and clean the campsite of food, or anything that might attract the bear back to the site of the attack.<sup>19</sup>

The DWR agents left the site believing that no one would use it, and even waved to the family of Samuel Ives (the Mulveys) as they passed them going in the opposite direction on the road.<sup>20</sup> In fact, the DWR agents did nothing to warn anyone who might use at the campground of the potential danger, nor did they warn any potential camper of the earlier bear attack.<sup>21</sup> Tragically, the Mulveys did use the campground, and unfortunately, they failed to properly pack away food items—including a can of soda and a granola bar that young Ives brought into the tent for a later snack.<sup>22</sup> Heartbreakingly, the same black bear that had earlier terrorized

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<sup>15</sup> *Francis*, 2013 UT 65, ¶ 8 (noting that the bear attack on the other camper occurred early in the morning of June 17, 2007, the same day that Samuel Ives was killed).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at ¶ 10. *See also* UTAH DIVISION OF WILDLIFE RESOURCES, UTAH BLACK BEAR MANAGEMENT PLAN PUBLICATION NO.00-23, (June 27, 2000) [hereinafter BLACK BEAR MANAGEMENT PLAN] [p. 21] available at: <http://wildlife.utah.gov/bear/pdf/00bearplan.pdf> (“Level Three bears are chronic or acute offenders that have caused significant property damage or are a threat to human safety. The prescribed solution is destruction of the bear, usually by Wildlife Services, with which the DWR has a Memorandum of Understanding.”).

<sup>18</sup> *Id.* at ¶ 11.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at ¶ 13.

<sup>21</sup> *Francis*, 2013 UT 65, ¶ 12.

<sup>22</sup> *Id.* at ¶ 14.

Timpooneke Campground returned in the night, stole Ives from the family tent in his sleeping bag, and mauled him to death.<sup>23</sup>

### III. CASE HISTORY AND RECENT RULING

Because of the travesty and the horrific death of their son, the Mulveys initiated separate legal suits against the United States government and the United States Forest Service, as well as the State of Utah and the Utah Division of Wildlife Resources, asserting “that state and federal officials knew about a bear encounter with humans and searched for the bear but failed to close the area until the animal could be found.”<sup>24</sup>

The Mulveys brought suit in United States District Court in *Francis v. United States* under the Federal Tort Claims Act (“FTCA”).<sup>25</sup> More specifically, under the FTCA Ives’s asserted that the United States Forest Service was negligent for its failure to warn campers of the black bear, or to close the campground after it knew of the bear’s presence in the area.<sup>26</sup> In May 2011, the court granted judgment in favor of the Mulveys, awarding them over \$1.9 million dollars for the United States’ negligence in protecting Samuel Ives.<sup>27</sup>

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<sup>23</sup> *Id.* at ¶ 14.

<sup>24</sup> Sara Israelsen-Hartley, *Family sues in '07 bear incident*, DESERET NEWS (Mar. 29, 2009), <http://www.deseretnews.com/article/695265672/Family-sues-in-07-bear-incident.html?pg=all>.

<sup>25</sup> *See Francis v. U.S.*, No. 2:08CV244 DAK, 2011 WL 1667915, at \*1 (D. Utah May 3, 2011).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 7-8, (Interestingly, in the opinion, the court found that the United States was 65% fault for Samuel Ives’s death, that the State of Utah (through the Department of Wildlife Resources) was 25% at fault for failing to contact the Forest Service, and that the Mulveys were 10% at fault for attracting the bear back to the site by leaving food out in the open. The court opined that although no price could replace the life of young Samuel Ives that the amount of \$3 million was an appropriate award based on other awards from previous child-related wrongful death suits. However, the Mulveys were limited to collecting \$2 million for the cap of liability from the United States government due to their administrative claim under 28 U.S.C. § 2675(b). Therefore because the United

In the second, and more monumental action, the Mulveys initiated suit in district court against the State of Utah and the Department of Wildlife Services, in *Francis v. State (Francis)*, in March of 2008.<sup>28</sup> Through the many appeals process, the commencement of this action would prove paramount for the purposes of this article, and in July 2013, would eventually lead to the monumental determination of whether a black bear is a “natural condition” on public or controlled lands.<sup>29</sup> Similar to their negligence claims against the United States government in *Francis v. United States*, in *Francis v. State*, the Mulveys alleged negligence on part of the State of Utah and the Department of Wildlife Services (DWR) for failure to warn them about the dangerous bear in the area.<sup>30</sup>

Initially, the district court dismissed the Mulveys’s claims under the “permit exception” of the Utah Governmental Immunity Act.<sup>31</sup> The Mulveys appealed the decision, and the Supreme Court reversed and held that the permit exception did not apply to the particular facts of the case.<sup>32</sup> The State of Utah, on remand, asserted two alternative arguments: that it owed no duty to the Mulveys, and even if it did, any liability was precluded under the “natural condition” exception to the Utah Governmental Immunity Act—to which the district court dismissed the case for a second time.<sup>33</sup>

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States was 65% at fault, the Mulveys were awarded 65% of the \$3 million damages calculation, which equaled \$1,950,000).

<sup>28</sup> See generally *Francis v. State*, Utah Div. of Wildlife Res., 2010 UT 62, 248 P.3d 44.

<sup>29</sup> *Id.*

<sup>30</sup> *Francis v. State*, 2013 UT 65, ¶ 1; see also *Francis v. U.S.*, No. 2:08CV244 DAK, 2011 WL 1667915, at \*1 (D. Utah May 3, 2011) (where the Mulveys asserted claims of negligence against the United States Forest Service under the Federal Torts Claims Act).

<sup>31</sup> *Francis*, 2013 UT 65, ¶ 1; see Utah Code Ann. § 63G-7-301 (5)(k) (West) (where the “permit exception” provides that the immunity for a governmental entity is not waived if the injury arises from “the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization.”).

<sup>32</sup> *Francis*, 2013 UT 65, ¶ 1.

<sup>33</sup> *Id.* at ¶ 2; see also UTAH CODE ANN. § 63G-7-301 (5)(k) (West 2013).



After the second dismissal, the Mulveys appealed and raised three arguments: that under case law doctrine the State of Utah was disallowed from presenting its alternative arguments on remand because the alternative arguments had not originally been raised on the record; that the State owed the Mulveys a duty of care; and lastly that the “natural condition” exception of the Utah Governmental Immunity Act was inapplicable to the State’s defense.<sup>34</sup> The State responded that it was not disallowed from presenting the alternative arguments on remand; that it owed no duty to the Mulveys because no “special relationship” had been created; and that it was precluded from liability because the black bear that attacked Samuel Ives was “natural condition” on the land under the Immunity Act’s exception.<sup>35</sup>

Based on these arguments, in July 2013, the Supreme Court of Utah reversed the district court’s previous grant of summary judgment for the State.<sup>36</sup> The court held that the State was not barred in presenting its alternative arguments on remand; that the State created a “special relationship” with the Mulveys<sup>37</sup>; and that a bear was not considered a “natural condition” under the Immunity Act, and therefore the State of Utah was not immune from liability.<sup>38</sup> Based on these holdings, the Utah Supreme Court reversed and remanded the case for further proceedings that are to be construed consistent with this most recent opinion.<sup>39</sup>

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<sup>34</sup> *Francis*, 2013 UT 65, ¶ 2.

<sup>35</sup> *Id.* at ¶ 3.

<sup>36</sup> *Id.* at ¶ 4.

<sup>37</sup> *Id.* at ¶ 34 (where the Supreme Court held that the State had created a “special relationship” with the Mulveys because it took specific action to protect them as the next group to use the campsite. After the initial attack on Mr. Francom [the man who was attacked earlier the day of Ives’s death at the same campground] DWR agents swept the campsite to make sure no one was there and that there was nothing that would attract the bear back to the location. Because of this, the court stated that the State knew of “a specific threat to a distinct group and took specific action to protect that group”, and thereby created a “special relationship” with anyone that would occupy the campsite, including the Mulveys).

<sup>38</sup> *Id.* at ¶ 4.

<sup>39</sup> *Francis*, 2013 UT 65, ¶ 49 (it should be noted that as this article went to print, the case had been recently remanded, therefore there was no information

#### IV. UTAH'S STATE IMMUNITY ACT AND THE "NATURAL CONDITION" EXCEPTION

In *Francis v. State (Francis)*, the crux of the State of Utah's liability hung on the issue of whether the black bear that killed Ives was considered a "natural condition" on the land under Utah's Immunity Act, specifically section § 63G-7-301 (5)(k).<sup>40</sup> The interpretation and classification of the bear was crucial because if it was considered a "natural condition" on the land, under the operation of the Immunity Act, the State would have been precluded from liability in *Francis*.<sup>41</sup>

Specifically, the Immunity Act states that Utah as a governmental entity, does not waive immunity from suit if specific injury arises, results, or is in connection with "any *natural condition* on publicly owned or controlled lands."<sup>42</sup> However, the text of the Immunity Act itself lacks clarification or direction as to what constitutes or defines a "natural condition" on publicly owned or controlled lands.<sup>43</sup> The purpose of the "natural condition" exception in Utah is to necessarily protect the State from liability arising on Utah's vast wild landscapes; it is unreasonable to expect the government to protect every member of the public from every potentially hazardous encounter on such terrain.<sup>44</sup>

In *Francis*, the State claimed that section 301(5)(k) of the Immunity Act precluded any liability against the State, because under interpretation of the statute, the black bear that killed Ives was circumscribed as a "natural condition".<sup>45</sup> The court applied a three-part-test, in order to determine whether the State of Utah had immunity under Utah's Immunity Act: (1) whether activity was undertaken, which activity sanctioned as a governmental function;

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available at the time of publication as to the final disposition of the case—including any award of damages).

<sup>40</sup> *Id.* at ¶ 39; *see generally* UTAH CODE ANN. § 63G-7-301 (5)(k) (West 2013).

<sup>41</sup> *Id.* at ¶ 40; *see generally* UTAH CODE ANN. § 63G-7-301 (West 2013).

<sup>42</sup> UTAH CODE ANN. § 63G-7-301(5)(k) (West 2013) (emphasis added).

<sup>43</sup> *Id.*

<sup>44</sup> *See* Grappendorf v. Pleasant Grove City, 2007 UT 84, ¶ 8.

<sup>45</sup> *Francis*, 2013 UT 65, ¶¶ 16-17.

(2) whether the government waived immunity for the particular sanctioned governmental activity; and (3) whether there was an exception to the waiver of immunity for the activity sanctioned as a government function.<sup>46</sup>

In *Francis*, the only disputed part of the test was whether the “natural condition” exception was applicable as an exception to the State of Utah’s waiver of immunity.<sup>47</sup> The court determined that the “natural condition” exception was not applicable in the State’s case as an exception to waiver of immunity, because the black bear that killed Ives was not a “natural condition” on publicly owned or controlled lands under section 301(5)(k) of the Immunity Act.<sup>48</sup>

The Utah Supreme Court’s puzzling interpretation that the black bear that killed Ives was not a “natural condition” on the land ultimately lost the State its case, and precluded the State from asserting governmental immunity under Utah’s Immunity Act.<sup>49</sup> Further, the interpretation of the Immunity Act under *Francis*, raises serious public policy stretching over public, municipal, safety, environmental, and economic concerns.<sup>50</sup>

## V. THE MAJORITY’S “NATURAL CONDITION”

To fully understand the importance of the determination that the black bear that killed Ives did not fall under the “natural condition” exception in *Francis*, it is imperative to look first at how the court came to its conclusion, which ultimately opened the State to liability. This began with the court’s construction of statutory interpretation generally, and then specifically of the narrow interpretation of the Immunity Act’s “natural condition” exception.

The court in *Francis* stated that the determination of whether any condition on the land is a “natural condition” is a matter of statutory interpretation, and that the objective is to first

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<sup>46</sup> *Id.* at ¶ 39 (citing *Blackner v. State, Dept. of Transp.*, 2002 UT 44, ¶ 10, 48 P.3d 949 (Utah 2002)).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See generally *Francis*, 2013 UT 65, ¶ 49.

<sup>50</sup> See generally *infra* Section IX.

look to the evidentiary intent and purpose of the legislature—illustrated by the “plain meaning” of the text.<sup>51</sup> Next, the court stated that to define the “plain meaning” of the text, the court should look to the “lay meaning” or usual (daily) meaning of the text.<sup>52</sup> To state otherwise, to comprehend legislative intent behind the text of the statute, the court should look to the plain meaning. In order to find the plain meaning of the text, the court should look to an everyday or “ordinary” understanding of the text.

Specifically the court in *Francis*, construed the ordinary meaning of the terminology “natural condition on the land”, citing its *own view* as support for the definition of the term’s ‘ordinary meaning’.<sup>53</sup> The court used this interpretation scheme to determine that, in *its view*, “condition on the land” meant features tied into the land solely, such as rivers, trees, and lakes, and that because bears are naturally *transitory* they don’t fit this ‘ordinary meaning’.<sup>54</sup> The court further determined that, in *its view*, “one would not ordinarily refer to a bear, or wildlife generally, as a ‘condition on the land’”.<sup>55</sup> The court thus limited the “natural condition” exception to solely topographical features or conditions.<sup>56</sup> The majority did so based on *its own* opinion on the ordinary meaning, with no reference to any other outside resources, other than *its* own past opinions where only topographical structures were considered “natural conditions”.<sup>57</sup>

Aside from its own opinion that a bear was not considered a “natural condition” under an ordinary meaning, the court further relied on another Utah Supreme Court case, *Grappendorf v. Pleasant Grove City*, with a similar holding.<sup>58</sup> *Grappendorf* involved the parents of a young, deceased boy, suing the city in a wrongful death action after a major gust of wind picked up and

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<sup>51</sup> *Francis*, 2013 UT 65, ¶ 41 (citing *Grappendorf*, 2007 UT 84, ¶ 9).

<sup>52</sup> *Id.* (citing *O’Dea v. Olea*, 2009 UT 46, ¶ 32, 217 P.3d 704).

<sup>53</sup> *Id.* at ¶¶ 41-42 (emphasis added).

<sup>54</sup> *Id.* (emphasis added).

<sup>55</sup> *Id.* (emphasis added) (the court extends the black bear to other forms of “indigenous wildlife” in Utah for purposes of statutory interpretation).

<sup>56</sup> *Id.* at ¶ 42-46.

<sup>57</sup> *See Francis*, 2013 UT 65, ¶¶ 42-48.

<sup>58</sup> *Id.* at ¶ 43-46.

threw a moveable pitching mound at the boy and killed him.<sup>59</sup> The city asserted the “natural condition” exception to waiver of immunity under the Immunity Act, stating that a gust of wind that picked up the pitching mound was a “natural condition”.<sup>60</sup> However, the city was unsuccessful in their claim of immunity under the Immunity Act’s “natural condition” exception, as the gust of wind was not considered a “natural condition” on the land.<sup>61</sup>

Similar to *Francis*, the court in *Grappendorf* encountered the task of deciphering the meaning of a “natural condition” under Utah’s Immunity Act.<sup>62</sup> The majority considered the plain language of the statute when determining applicability of the “natural condition” exception.<sup>63</sup> The court used the Webster’s Dictionary and determined that the word “natural” was limited to something produced or present in nature, and was then modified by the word “condition”, which meant, a state of being or mode.<sup>64</sup> It then stated that the language “on publicly owned or controlled lands” limited the terminology of “natural condition”, indicated a *position* on the land “topographical in nature, not merely atmospheric”.<sup>65</sup> The court determined that the language of the statute required *some* physical contact, supported by the surface, or a part of the land in order to be a “natural condition” and that a gust of wind did not fall under the exception of the Immunity Act.<sup>66</sup>

In *Francis*, the court gleaned seemingly additional support that a “natural condition” is exclusively topographical in two other Utah Supreme Court decisions, *Stuckman ex rel. Nelson v. Salt Lake City and Blackner v. Department of Transportation*.<sup>67</sup> The

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<sup>59</sup> *Grappendorf*, 2007 UT 84, ¶ 2.

<sup>60</sup> *Id.* at ¶ 3.

<sup>61</sup> *Id.* at ¶ 15.

<sup>62</sup> *Id.* at ¶ 10.

<sup>63</sup> *Id.*

<sup>64</sup> *Grappendorf*, 2007 UT 84 (citing WEBSTER’S II NEW COLLEGE DICTIONARY, 729 (1995)).

<sup>65</sup> *Id.* at ¶ 10.

<sup>66</sup> *Id.* at ¶¶ 10-15; (specifically the court stated, “[a]tmospheric conditions, like the gust of wind that allegedly led to [the boy’s] fatal injuries, do not constitute natural conditions on the land”).

<sup>67</sup> *Francis*, 2013 UT 65, ¶ 44.

court in *Stuckman* determined that a river was a “natural condition” on the land.<sup>68</sup> And avalanches (and the originating snow-packs) were determined to be conditions on the land, in *Blackner*.<sup>69</sup>

Lastly, in *Francis*, the court naively reasoned that if the legislature intended to include indigenous wildlife as part of the Immunity Act’s “natural condition” exception, then it would have specifically stated so.<sup>70</sup> The court stated that when a statute leaves the possibility for narrow exceptions open for interpretation, any uncertainties should be resolved in way of the general provision instead of the exceptions to the provision.<sup>71</sup>

## VI. THE DISSENT’S “NATURAL CONDITION”—THE APPROPRIATE INTERPRETATION UNDER PROPER UTAH IMMUNITY ACT AND UTAH CASE LAW ANALYSIS

The Utah Supreme Court’s reasoning behind the interpretation that indigenous wildlife (specifically the black bear) was not a “natural condition” is nothing but befuddling, and lacks evidentiary support under proper interpretation of case law under application of the Immunity Act. Because of this, *Francis* was not a unanimous decision—as two justices appropriately wrote a dissenting opinion.<sup>72</sup> In the dissent’s opinion, the State was immune

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<sup>68</sup> *Id.* (citing *Nelson By and Through Stuckman v. Salt Lake City*, 919 P.2d 568, 574-75 (Utah 1996)).

<sup>69</sup> *Id.* (citing *Blackner*, 2002 UT 44, ¶ 16).

<sup>70</sup> *Id.* at ¶¶ 45-46.

<sup>71</sup> *Id.* at ¶ 47 (citing *Nini v. Mercer Cnty. Cmty. Coll.*, 995 A.2d 1094, 1100 (N.J. 2010)).

<sup>72</sup> *Francis*, 2013 UT 65, ¶ 50 (Parrish, J., dissenting) (dissenting opinion was filed by Justice Parrish, in which Justice Lee joined).

because the presence of the black bear as indigenous wildlife constituted a “natural condition on publicly owned or controlled lands”.<sup>73</sup> The dissent appropriately scrutinizes the majority’s opinion, and illustrates that the holding should have affirmed that indigenous wildlife constitutes a “natural condition” under a more broad interpretation of the Immunity Act and prior case law.<sup>74</sup> Because of these distinctions, the State should have been immune from liability.<sup>75</sup>

**A. Indigenous wildlife as a “natural condition” under proper analysis of the ‘ordinary meaning’ under Utah’s Immunity Act**

The dissent stated that, although the majority used a proper statutory analysis scheme to interpret the Immunity Act, it did not come to the proper outcome in determining that indigenous wildlife was not a “natural condition” on the land, as the “textual analysis suggest[ed] the *contrary* conclusion”.<sup>76</sup> The dissent criticized the majority for “lack[ing] both explanation and textual analysis” for its why, under the ordinary meaning, wildlife would not constitute a “natural condition.”<sup>77</sup>

Contrary to the majority’s unfounded opinion, under the plain language of the statute, the ordinary opinion of the “natural condition” of Utah’s vast landscapes would undoubtedly include wildlife as an essential component of the natural topography.<sup>78</sup> Utah’s lands and wildlife, under the plain meaning and ordinary opinion, are, and always have been intricately intertwined—fused by nature.<sup>79</sup> As the dissent eloquently states:

[I]ong before the borders of Utah were drawn, the land, in its natural condition, contained large and

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<sup>73</sup> *Id.* at ¶¶ 50-62.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at ¶ 51 (emphasis added).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at ¶¶ 53-54.

<sup>79</sup> *Francis*, 2013 UT 65, ¶ 54 (Parrish, J., dissenting).

small indigenous wildlife in addition to its topographical features. And today, conservation efforts aimed at preserving the natural condition of Utah's public lands include support for and rehabilitation of native species. To read "natural condition" in the limited context of topographical features ignores an entire segment of the unique natural condition of Utah's public lands.<sup>80</sup>

Further providing evidence of the lay opinion, the dissent remarks that when drawing a comparison of the naturally existing conditions between Utah and other states, one would irrefutably describe the abundant and diverse wildlife that habituates Utah's lands.<sup>81</sup> Additionally, this diverse wildlife is a component for drawing in tourists, who visit particular areas of Utah's landscapes specifically to enjoy the diverse indigenous wildlife.<sup>82</sup> This cogent reasoning demonstrates that the majority was mistaken in its analysis, and that under the ordinary 'lay' meaning, the meaning of "natural condition" encompasses indigenous wildlife.

The majority's narrow interpretation of the Immunity Act goes against the very purpose of the Act, which was passed to protect the State from particular liabilities, as it cannot be reasonably expected to protect the public from every condition on government owned natural lands.<sup>83</sup> The dissent displays the majority's bewildering reasoning that if the legislature meant to include wildlife within the statute it would have, as the court had previously taken no issue with broadly construing the exception to include to rivers, avalanches, and cliffs, even when the Act itself

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at ¶ 55 (specifically the dissent states that, "[a] component of the natural condition of the land in Utah is the presence of deer, elk, moose, and black bears").

<sup>82</sup> *Id.* (the dissent further draws a comparison between Utah and Yellowstone National Park, as tourists are drawn to both Yellowstone and Utah for both the topography as well as the wildlife).

<sup>83</sup> *See Grappendorf*, 2007 UT 84, ¶ 8.



does not expressly define such applicability.<sup>84</sup> Therefore, the very purpose of the Immunity Act has been and can be reasonably be inferred to intend for a broad interpretation, in order for municipal liability protection, and the majority should have construed the Immunity Act broadly to effectuate this intent.

Lastly, and most interestingly, the majority perplexingly admitted that wildlife could fall under this exception, stating, “we readily acknowledge that wildlife *could* plausibly fall within the scope of the natural condition exception”.<sup>85</sup> With this admission the majority displays that it is conceivable that the lay opinion could reasonably include wildlife within the “natural condition” exception.<sup>86</sup> Therefore, its determination that the black bear did not fall under the “natural condition” exception is capricious and unfounded.

### **B. Indigenous wildlife as a “natural condition” under proper analysis of Utah case law**

The dissent further indicates that the majority improperly interpreted and placed undue reliance on the foundation of the *Grappendorf* case.<sup>87</sup> A closer look at the actual reading of the *Grappendorf* case reveals a much different result than the majority’s conclusion.<sup>88</sup> The *Grappendorf* case stated that “natural” means to be “[p]resent in or produced by nature”, and is a modifier to the word “condition” which means “[a][m]ode or state of

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<sup>84</sup> See *Francis*, 2013 UT 65, ¶ 60 (Parrish, J., dissenting); see also UTAH CODE ANN. § 63G-7-301 (5)(k) (West).

<sup>85</sup> *Francis*, 2013 UT 65, ¶ 45 (emphasis added).

<sup>86</sup> See 2013 UT 65 at ¶ 60 (Parrish, J., dissenting).

<sup>87</sup> *Id.* at ¶¶ 56-57.

<sup>88</sup> *Id.*, see *Grappendorf*, 2007 UT 84, at ¶ 15. Interestingly, it should be noted that Justice Parrish wrote the Utah Supreme Court’s decision in *Grappendorf*, which held that an atmospheric condition on the land was not a “natural condition” on the land, and also wrote the dissenting opinion in *Francis*, where he disagrees that only topographical features constitute a “natural condition” on the land.

being.”<sup>89</sup> The prepositional phrase “on publicly owned or controlled lands” limits the terminology of “natural condition”.<sup>90</sup> Then in looking to the contextual usage of “on” would be “[u]sed to indicate . . . [a] [p]osition above and in contact with” or “[c]ontact with a surface, regardless of position.”<sup>91</sup>

Subsequently, under a more careful reading of *Grappendorf*, a “natural condition” requires *contact* with the land, as it refers to a state of being or a mode present or produced by nature, which, as the dissent remarked, would include the black bear that attacked Ives as indigenous wildlife.<sup>92</sup> As the dissent stated:

[w]hile I would agree that one does not normally refer to a particular animal as a ‘natural condition on the land,’ the presence of indigenous wildlife generally is as much a part of the natural condition of land as are the rivers, lakes, or trees cited by the majority.<sup>93</sup>

Further of issue is the majority’s interpretation that, under *Grappendorf*, natural conditions must be only topographical.<sup>94</sup> A careful reading illustrates that the case *did not* exclusively limit topographical conditions as “natural conditions” but rather held that such features “can” constitute “natural conditions” as they *are* on the land.<sup>95</sup> The requirement merely states that a “natural condition” needs to have its existence or physical contact on or with the land, or be a part of the land.<sup>96</sup> The purpose of the *Grappendorf* decision was to exclude atmospheric conditions, like wind, from being considered “natural conditions”, not to hold that topographical conditions *exclusively* constitute such.<sup>97</sup>

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<sup>89</sup> *Francis*, 2013 UT 65, ¶ 52 (citing *Grappendorf*, 2007 UT 84, ¶ 10 (citing WEBSTER’S II NEW COLLEGE DICTIONARY 729 (1995))).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at ¶ 53.

<sup>93</sup> *Id.*

<sup>94</sup> *Francis*, 2013 UT 65, ¶ 56 (Parrish, J., dissenting).

<sup>95</sup> *Id.* at ¶¶ 56-57 (citing *Grappendorf*, 2007 UT 84, ¶ 10) (emphasis added).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

While the majority is correct that wildlife is *not* topographical, it completely fails to recognize that wildlife *is* a part of the land. It is erroneous to say that wildlife is not tangibly and organically connected to the land, simply because it is *transitory*.<sup>98</sup> There is a deep-rooted connection between wildlife and the land, which forms a complete ecological cycle of nature. Wildlife is created and is born on the land, it dies on the land, and its remains become a part of the land. Contrary to the majority's opinion, wildlife is a part of the land, it is supported by the land's surface, and it is completely reliant ecologically for sustainment and its natural habitat on the land.<sup>99</sup> Because of this indissoluble connection between wildlife and the land, the contextual analysis requirements in *Grappendorf*; under the application of the Immunity Act's "natural condition" exception, was satisfied in *Francis*.<sup>100</sup>

Another point of contention is the second case that the majority cited as support, *Blackner v. Department of Transportation*, where avalanches were considered a "natural condition" under the Immunity Act exception.<sup>101</sup> The *Francis* dissent correctly pointed out that the majority's holding in *Francis* is directly and paradoxically in contrast with its previous holding in *Blackner*, because an avalanche is not topographical itself, but only originates and travels down or on top of features that are topographical.<sup>102</sup> The dissent in *Francis* stated:

[w]hile the path of an avalanche may be traced on a map, its limited existence means that such efforts will not endure when the weather or the season changes. In this way, an avalanche shares little with

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<sup>98</sup> See *Francis*, 2013 UT 65, ¶ 42 (where majority states that in its opinion the "ordinary meaning" of a "condition on the land" is tied with features that have a much closer tie to the land, like lakes, rivers, trees, and topographical structures. The majority states that because a bear is "transitory in nature" it is not *directly* a part of the land).

<sup>99</sup> *Id.* at ¶ 57 (Parrish, J., dissenting).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at ¶ 58.

<sup>102</sup> *Id.*

enduring topographical features such as rivers or cliffs, but is more akin to indigenous wildlife.<sup>103</sup>

The above distinction evidences that even a temporary, seasonal, and arguably transitory product of weather, has been considered a “condition on the land” for the purpose of the natural condition” exception.<sup>104</sup> Consequently, under the court’s very own previous reasoning and holding, a “natural condition” on the land need not be *solely topographical*, and can possess some cog of natural transition to fit under the distinction.<sup>105</sup> Where the court had previously held that such a temporary and transitory condition on the land, such as an avalanche, is a “natural condition” then, “native species that have been supported for hundreds, if not thousands, of years ‘on’ the land must also fall within the ambit of the natural condition exception”.<sup>106</sup> The majority’s own reasoning suggests that indigenous wildlife should qualify under the description of a “natural condition” on the land. To hold otherwise is paradoxical, and goes against the court’s very own previous holdings.<sup>107</sup>

Therefore, under both the proper broad interpretation of the Act’s ordinary meaning, and Utah case law, indigenous wildlife is a “natural condition” on the land, and should have been so considered as such by the majority. As the dissent rightfully argues, “the presence of indigenous wildlife generally is as much a part of the *natural condition* of land as are the rivers, lakes, or trees cited by the majority”.<sup>108</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> *See Blackner*, 2002 UT 44, ¶¶ 15-16.

<sup>105</sup> *See Francis*, 2013 UT 65, ¶ 58 (Parrish, J., dissenting) (emphasis added).

<sup>106</sup> *Id.*

<sup>107</sup> *See generally Blackner*, 2002 UT 44, ¶¶ 15-16.

<sup>108</sup> *Francis*, 2013 UT 65, ¶ 53 (Parrish, J., dissenting) (emphasis added).

**VII. WILDLIFE AS A “NATURAL CONDITION”—  
SUPPORT FROM OTHER JURISDICTIONS WHERE  
WILDLIFE HAS BEEN APPROPRIATELY INTERPRETED  
AS A CONDITION ON THE LAND**

Aside from the baffling holding of the majority in basing its reasoning on paradoxical interpretation of both the Immunity Act and Utah case law, had the majority comprehensively looked to other states for elucidation on whether wildlife should be considered a “natural condition”, it would have found that there is support for the interpretation of wildlife as a condition on the land.<sup>109</sup> In fact, in many jurisdictions throughout the United States, indigenous wildlife has been considered a naturally occurring condition on the land, as construed broadly under particular immunity or recreational statutes, and that the distinction is not solely placed upon topographical structures in nature.<sup>110</sup>

Because the support from other jurisdictions involve injuries caused by wildlife, it is first important to recognize how wildlife is treated under tort law and the American legal system, in order to better understand the reasoning behind other jurisdictional decisions. In the American legal system, wild animals are often called *ferae naturae*. Wild animals are defined as animals that are not considered statutorily domesticated or controlled but rather are “naturally untamable, unpredictable, dangerous, or mischievous.”<sup>111</sup> “Wild creatures, such as game, are part of the land and pass with it, though it cannot be said that they are within the ownership of any particular person.”<sup>112</sup> Under the Restatement (Second) of Torts, a wild animal is one that “is not by custom devoted to the service of mankind at the time and in the place in which it is kept.”<sup>113</sup>

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<sup>109</sup> See generally *Arroyo v. State of California*, 40 Cal. Rptr. 2d 627 (Cal. Ct. App. 1995); *Estate of Hilston ex rel. Hilston v. State*, 160 P.3d 507 (Mont. 2007); and *Belhumeur v. Zilm*, 949 A.2d 162 (N.H. 2008).

<sup>110</sup> *Francis*, 2013 UT 65, ¶ 59 (Parrish, J., dissenting) (emphasis added).

<sup>111</sup> BLACK'S LAW DICTIONARY (9th ed. 2009) (West).

<sup>112</sup> *Id.* citing G.C. Cheshire, *Modern Law of Real Property* 118 (3d ed. 1933).

<sup>113</sup> RESTATEMENT (SECOND) OF TORTS § 506 (1977).

The Restatement of Torts advises that a landowner is not generally liable for harm caused by wildlife on his or her property unless the landowner exerts some containment or control of the wild animal, or the animal was introduced to the area by the landowner as a non-indigenous species.<sup>114</sup> Generally, wild animals are considered a “condition on the land” or a “natural condition” under recreational use statutes (similar to immunity statutes—which preclude liability).<sup>115</sup>

In stating the above, the following cases from neighboring jurisdictions, should be considered in stark contrast to the Utah Supreme Court’s narrow interpretation of the Utah Immunity Act, and the holding that wildlife is not a “natural condition” in *Francis*.<sup>116</sup>

#### A. Montana:

One of the closest cases on point to *Francis* is a Montana Supreme Court case, *Estate of Hilston ex rel. Hilston v. State*, where a hunter was the victim of a fatal grizzly bear attack.<sup>117</sup> The representative of the hunter’s estate sued the state for negligence and sought damages for the attack that happened on state owned land while the hunter was hunting elk.<sup>118</sup>

Unlike the Utah Supreme Court, the Montana Supreme Court held that grizzly bears were “conditions of the property” under Montana’s State Recreational Use Immunity Act, barring Hilston’s representatives from recovering of damages against the State.<sup>119</sup>

The Montana Supreme Court went through an analysis of the important distinction of how the law has treated the

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<sup>114</sup> 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 37:2 (2d ed.).

<sup>115</sup> *Id.* at § 39:36.

<sup>116</sup> *See generally Francis*, 2013 UT 65, ¶ 59 (Parrish, J., dissenting) (where the dissent readily points to much of the following case law support to contrast the majority’s decision with other jurisdictions).

<sup>117</sup> *See Hilston*, 160 P.3d 507.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at ¶ 17.

classification and legal applications when dealing with wild indigenous animals.<sup>120</sup> The typical rule cited by the court was that the owner of land is not liable for wild animals that are indigenous to the land, unless the owner of the land has controlled possession or the animal, or the animal is a non-native, that the owner introduced to the area.<sup>121</sup>

The Montana Supreme Court determined that, because grizzly bears are indigenous wild animals that exist upon the property in the area of the attack, the bear fit under the “condition of the property” for the Montana Recreational Use Immunity Act.<sup>122</sup>

### **B. California:**

The opinion in *Hilston* cited a similar case, *Arroyo v. State of California*, from the California Court of Appeals, which supported the holding of wildlife being a condition of the land.<sup>123</sup> *Arroyo* was a case about a young boy who was hiking a trail in a state park with his family when he was mauled by a mountain lion.<sup>124</sup> The boy’s family sued the State for infliction of emotional distress and negligence.<sup>125</sup>

Similar to the legal considerations in *Francis* and *Hilston*, *Arroyo* dealt with the issue of state immunity under the California’s immunity statute, called the California Tort Claims Act.<sup>126</sup> The Act “. . .provides an absolute immunity from liability for injuries

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<sup>120</sup> *Id.* at ¶¶15-17 (the court recognized the general legal distinction between *domitae naturae* (domestic animals) and *ferae naturae* (wildlife) in terms of the application of landowner duties and liabilities towards third parties under the law. Generally under the law, a landowner assumes liability towards third parties regarding injuries resulting from domestic animals. Contrastingly, generally under the law, a landowner assumes *no liability* regarding injuries resulting from wildlife).

<sup>121</sup> *Id.* at ¶ 15, *citing* *Nicholson v. Smith*, 986 S.W.2d 54, 60 (Tex. App. 1999).

<sup>122</sup> *Id.* at ¶ 15.

<sup>123</sup> *Hilston*, 160 P.3d 507 at ¶ 16, *see Arroyo*, 40 Cal. Rptr. 2d 627, 627.

<sup>124</sup> *Arroyo*, 40 Cal. Rptr. 2d 627 at 627.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

resulting from a natural condition of any unimproved public property.”<sup>127</sup>

Also similar to the plaintiffs in *Francis*, the plaintiffs in *Arroyo* asserted that a wild animal is not a “natural condition” of the state park, and that only physical conditions to the land are applicable under the statute.<sup>128</sup> However, the court disagreed and narrowly determined that within the statute (and interpreting the intent of the legislature) wild animals are a natural condition of unimproved public property, and fit within the meaning of the statute because they are wild and the state did not have custody of the animals.<sup>129</sup>

The court in *Arroyo* determined for policy reasons that the State wanted to encourage the public use of hiking trails in public regions, and that such immunity statutes help to relieve the State from taking on the large burden of public safety, and of defending against legal suits.<sup>130</sup> The Court stated that the statute “. . . requires the public to assume the risk of using hiking trails in state parks”.<sup>131</sup>

### C. New Hampshire:

Even in cases with privately owned land, courts have readily interpreted that wildlife is a “natural condition”. For example, the Supreme Court of New Hampshire in *Belhumeur v. Zilm*, held that wild bees, that attacked an individual, were a condition of purely natural origin as condition on the land.<sup>132</sup> Because of this, the court determined under common law that the landowner, on whose land the injury occurred, was immune from liability for injuries to

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<sup>127</sup> CAL. GOV'T CODE ANN. § 831.2 (West).

<sup>128</sup> *Arroyo*, 40 Cal. Rptr. 2d 627 at 630-31.

<sup>129</sup> *Id.*, (the court cited the California Supreme Court's reasoning in *Ex parte Maier*, 37 P. 402, 404 (Cal. 1894), where it stated “[t]he wild game within a state belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so . . .”).

<sup>130</sup> *Id.* at 631.

<sup>131</sup> *Id.*

<sup>132</sup> *Belhumeur v. Zilm*, 949 A.2d 162 (N.H. 2008).



another resulting from the wild bees.<sup>133</sup> The court reasoned that the wild bees that attacked and injured an individual on the land were a “condition of purely natural origin”.<sup>134</sup> Because the bees were wild animals, indigenous to the property, and no evidence indicated that the landowner contributed to the existence of the bees or nest, the landowner was immune from liability under common law.<sup>135</sup>

The above cases illustrate that dangerous indigenous wildlife have consistently been defined as a “natural condition” or condition on the land, fitting neatly under immunity or recreational act exceptions, as well as under common law. Aside from the above cases, throughout numerous other jurisdictions in the United States, migratory wildlife has been held to fit within the exceptions of various immunity statutes.<sup>136</sup>

The Utah Supreme Court should have comprehensively studied these examples, and gleaned that other jurisdictions support the notion that indigenous wildlife is not solely confined to topographical features, and therefore a black bear could, and should have been considered a “natural condition” under the Immunity Act.<sup>137</sup> Like many of these other jurisdictions, the Utah Supreme Court should have construed the “natural condition” exception more broadly, as to include wildlife within the Immunity Act.

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 163-64.

<sup>135</sup> *Id.*

<sup>136</sup> *See generally* Nicholson v. Smith, 986 S.W.2d 54, 60 (Tex. App. 1999) (where the court held that a recreational vehicle park (RV park) was not liable for injuries to camping guests caused by fire ants); *and* Palumbo v. State Game & Fresh Water Fish Comm'n, 487 So.2d 352, 353 (Fla. App. 1986) (where the court held that a recreational park (RV park next to a state park) was not liable for injuries to a swimmer resulting from an alligator attack. The court held that the animal was in its natural habitat, natural in its own existence, and was indigenous to the area—factors that barred liability on part of the State).

<sup>137</sup> *Francis*, 2013 UT 65, ¶ 59 (Parrish, J., dissenting).

### VIII. WILDLIFE AS A “NATURAL CONDITION”— LEGISLATIVE WORKS AND SUGGESTIONS FOR LAWMAKERS

As the result in *Francis* dramatically displayed, regarding municipal liability, lawmakers should decide whether wildlife should be included within immunity and recreational use statutes. Lawmakers facing the drafting and amending of immunity or recreational acts, with an applicable “natural condition” (intended to include indigenous wildlife), should look to other jurisdictions where courts have construed such acts to include wildlife.

Lawmakers must further look to the specific language and text of statutes that specifically state the inclusion of wildlife, to aid as templates for drafting or amending the acts. This should be done to give full effect of the statutes, by utilizing examples where courts have found evidence of legislative intent in interpreting the laws under the facts of particular cases, either under broad construction or expressly. By using such examples in drafting or amending immunity statutes, lawmakers can lay out a clear map to courts by displaying clear intent to include indigenous wildlife under “natural condition” exceptions—and hopefully protect the State from outcomes like *Francis*.

Specifically, Utah lawmakers should redraft the current Immunity Act—as to include indigenous wildlife within the meaning of the “natural condition” exception; in order to preclude particular municipal liability; and to avoid outcomes like *Francis*. Listed below are several examples of immunity or recreation use statutes, and court decisions regarding the interpretation of the acts. These examples should benefit Utah (and like jurisdictions) as suggestions in drafting or amending immunity statutes.

**(1) Montana:** The Montana Recreational Immunity Act lacks specific legislative language that asserts explicitly that

wildlife is considered a “condition of the property”.<sup>138</sup> Instead, the Montana Supreme Court has broadly construed the statute to include wildlife as such a condition of the property.<sup>139</sup> For instance, in the *Hilston* case, the Supreme Court of Montana interpreted the Recreational Immunity Act broadly to allow a grizzly bear to fit under the exception of a “condition of the property”.<sup>140</sup> The purpose of the Recreational Immunity Act is to “grant a landowner relief from liability to persons gratuitously entering land for recreation purposes.”<sup>141</sup> The Montana Recreational Immunity Act specifically states:

A person who uses property, including property owned or leased by a public entity, for recreational purposes, with or without permission, does so without any assurance from the landowner that the property is safe for any purpose if the person does not give a valuable consideration to the landowner in exchange for the recreational use of the property. The landowner owes the person no duty of care with respect to the *condition of the property*, except that the landowner is liable to the person for any injury to person or property for an act or omission that constitutes willful or wanton misconduct.<sup>142</sup>

**(2) California:** The purpose of the California Tort Claims Act is to limit liability of particular public entities in order to ensure that the public has access to certain recreational areas.<sup>143</sup> The limitation of liability is intended to result in cost savings to the public, by eliminating the need for funds to cover ‘potential’ litigation defense costs that would occur otherwise, from injury related suits on governmental lands.<sup>144</sup> The Act specifically

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<sup>138</sup> MONT. CODE ANN. § 70-16-302 (West); *cf.* UTAH CODE ANN. § 63G-7-301 (5)(k) (West) (which also has a similar provision for “natural condition” but does not define expressly what constitutes a “natural condition” on the land).

<sup>139</sup> *Hilston*, 160 P.3d at ¶¶ 14-15.

<sup>140</sup> *Id.*

<sup>141</sup> *Simchuk v. Angel Island Comty. Ass'n*, 833 P.2d 158, 161 (Mont. 1992), *overruled by Saari v. Winter Sports, Inc.*, 64 P.3d 1038 (Mont. 2003).

<sup>142</sup> MONT. CODE ANN. § 70-16-302(1) (West) (emphasis added).

<sup>143</sup> *Arroyo*, 40 Cal. Rptr. 2d at 630.

<sup>144</sup> *Id.*

includes a non-exclusive list of topographical features, but does not limit the list as inclusive of only topographical features as natural conditions.<sup>145</sup> The California Tort Claims Act provides:

Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any *natural condition* of any lake, stream, bay, river or beach.<sup>146</sup>

Although wildlife is not specifically mentioned in the statute, the court in *Arroyo* broadly interpreted the statute to include a mountain lion as indigenous wildlife that would constitute a “natural condition” under the immunity provision.<sup>147</sup> In California, courts have construed the “natural condition” exception to include: a lake boating accident; an injury from a man-made sandbar on a beach; the collapse of a cliff in an unimproved area of a state park; death from falling rocks; and the death of an individual caused by mauling by a mountain lion in a state park.<sup>148</sup>

**(3) Texas:** In Texas, although wild animals are not explicitly mentioned by the Texas Tort Claims Act, the Editor’s Notes section states that under the recreational use statute, “natural conditions” include “. . . a sheer cliff, a rushing river, or even a *concealed rattlesnake*”.<sup>149</sup> This clearly suggests that in Texas the statute does not exclusively include topographical structures, but also includes wild animals as a “natural condition”.

**(4) Wisconsin:** Wisconsin’s Recreational Use Statute explicitly states that wild animals fall within the liability exceptions of the State (with limited exceptions). Stating that a landowner, or governmental agent is not “. . . liable for the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner’s property or for any death or

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<sup>145</sup> CAL. GOV’T CODE ANN. § 831.2 (West) (2012).

<sup>146</sup> *Id.* (emphasis added).

<sup>147</sup> *Arroyo*, 40 Cal. Rptr. 2d at 630.

<sup>148</sup> 2 Cal. Affirmative Def. § 38:108 (2013 ed.).

<sup>149</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 75.002 (West) (emphasis added).

injury resulting from an attack by a wild animal”.<sup>150</sup> This language makes it clear that wild animals are included within the liability exception for the state, and is helpful for potential interpretation issues, because of the transparency of including wild animals within the statute.

Although the majority in *Francis* stated that if the legislature intended wildlife to be considered within the Immunity Act, it would have stated so in the Act, statutes and decisions from other jurisdictions; as illustrated above, indicate otherwise.<sup>151</sup> In fact, it seems the opposite is true, that courts in these jurisdictions interpret applicable Immunity Acts more broadly to encompass wildlife as an applicable condition on the land, or a “natural condition”. The Utah Supreme Court should have likewise interpreted Utah’s Immunity Act broadly to allow for the black bear to be considered as part of the “natural condition” exception, which would have precluded liability for the State.

Because *Francis* displayed that the Utah Supreme Court requires more definite language to consider wildlife a “natural condition”,<sup>152</sup> lawmakers should change the Immunity Act to expressly include indigenous wildlife. Currently, the Utah Immunity Act and natural condition exception reads:

Immunity from suit of each governmental entity is not waived [. . .] if the injury arises out of, in connection with, or results from [. . .] (k) any natural condition on publicly owned or controlled lands.<sup>153</sup>

It is proposed that Utah lawmakers make the following necessary changes to the current Immunity Act, as to explicitly include indigenous wildlife within the definition of the natural condition exception:

Immunity from suit of each governmental entity is not waived [. . .] if the injury arises out of, in

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<sup>150</sup> WIS. STAT. ANN. § 895.52(2)(b) (West), (emphasis added).

<sup>151</sup> See *Hilston*, 160 P.3d at ¶¶ 14-15; *Arroyo*, 40 Cal. Rptr. 2d at 630; Tex. Civ. Prac. & Rem. Code Ann. § 75.002 (West).

<sup>152</sup> *Francis*, 2013 UT 65, ¶¶ 45-47.

<sup>153</sup> UTAH CODE ANN. § 63G-7-301(5)(k) (West).

connection with, or results from [ . . . ] (k) any natural condition on publicly owned or controlled lands—  
[where natural condition refers to both naturally occurring topographical structures on the land (such as rivers, lakes, and mountains), as well as indigenous wildlife on the land].

This simple change to the text of the statute would satisfy the ‘want’ of the majority in *Francis* for the legislature to expressly include the intended language on wildlife in the statute.<sup>154</sup> Utah and similar jurisdictions should take note from the express legislative language used in jurisdictions Texas and Wisconsin, where immunity statutes expressly state that wild animals fall within the “natural condition” exception, or fall under the immunity exception in general.<sup>155</sup>

### IX. WILDLIFE EXCLUDED AS A “NATURAL CONDITION”—PUBLIC POLICY CONSIDERATIONS UNDER FRANCIS

It could be argued that, as a matter of public policy, the Utah Supreme Court came to the correct decision in *Francis*. One such concern is that the court is not extending the “natural condition” exception past what the legislature had stated within the statute.<sup>156</sup> Interpretation of the statute under a conservative or traditional ‘textualist’ reading might agree that the Utah Supreme Court interpreted the statute correctly by following the letter of the law within the bounds of the text of the statute.<sup>157</sup> Textualists would

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<sup>154</sup> *Francis*, 2013 UT 65, ¶¶ 45-47.

<sup>155</sup> See TEX. CIV. PRAC. & REM. CODE ANN. § 75.002 (West 2007); Wis. Stat. Ann. § 895.52(2)(b) (West 2013).

<sup>156</sup> See *Francis*, 2013 UT 65, ¶¶ 45-47.

<sup>157</sup> ‘Textualist’, derived from ‘textualism’ is a traditionally based theory of statutory interpretation, where the text within the statute is solely the evidentiary basis of the statute’s original meaning, and governs how the statute should be interpreted. This is contrasted with other methods of statutory interpretation schemes, such as looking into the intent of the legislature, and a historical meaning behind the passing of the statute, as aid in interpretation of the meaning

argue in line with the majority in *Francis*, that if the legislature intended wildlife to be considered a “natural condition” on the land, then they would have put the language in the statute.<sup>158</sup>

Certainly, public policy may dictate that a narrow construction of the statute is required. However, as other jurisdictions with similar statutes have proven, immunity acts have been construed broadly, despite the lack of specific inclusion of wildlife within the text of the acts.<sup>159</sup> Unlike the majority’s reasoning, it is inconceivable and irrational for the legislature to expressly list every single mechanism that constitutes a “natural condition” within the exception of the statute in order for the court to construe the statute appropriately.<sup>160</sup> Reasonably, the very intent of the Immunity Act calls for broad application, to protect the State from liabilities arising from hazards on unimproved government property.<sup>161</sup> The court itself had previously broadly construed the Act under prior case law to include topographical features, when the Act does not expressly provide for such application.<sup>162</sup> Therefore, the majority’s narrow ‘textualist’ interpretation that the black bear was not a “natural condition” under the Immunity Act’s exceptions was unsubstantiated, and it should have held otherwise.

Further reflecting the majority’s opinion, is the idea of public satisfaction in holding the State of Utah responsible for heightened safety concerns in state parks and on state lands. Had the court come to an opposite conclusion, the results could have caused serious apprehensions about the idea of State immunity in general. The public could have possibly taken issue with the State,

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of the text; *see generally Textualism*, JUDGEPEdia.ORG, <http://judgepedia.org/index.php/Textualism> (last visited Nov 1, 2013).

<sup>158</sup> *See Francis*, 2013 UT 65, ¶ 46, (where the majority states, “the legislature could easily have stated expressly that the State retains immunity for injuries arising from indigenous wildlife”).

<sup>159</sup> *See generally Arroyo*, 40 Cal. Rptr. 2d 627 (Cal. App. 2d Dist.1995); *Hilston*, 160 P.3d 507 (Mont. 2007).

<sup>160</sup> *See generally Francis*, 2013 UT 65, ¶ 60.

<sup>161</sup> *See Grappendorf v. Pleasant Grove City*, 2007 UT 84, ¶ 8 (Utah 2007).

<sup>162</sup> *See Francis*, 2013 UT 65, ¶ 60. (Parrish, J., dissenting); *see also* UTAH CODE ANN. § 63G-7-301 (5)(k) (West 2008).

for having preclusion to liability in egregious situations on public lands involving wildlife. This could potentially result in public distrust in the legislature, as well as the current Immunity Act and State system. However, even if such public dissatisfaction and distrust were to result, then a public call to action for the legislature to change the law could occur. It can be argued that it often takes tragic or unfortunate occurrences to display areas of the law that call for reformation or change; such change is a necessary component in our political system and society as a democracy.

There could have been negative public backlash through public condemnation, by not holding the state liable for the incident—especially when state agents had knowledge of the bear's presence in the area.<sup>163</sup> In the court of public opinion, the people would likely empathize with the side of apparent 'justice' for an innocent 11-year old, who met such tragic ends—even if such 'justice' comes at the cost of the inappropriate statute interpretation. However, the public should be far more concerned if the judiciary chooses its decisions based on public satisfaction over the proper interpretation of the law. Such risky decision-making places the entire concept of the law and justice in a box of invalidity and arbitrariness. This result does not provide justice, and is certainly not exemplar for a law abiding society.

Finally, those who side with the majority might also argue that were the State not liable in *Francis*, then it would result in decreased tourism because of public fear in visiting government run parks. These results could ultimately have an adverse effect on the economic system's entire economy and of the State and Parks Systems. However, there are heavier negative implications regarding public policy and economic concerns under the decision in *Francis*.<sup>164</sup>

As will be discussed, the Utah Supreme Court's decision in *Francis*, carries far more potentially damaging public policy

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<sup>163</sup> See *Francis*, 2013 UT 65, ¶¶ 7-10 (where the court discusses that the DWR had knowledge that an aggressive black bear had frequented the campground earlier the day of Samuel Ives's death).

<sup>164</sup> See *infra* text and accompanying notes in Section 0.



consequences for the public, than if it had held that wildlife is a “natural condition” on the land.<sup>165</sup> Primarily, governmental liability costs taxpayers money in general, as funds are redistributed to cover potential litigation costs and settlements.<sup>166</sup> Because of *Francis*, an entirely new classification of liability causing devices has now been recognized—which is wildlife.<sup>167</sup> By adding wildlife as another group of devices that can create liability for the State, the ramifications from this heightened liability will adversely cost the taxpayers, local economies, the State Parks System, and will ultimately cause an unreasonable burden to the State.<sup>168</sup> As will be discussed, the decision in *Francis* could detriment Utah’s indigenous wildlife populations, and such faunae have previously been and should continue to be protected and preserved.<sup>169</sup>

Generally governmental liability imposes significant burdens and costs on taxpayers, and specifically burdens the portion of the public needing governmental assistance—who are likely to lose out on resources when fund allocation goes to paying litigation costs and judgments.<sup>170</sup> For instance, the allocation of resources in regards to taxes and governmental funds are significantly reduced because of governmental tort liability, regarding the “optimal ratio of government benefit to taxes” by elected officials.<sup>171</sup> When judgments and litigation expenses are rendered against the State, government officials are faced with the decision to reduce funds available for future allocation, raise taxes, or to incur and divert the debt to future budgets where it will be repaid at market-rate-interest (jurisdiction permitting).<sup>172</sup>

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<sup>165</sup> *Id.*

<sup>166</sup> *See infra* text and accompanying notes 170-172.

<sup>167</sup> *See generally Francis*, 2013 UT 65, ¶¶ 48-49 (where the court holds that the black bear is not a “natural condition” under the Immunity Act, therefore the State could not raise this defense to preclude its liability).

<sup>168</sup> *See infra* text and accompanying notes 174-184.

<sup>169</sup> *See infra* text and accompanying notes 190-193.

<sup>170</sup> Rosenthal, *supra* note 6 at 870.

<sup>171</sup> Rosenthal, *supra* note 6 at 832.

<sup>172</sup> *Id.*

Currently, *Francis* is in remand, and because the State has been precluded from asserting immunity for liability under the Immunity Act, this could likely result in the State paying damages to the Mulveys; the calculations of which could be potentially significant. As was mentioned in the beginning of this article, the Samuel Ives's family (the Mulveys) was awarded over 1.9 million dollars from the United States after winning its suit in federal court.<sup>173</sup> It can be inferred that if state and federal parks and entities were held liable for every unfortunate act where indigenous wildlife injured a human, then such large awards reasonably could preclude public use and park economic viability.

In fact, the Utah Park System and some parks are already facing financial difficulties and the possibilities of closure. Due to existing budget concerns and deficiencies, a 2011 Utah State Park Legislative Audit Report suggested that the State consider the privatization, or pilot the privatization of several State parks.<sup>174</sup> In 2011, only nine out of forty-three Utah parks made enough money to not require State funding.<sup>175</sup> Therefore, lawmakers ordered the report to collaborate ideas on how to make Utah parks more efficient.<sup>176</sup> The Audit Report proposed that in order to cut costs, certain parks should be completely closed, and that jobs and employee positions should be completely eliminated for many of the Utah parks.<sup>177</sup>

Further, the Utah State Park's General Fund has been significantly decreasing in recent years—from over \$12-million dollars in 2008, to only \$6.8 million in 2012.<sup>178</sup> This decrease has

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<sup>173</sup> See *Francis v. U.S.*, No. 2:08CV244 DAK, 2011 WL 1667915, at \*7-8 (D. Utah May 3, 2011).

<sup>174</sup> STATE OF UTAH OFFICE OF THE LEGISLATIVE AUDITOR GENERAL, A PERFORMANCE AUDIT OF UTAH STATE PARKS 49, 57 (2011) [hereinafter AUDIT REPORT], available at [http://le.utah.gov/audit/11\\_03rpt.pdf](http://le.utah.gov/audit/11_03rpt.pdf).

<sup>175</sup> Brock Vergakis, *Audit: Some Utah State Parks May Need to Close*, STANDARD EXAMINER, XPLORE OUTDOORS, (Jan. 18, 2011), <http://www.xploreutah.net/story/audit-some-utah-state-parks-may-need-close>.

<sup>176</sup> *Id.*

<sup>177</sup> AUDIT REPORT, *supra* note 174 at 31-57.

<sup>178</sup> FRIENDS OF UTAH STATE PARKS, FRIENDS OF UTAH STATE PARKS PARK REPORT, 8-9, <http://friendsofutahstateparks.org/sites/default/>

resulted in the reduction of many of the parks' dates of operation and hours; fewer outreach programs; fewer law enforcement officers in the parks; the deferment of many maintenance issues and repairs; as well as the termination of twenty-two full-time employees.<sup>179</sup>

Adding proverbial fuel to the already existing financial fire for State parks and local economy was the recent partial government shutdown in October 2013. Closure for the majority of the parks lasted approximately ten days, before any State intervention for any re-openings.<sup>180</sup> Because of the partial shutdown, it was estimated that Utah's tourism took a significant financial impact loss of 30 million dollars, with a majority of the hit coming from the closure of national and state parks and related businesses.<sup>181</sup>

It is therefore reasonable to deduce that the already existing financial burdens will not improve with newly impending heightened liability on the State; government funds could be tightened generally, and specifically for the allocation of certain programs. If heightened liability adds to the dissolution of State Park funds, it is also reasonable to conclude that this will have a rippling adverse impact on the public—as State Parks make up an essential part of the Utah's public economy and way of life.<sup>182</sup> Utah's Department of Natural Resources has stated, “[t]he Utah state park system was created to provide recreation and educational opportunities for citizens of Utah and to stimulate local economies.”<sup>183</sup> According to the Utah Department of Natural Resources (DNR), state parks provide “tremendous economic

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files/ UtStPksBudgetPresentation2011-09.pdf (last visited Sept. 14, 2013).

<sup>179</sup> *Id.*

<sup>180</sup> Dennis Romboy, *Government Shutdown Hit Utah Tourism for \$30M*, DESERET NEWS (Oct. 24, 2013, 3:17 PM), <http://www.deseretnews.com/article/865589076/Government-shutdown-hit-Utah-tourism-for-30M.html>.

<sup>181</sup> *Id.*

<sup>182</sup> AUDIT REPORT, *supra* note 174, at 71.

<sup>183</sup> *Id.*

benefits to [Utah's] state and local communities through increased revenue and tourism".<sup>184</sup>

Additionally, it is completely irrational to place the burden of protecting the public from indigenous wildlife on the State. The dissent in *Francis* reasonably acknowledged the key importance of the natural condition exception for State immunity, opining that especially in naturally dense public lands, like Utah's vast natural landscape, the government cannot be expected to protect every person against every condition that might be dangerous on public lands.<sup>185</sup> Placing this heavy burden of liability on the State would result in serious restrictive measures and prohibitions on public use of respective lands.<sup>186</sup> As the dissent stated in its conclusion, "[t]he natural condition exception thus requires that those who voluntarily use unimproved public land assume some of the related risks as part of the price paid for the benefits of its use."<sup>187</sup> Furthermore, wildlife are potentially unpredictable and dangerous, and for these reasons alone, it should be considered unreasonable for the public to expect the State to protect it from every incident of contact with wildlife on State lands.<sup>188</sup> Injury is therefore a "foreseeable" risk that one takes, when adventuring in the "unimproved wilderness", and the State should not be responsible for this risk.<sup>189</sup>

Lastly, there also must be some protection in place for indigenous wildlife in their natural habitats, as Utah's wildlife has

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<sup>184</sup> UTAH DEP'T OF NATURAL RES., ECONOMIC BENEFITS OF STATE PARKS, <http://stateparks.utah.gov/resources/about/economic-benefits-state-parks> (last visited Nov. 1, 2013) (stating that such significant state revenues include: generating \$9.85 in local economic impact for every \$1 of general fund appropriation; generating \$67 million in state economic benefit through day-use, camping and golf; paying \$11.2 million to individual counties in 2010 property tax for off-highway vehicles and boats; and collecting and paying more than \$1 million in state and local taxes to counties and communities).

<sup>185</sup> *Francis*, 2013 UT 65, ¶ 62 (Parrish, J., dissenting) (citing *Grappendorf*, 2007 UT 84, ¶ 8).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> BLACK'S LAW DICTIONARY, *supra* note 111 (where "wild animals" are defined as "untamable, unpredictable, dangerous, or mischievous").

<sup>189</sup> *Francis*, 2013 UT 65, ¶ 62. (Parrish, J., dissenting).

significance to its natural ecology and people.<sup>190</sup> The majority of Utah's vast, wild, landscape is made up of governmental public lands; reasonably the natural habitat of many of Utah's indigenous wildlife species populations is located within these boundaries.<sup>191</sup> This means that realistically, many times humans are stepping into the natural habitat of wildlife, not *vice versa*. Further, unfortunately natural-habitat-loss in Utah has already resulted in the reduction of many native wildlife populations throughout the state, calling for a comprehensive wildlife conservation strategy.<sup>192</sup> These conservation strategies and relating funds were put in place under strong policy concerns to "effectively restore and enhance wildlife populations and their habitat[s], and prevent the need for additional listings on the Endangered Species List".<sup>193</sup> Such conservation efforts support the idea of the public concern for the "rehabilitation

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<sup>190</sup> Specifically Utah's indigenous bear population carries significant past and present ecological and cultural symbolic importance to Utah's Ute Indian Native American Tribes. Even annually, many tribes hold a ceremonial spring social dance where they perform the Ute Bear Dance; which origins back to the fifteenth century. See Lynda D. McNeil, *Ute Indian Bear Dance: Related Myths and Bear Glyphs* [spot.colorado.edu/~lmcneil/UteBearDance.pdf](http://spot.colorado.edu/~lmcneil/UteBearDance.pdf) (last visited Nov. 13 2013); *The Southern Ute Indian Tribe*, SOUTHERN UTE INDIAN TRIBE, <http://www.southernute-nsn.gov/culture/bear-dance/> (last visited Nov. 13 2013).

<sup>191</sup> See generally GOVERNOR'S PUBLIC LANDS POLICY COORDINATION OFFICE, <http://governor.utah.gov/PublicLands/>; and [http://governor.utah.gov/PublicLands/Images/Map\\_UtahFederalLand8x11.pdf](http://governor.utah.gov/PublicLands/Images/Map_UtahFederalLand8x11.pdf) (last visited Nov. 14, 2013) (where according to the site and accompanying map, 64% of Utah lands are managed by the Federal government, and 10% managed by the State); see also BUREAU OF LAND MGMT, UTAH STATE OFFICE, <http://www.blm.gov/ut/st/en.html> (last visited Nov. 14, 2013) (where the Utah BLM states that it manages approximately 42 percent of the State of Utah, which encompasses approximately 22.9 million acres of public lands); see also generally UTAH DIV. OF WILDLIFE RES. PUBL'N NO. 05-19: UTAH COMPREHENSIVE WILDLIFE CONSERVATION STRATEGY (effective Oct. 1 2005-2015) [hereinafter CONSERVATION STRATEGY], [http://wildlife.utah.gov/cwcs/11-03-09\\_utah\\_cwcs\\_strategy.pdf](http://wildlife.utah.gov/cwcs/11-03-09_utah_cwcs_strategy.pdf) (last visited Nov 1, 2013) (where the Conservation Strategy covers the conservation concerns and efforts of many diverse specimens of Utah's wildlife, many of which are located on Utah's public lands).

<sup>192</sup> CONSERVATION STRATEGY, *supra* note 191, at 3-5.

<sup>193</sup> *Id.*

of native species” as part of the “natural condition” of Utah lands.<sup>194</sup> Utah has long-standing public policy concerns for protecting even seemingly dangerous wildlife in the State of Utah; the black bear and cougar populations have both been specifically protected species since 1967.<sup>195</sup>

In certain instances, like in the *Francis* case, when such unfortunate attacks occur, the animals are often hunted down and terminated under State policy.<sup>196</sup> Although there are reasonable policy concerns for the termination of proven deadly or dangerous animals for the protection of the public, there are policy concerns for protecting and preserving these wild animals in their own domain.<sup>197</sup> Wildlife should remain protected, especially when in certain circumstances humans are theoretically merely visitors in the wild and wondrous natural world, and are reasonably on the ‘turf’ of indigenous wildlife.

## X. CONCLUSION

In conclusion, The Utah Supreme Court in *Francis*, should have held that the black bear that killed Samuel Ives, as indigenous wildlife, constituted a “natural condition” under proper interpretation of both Utah’s Immunity Act, as well as Utah case law, and therefore liability against the State of Utah should have been precluded in the case. A black bear is as much a part of the land, as the land itself as a part of nature; the majority even admits that it reasonably could be perceived as a “natural condition”.<sup>198</sup> Further, Utah case law has not precluded the determination that indigenous wildlife fall under the “natural condition” exception of the Immunity Act.<sup>199</sup>

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<sup>194</sup> *Francis*, 2013 UT 65, ¶ 54. (Parrish, J., dissenting).

<sup>195</sup> BLACK BEAR MANAGEMENT PLAN, *supra* note 17, at 1.

<sup>196</sup> *See Francis*, 2013 UT 65, ¶ 10; *see also* BLACK BEAR MANAGEMENT PLAN, *supra* note 17, at 21.

<sup>197</sup> *See generally supra* notes 190-193

<sup>198</sup> *Francis*, 2013 UT 65, ¶ 45.

<sup>199</sup> *See generally Grappendorf*, 2007 UT 84, ¶¶ 10-15; *Blackner*, 2002 UT 44, ¶¶ 10-16.

Although there could have been potential concerns of public distrust and negative backlash for not holding the State of Utah liable under the Immunity Act in *Francis*, there are heavier negative policy concerns in the current decision that spread over public, municipal, safety, environmental, and economic concerns. As has been discussed, State Parks are already grappling with serious financial and budgetary issues, and adding liability suits against the State will reasonably only add to these budgetary issues.<sup>200</sup> Such issues could reasonably be said to cause a chain reaction in the reduction and even possible closure of State Parks; the public could potentially lose access to beloved recreational activity, or such places could become privatized with increased costs for public use. The addition of heightened liability on the State, could reasonably further inflame the already troublesome budgetary concerns facing the Utah State Parks system.<sup>201</sup> As a trickling-effect, this liability could also potentially hurt the employment and overall economies for the State of Utah, as well as the taxpayers.

Further, although injuries and deaths caused by indigenous wildlife, on government owned land are tragic, existing Immunity Acts and statutes should be interpreted broadly to allow for indigenous wildlife to fall under the definition of a “natural condition” or “condition” on the land. If the courts refuse to broadly construe the “natural condition” exception, Utah, and similar lawmakers, should amend Immunity Acts to reflect that a “natural condition” to not only include topographical structures, but also indigenous wildlife. At the very least, lawmakers should include such information in the commentary to Immunity or Recreational Acts. These simple changes could rectify interpretative issues, and ensure that wildlife is expressly incorporated into intended immunity exceptions. Such changes would further relieve some of the major policy driven concerns that were previously discussed for the State of Utah, and other states facing similar issues.

Lastly, there should be a balance struck between human enjoyment of State parks, along with the preservation of indigenous

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<sup>200</sup> See generally *supra* notes 174-183.

<sup>201</sup> *Id.*

wildlife and its natural habitats. And court interpretations like *Francis* could have a negative impact on these efforts. Because wildlife in Utah has been excluded as a “natural condition” on the land, the State now faces potentially serious liability implications concerning the protection of the public from indigenous wildlife on government owned lands.<sup>202</sup> The public should be able to use public property in its “natural condition” for enjoyment and recreational purposes, but the burden of litigation and safety costs could detrimentally affect public use of such properties, and wildlife populations.<sup>203</sup>

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<sup>202</sup> *Francis*, 2013 UT 65, ¶ 54. (Parrish, J., dissenting).

<sup>203</sup> *See also Arroyo*, 40 Cal. Rptr. 2d at 761, (citing SEN. LEGISLATIVE COM., CAL. GOV'T CODE ANN. § 831.2. (West), (stating that the public should be able to use public property in its “natural condition” for enjoyment and recreational purposes, “[b]ut the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use.”); *see generally supra* 170-172