

## KANSAS FENCE LAW

### **WHAT RURAL LANDOWNERS (AND COUNTY COMMISSIONERS) SHOULD KNOW**

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## Washburn University School of Law Courses That Relate to Agricultural Law

- Advanced Oil & Gas Law
- Agricultural Law
- Agricultural Contracts
- Drafting Contracts and Conveyances
- Energy Regulation
- Environmental Regulation of Agriculture
- Environmental Regulation of the Oil and Gas Industry
- Estate and Business Planning for Farmers and Ranchers
- Estate Planning and Taxation
- Farm Bankruptcy
- Farm and Ranch Taxation
- Farm Income Tax Planning and Management
- Federal Indian Law
- Independent Readings in Natural Resources Law
- Independent Study in Oil and Gas Law
- International Petroleum Arbitration
- International Petroleum Transactions
- Kansas Legal Research
- Mineral Title Examination
- Mining Law
- Oil and Gas Conservation Law and Practice
- Oil and Gas Joint Operations
- Oil and Gas Law
- Oil and Gas Taxation
- Property Law Issues Related to Rural Land
- Public Land Law
- Real Estate Transactions
- Renewable Energy Law: Wind and Solar
- Rural Practice Externship
- Secured Transactions
- Tribal Law and Government
- Water, Environmental, and Regulatory Law Impacting Agriculture
- Water Rights



## Rural Fences

- **Primary issues:**
  - “Partition”
  - Construction and maintenance
  - Liability for damages caused by escaped livestock
  - Fence viewers
  - Stray animals



## Partition Fences and Location Issues

- **A partition fence is to be placed on the line between tracts of land owned by different persons.**
- **But, it can be located entirely on one side of the boundary**
  - This can become the actual boundary via passage of time
  - In ag, usage of property may determine a boundary more often than does a survey.



## Adverse Possession

- **Landowner may acquire title to property by making an open and notorious use of the property for 15 years.**
  - Applies when adjacent parties *know the existing fence is not on the boundary* and one party is benefitted by the misplaced fence
  - Elements:
    - **To adversely possess a property in Kansas, you must have openly, exclusively, and continuously been in possession of the real property knowingly adverse to the true property owner**



## Doctrine of Practical Location

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- **Applies whether the parties know the existing fence is not on the boundary, but don't know where the boundary is located**
  - After 15 years, the usage of the fence in this location can cause it to become the boundary



## Building and Maintenance of Partition Fences

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- **The equal share rule (but it's not halves)**
  - "...so long as the parties continue to occupy or improve such lands, unless otherwise agreed."
  - Can modify by agreement
  - Can enter the neighboring land at reasonable times and in reasonable manner to maintain fence
    - "Reasonability" is a fact-based determination
- **The reality – "right-hand" rule**
- **Is there a written fence agreement?**
  - Can record it to bind current and subsequent owners



# Fence Laws and Trespassing Livestock

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- **Fence law theories**

- Common law approach - failure to keep livestock on property subjects owner to liability
  - “Fence-in” theory (Kansas approach)
- “Fence-out” theory
  - Some western states required landowners to construct fences around their property to “fence out” trespassing livestock before damages can be collected
  - If livestock trespasses within a lawful enclosure, the owner is strictly liable for the damages, no proof of negligence is necessary

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## Fence-In Jurisdiction

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- **Livestock owners must keep their animals fenced in**
- **But, there’s a limitation...**
  - Equal share rule



## Fence-In, But.....

- **What if a livestock owner shares a fence with a crop farmer?**
  - Crop farmer doesn't want to share equally in the cost of building and maintenance
    - Can bar recovery of damages if livestock escape part of fence crop farmer was responsible for
    - Can be responsible to others for trespassing livestock damage



## What if Non-Livestock Owner Doesn't Want Land Enclosed?

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- **Cannot be forced to build or pay for equal share of partition fence, if...**
  - Adjoining tracts are used in common (i.e., for the same purpose (such as crop raising))
    - Two requirements
      - One party doesn't want a partition fence; and
      - The adjoining tracts are used to grow crops
    - Statute only applies to relieve a landowner from the responsibility for sharing equally the cost of building and maintaining partition fences when the land is used in common, and the complaining party does not want the fence.



## Handling Fence Disputes

- **What if the parties can't agree on fence building and/or maintenance?**
  - Negotiate a fence agreement and have it recorded
  - Resolve the matter privately
  - No agreement?
    - Call the fence viewers
      - County commissioners (or their designees) in county where fence located
        - » What if fence is on county border?
          - **Chairman of each county board; if can't agree, then a third viewer is selected from the county fence viewers in the counties**
          - **Decision must be recorded in land records of each county**



## Handling Fence Disputes

- **Decision of fence viewers must be by majority vote**



## Fence Viewers

- **Commissioners may act as a board collectively, or any two of them may be appointed**
  - Act upon application of landowner for a view
  - Viewers only have jurisdiction over *building and maintenance* disputes
    - Cannot order an existing fence to be moved
  - After view, will assign to each party, in writing, an equal share or part of the fence to build, maintain or repair.
    - Decision is recorded in county Register of Deeds office



## Fence Viewers

- **If acting as “fence viewers,” decision is final, conclusive, non-appealable and binding on parties and all succeeding occupants of the land**
- **If commissioners do not appoint “any two of them,” any decision is deemed to be a board decision**
  - Triggers normal appeal rules
    - Notice of appeal served on board’s clerk within 30 days; appealing party must provide a bond and pay necessary costs





## Fence Viewers

- **What if a party doesn't abide by the decision of the viewers?**
  - Other party may erect, repair or maintain the entire fence and charge the non-performing party for its share of the cost of the fence, plus interest (1%/mo.) and att'y fees if legal action needed to collect



## Procedure – The Riley County Saga

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- ***Kunze v. Schwartz (2001)***
  - Call viewers
  - Viewers make decision
  - One party doesn't comply
  - Call viewers again to make second view to determine that fence needs built/repared
  - Building/maintenance conducted
  - Viewers make third view to certify work and amount claimed due
  - Nonperforming party billed



## What Type of Fence Can Be Required?

- **Legal fence in the county**
  - Barbed wire with at least 3 wires
  - Other types listed in statute
  - At discretion of viewers, a brook, river, creek, ditch and equivalent constructs may be deemed to be a legal fence.
  - County commissioners can enact more stringent legal fencing requirements on a countywide basis



## Fence-In Jurisdictions

- **If livestock escape a fence that is in good repair, the owner is generally *not* liable for any resulting damages absent a showing of negligence. Evidence of negligence**
  - Gates left open
  - Fence improperly constructed or maintained
  - Knowledge that animals are in heat and not constructing a stronger enclosure
  - Knowledge that animals are out and not attempting to return them



## Distrain

- **What if animals trespass onto another owner's property and cause damage?**
  - Can retain the animals until payment made for damages, plus reasonable costs
  - Owner must be notified within 24 hours
  - Once notice given, can only hold for 5 days without bringing legal action against owner
  - Alternatively, Sheriff can take animals into custody and give notice.
    - 10 days to reclaim and pay costs
    - If not reclaimed, sold at auction



## Strays (owner not known)

- **Sheriff notified within 24 hours**
- **Party finding them gets an agister's lien for feed and care costs**



## Fence Laws and Trespassing Livestock

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- **Moving livestock on a public roadway**
  - Usually permissible if animals are under control
  - Stock owner is typically strictly liable for any damages.

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## Railroad Fences

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- **Landowners do not have any responsibility to build or maintain railroad fences**
  - Railroad is responsible for damages caused to livestock (fault not an issue)
    - Can avoid liability by enclosing tracks with fencing
    - Adjacent landowners can require railroad to enclose right-of-way with lawful or hog-tight fence
  - Some states fine railroads for refusing to build fences
  - Other states allow the landowner to be reimbursed for costs plus interest for building a fence
  - Failure by a railroad to maintain a fence at a public road crossing makes the railroad liable, unless the animals were on the track through a willful act of the owner

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## Highway Fences

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- **The farmer is responsible for maintaining the inner fence and the state department of transportation is responsible for maintaining the outer fence**
  - The land between the fences causes weed control problems



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## Highway Fences

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- **What responsibility does the state have to the motoring public with respect to building and maintaining highway fences?**
  - Must they maintain a “cattle-tight” fence?
  - Must they fence the entire road frontage of a particular parcel?

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## Public Roads Through Private Pastures

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- **May exist by authorization of county commissioners**
  - Can permit a gate and fence to be place across certain public roads
  - Cannot authorize locking of a gate that would bar the general public from accessing the road
    - Autogate or cattleguard



## Highway Fences

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- **KDOT has a common law duty to keep the highways in a reasonably safe condition**



## Highway Fences

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- ***Reynolds v. KDOT, 30 P.3d 1041 (Kan. Ct. App. 2001)***
  - **Facts:** Tenant grazed cattle in pasture on west side of highway. A highway fence constructed by KDOT was built up and around a double-box culvert. The tenant fenced the mouth of the culvert, but fence would wash out periodically and cattle would escape to orchard on other side of road. The fence on the east side of the highway was in disrepair. A car struck a cow on the road killing one occupant and injuring another.
  - **Issue:** (1) Does KDOT have a statutory duty to maintain cattle-tight fences? (2) Was KDOT negligent in not repairing a damaged highway fence?

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## Highway Fences

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- ***Reynolds v. KDOT, 30 P.3d 1041 (Kan. Ct. App. 2001)***
  - **Holding:** (1) KDOT does not have a duty to maintain cattle-tight fences. Highway fences are to control vehicular access to roadway, not to keep livestock in; (2) KDOT not negligent for not repairing damaged highway fence. There was no evidence that the cows escaped other than through the unfenced culvert and KDOT has no duty to fence off mouths of culverts.
    - **Trial court judgment for plaintiff of approx. \$1.2 million reversed.**
    - **Note: Kansas Supreme Court later reinstated the jury verdict. - state has a duty to maintain highway fences to keep livestock off public roadways**

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## Civil Liabilities

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- **Cow/vehicle accident**

- *Lee v. Kaup Kattle Co.*, 2022 U.S. Dist. LEXIS 93306 (D. Kan. May 24, 2022)

- Accident on I-70 near Goodland.
    - Plaintiff traveling 80 mph at night with some visibility issues.
    - Dead cow in interstate
    - Negligence and comparative fault claims
    - Defendant denied s.j. on negligence claim
    - Partial s.j. on comparative fault (unknown trespasser?)
    - KDOT did not breach its duty of care



## THANK YOU!

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