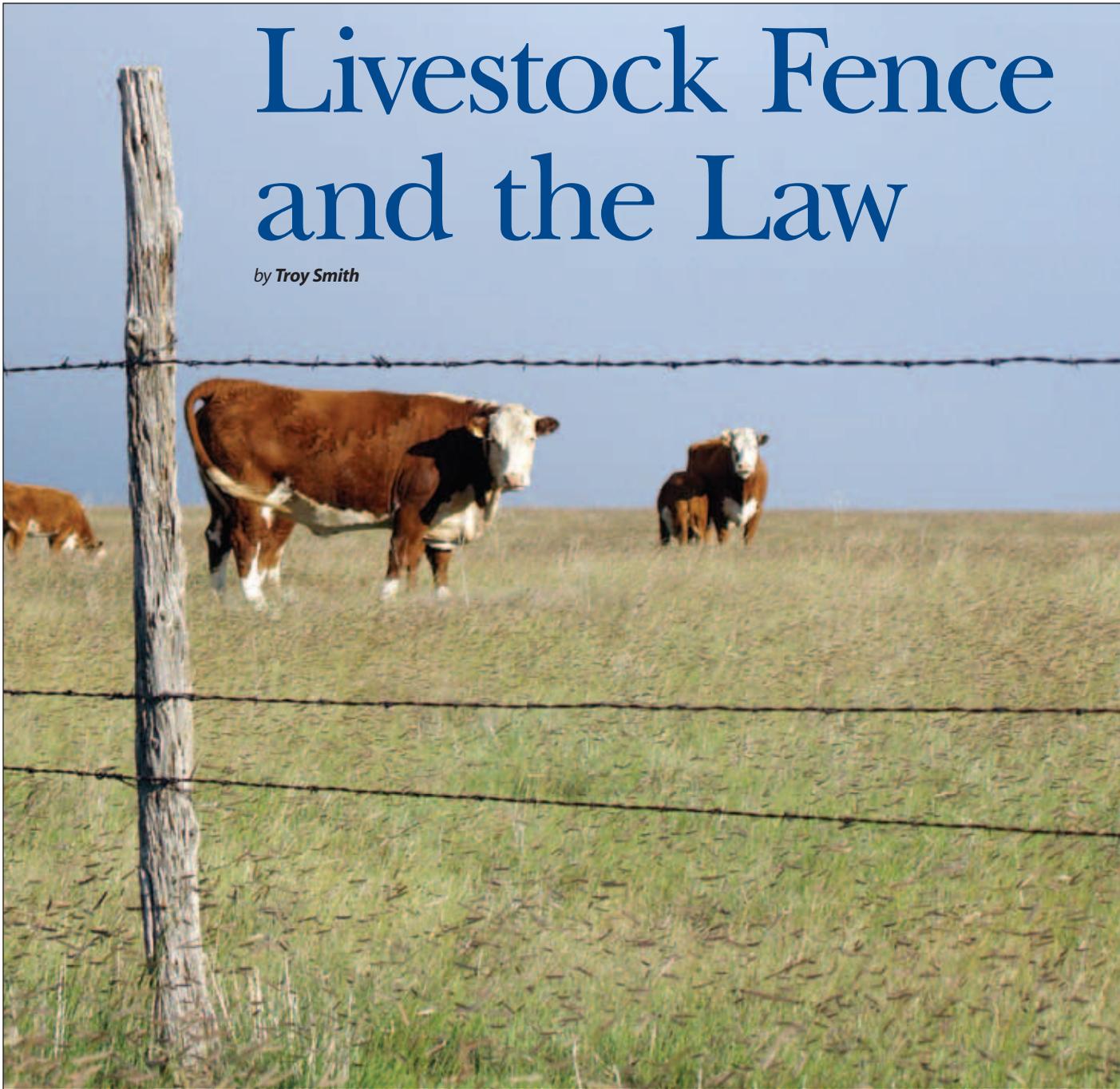


Livestock Fence and the Law

by Troy Smith



Do your livestock fences meet the law's requirements? Some livestock owners may be unaware that state laws prescribe when a fence is required, what kind of fence it should be and who has responsibility for building and maintaining it. Familiarity and compliance with requirements for a lawful or legal fence could help livestock owners avoid disputes with neighboring landowners and might also help minimize liability issues.

While many states have relatively few state statutes pertaining to agricultural issues, every state has a fence law statute, says University of Missouri Emeritus Professor Steven Matthews, director of the Missouri Agricultural Law Center.

"The original American colonies adopted the English Common Law," explains Matthews. Common Law, or case-made law, puts the burden of responsibility on livestock owners to keep their animals from trespassing on a neighbor's property. However, some states departed from Common Law, requiring crop farmers to fence their fields to keep free-ranging cattle out.

"While states often first defined 'open range' by statute, in doing so, they necessarily defined how a crop farmer could lawfully erect a 'lawful fence' and thus be allowed to collect damages or apply other remedies (to impound or kill trespassing livestock) if he first protected his land with a lawful fence," adds Matthews.

The definition of a lawful fence varies considerably among states and may include specific descriptions of acceptable fences constructed of rails, boards and stone and fences incorporating natural barriers such as cliff walls or bluffs. Even the requirements for a lawful barbed wire fence are variable from state to state.

State laws

In some states, a legal barbed wire fence must be at least 36 inches high, while others call for minimum heights of 48 or 52 inches. The minimum number of strands of barbed wire required can vary from three to as many as eight. Some state codes require spacing between the wires to meet specific measurements. Requirements may call for fence posts to be placed at intervals of 20 feet, one rod (16.5 feet)

or other distances, sometimes depending on whether stays or pickets are used between posts. Different livestock species often are addressed, with different requirements for hog- or sheep-tight fence than for cattle, horses and mules.

Some state fence laws are more subjective. In some New England states, for example, the law reads as follows: "All fences four feet high and in good repair, consisting rails, timber, stone walls, iron or wire, and brooks, rivers, ponds, creeks, ditches and hedges, or other things which in the judgment of the fence viewers having jurisdiction thereof are equivalent thereto, are legal and sufficient fences." In states requiring the services of "fence viewers," the duty may go to local elected officials or, by appointment, to fence-savvy persons. It's their job to determine if new fences are legal and to arbitrate fence-related disputes.

In every state, however, plenty of fences on livestock operations fall short of specifications set down in law. For certain fences, that's OK. The laws do not pertain to fences that subdivide a landowner's pastures and fields.

They do apply to boundary fences and certainly those which serve as a partition between properties of neighboring landowners. And it's over these fences that neighbors sometimes argue.

Fence disputes

"In my opinion, based upon 35 years of Extension work and fielding fencing questions," says Matthews, "the most common fence disputes are over fence boundaries, maintenance of existing fence and the replacement of an old fence."

According to Matthews, disputes over placement of an existing fence may arise when a piece of real estate changes hands and a land survey is performed to determine actual boundaries for the property. A survey may reveal that an existing "boundary" fence really doesn't stand on the property line, but some distance to one side or the other. If the buyer of the property feels he is giving up too much of his newly acquired land to a neighbor, he may want the fence moved to align with the surveyed boundary. That might be agreeable to the neighbor, or it may not. If that neighbor has actually been using the land gained because of fence placement for a long enough period of time, he may be able to claim it through the doctrine of adverse possession, which is observed in all 50 states.

"It basically means," states Matthews, "an existing fence (that the previous landowner and the neighbor) regarded as being on the lawful boundary for a statutorily prescribed minimum of time, that such fence will re-establish the lawful boundary line."

States vary in the time required before someone can assert a claim of adverse possession. It may be as few as two years or as many as 60 years.

Neighbors and fences

Neighboring landowners sometimes disagree over who has responsibility for building and maintaining fences. The answer, found in their state's fence law, depends on whether it is a "fence-in" or "fence-out" jurisdiction.

"Most states are fence-in jurisdictions now," says Roger McEowen, Director of the Center for Agricultural Law and Taxation, Iowa State University. "That means livestock owners are responsible for fencing in their livestock. In fence-out or open-range jurisdictions, crop farmers and other landowners must use fences to keep livestock out.

"In application it's not quite that simple. Statutes often require neighbors to share responsibility for maintaining boundary fences, even if one of them doesn't have livestock," adds McEowen. "That

surprises a lot of people, but it's that way in most of the major livestock-producing states."

In such instances, landowners might be required to equally share the cost of maintaining a boundary fence. Or, the law may state that each landowner is responsible for maintaining half of the fence — specifically that half which lies to his right when he stands on his side of the fence at the midway point and facing the fence.

Typically, each party is responsible for the cost of the prescribed share of a legal fence, as defined by law. "You only have to pay for your share of a fence meeting minimum requirements, even if your neighbor wants a fence to make an enclosure as secure as Fort Knox," says McEowen.

A state might have it both ways, with fence-in or fence-out status determined at the county level. And while state statutes may determine minimum requirements for a legal fence, additional local codes may also apply. The ever more popular electric fence is a good example. A single electrically charged wire might qualify as a legal fence, according to some state statutes but not meet county requirements. McEowen advises livestock producers to be aware of their respective state and local laws.

The consequences

What if a livestock owner's boundary fences don't meet requirements for a lawful fence? What if his cattle escape and cause damage to the neighbor's crops? Worse yet, what if the cattle mix it up with highway traffic, resulting in a motorist's injury or death? If an injured party brings a lawsuit against the livestock owner, does the kind of fence really matter?

"It matters. Technically, a legal fence is required," states McEowen. "With anything less, you're more at the mercy of a complaining party."

Steven Matthews agrees that maintaining legal fences is a good defense. A good example comes from an actual Illinois case Matthews often used in his undergraduate Ag Law classes. In this particular case, a rancher's horses had escaped onto a highway. A motorist whose vehicle struck one of the animals sued the rancher, citing negligence in failing to maintain a lawful fence.

"The rancher's attorney at trial offered evidence for the jury that the fence where the horses broke through was a corner section recently rebuilt and reinforced with extra posts and cross-posts and that the

fence was flattened by the impact of the horses breaking through," explains Matthews.

"The jury apparently inferred that the animals got out through no fault of the rancher, even though there was no evidence that dogs had chased them or that a storm had spooked them. The rancher's attorney also offered evidence that this rancher had a reputation for always maintaining good fences and that his livestock were not known to have escaped onto the highway before. The jury held there were no liability and no recovery for the motorist."

Matthews' example brings up the point that, in spite of a good lawful fence, livestock may escape due to an "Act of God." Events which a jury may consider plausible acts of God could include a storm-felled tree which takes down a fence or dogs chasing livestock through a fence. However, according to Matthews, jury consideration of such events is not meant to excuse negligence by livestock owners. A lawful fence is still required.

Bob Kingsbery, Frisco, Texas, is a livestock management and fencing consultant who also provides "expert opinion" for court cases involving livestock related incidents. In cases involving cattle

or horses that wandered onto a highway and were hit by a vehicle, Kingsbery has been called upon to review the livestock owner's fence and management practices and present testimony.

He emphasizes that reputation matters. An injured party usually must prove the livestock owner was negligent. That's harder to do when he has a reputation for good management, maintaining good fences and responding quickly if livestock do escape. In some states, a livestock owner may be required to prove that he was not negligent when his livestock escaped, so a history of good stewardship is invaluable.

"Increasingly, accidents involving automobiles and livestock result in the livestock owner getting sued. That can happen whether he maintains legal fences or not," says Kingsbery. "If he does end up in court, I can almost guarantee that he will be asked to explain his fence maintenance program. And they will find out what kind of reputation he really has."

Kingsbery reminds livestock owners that a fence built according to the state's definition of a "legal fence" doesn't automatically make it the best fence for every situation.

In an increasingly litigious society, the construction and maintenance of good fences represents an investment in risk management.

"It depends on your purpose," explains Kingsbery. "In Texas a four-wire fence, 48 inches high, is a legal fence. But it's not the best fence for holding a set of bawling, just-weaned calves, when their mamas are in another field directly across the road. Neither is that kind of fence going to keep a bull separated from a set of cycling heifers. You need a fence that's adequate for the purpose."

Kingsbery, Matthews and McEowen agree there is wisdom in that old saying, "Good fences make good neighbors." Meeting requirements for a lawful fence is the least a livestock owner should do. In certain situations, however, fences that meet the letter of the law might not be good enough. In an increasingly litigious society, the construction and maintenance of good fences represents an investment in risk management. And because no fence is foolproof, liability insurance can be a wise investment too. **HW**

Who is liable, landowner or tenant?

Suppose you are the owner of some grazing land. It could be native range, improved pasture or wheat pasture. It might be a field with crop residue suitable for grazing. You own land with available forage but possess no livestock. So you rent the land to another party who stocks it with cattle.

Then, one dark night, the ringing telephone brings you out of bed. It seems your tenant's cattle have breached the fence surrounding your property and wandered onto the adjacent highway. Actually, the fence wasn't too great, but there hadn't been any problems until this night. But now, at least one escaped critter has been party to a fender bender. No one was injured but the owner of a banged-up automobile is mad and threatening to sue somebody for damages.

Who should be worried about potential liability for damage to the motorist's car? Is it you, as owner of the land, or your tenant, who actually owns the cattle? According to Terry Arthur, attorney for Kansas Farm Bureau, it's hard to provide a pat answer since state and local laws can vary so much. However, both parties may have cause for concern.

"Generally, a landlord is responsible for maintaining a legal fence," says Arthur, noting that most state fence law language says "landowners" must maintain legal fences when and where they are required. And responsibility for escaped cattle would rest with the landowner if he provided custom grazing services including care of the cattle on his property.

"But a tenant, as owner and manager of the livestock, is responsible for escaped cattle. It's possible, however, that the complaint could come against both landlord and tenant," Arthur adds.

California attorney and cattleman William Thomas thinks it is likely that both landlord and tenant would be named in the suit. He's seen it plenty of times. Typically, the landlord is included because fences are considered fixtures that go with the land he owns. Also, landowners are often viewed as having deep pockets. The tenant cattle owner would be named as having responsibility

for stewardship of the livestock. Thomas says the outcomes of such lawsuits usually depend on the particulars of the state's fence law and whether that jurisdiction observes "comparative" or "contributory" negligence tort law liability.

"In a comparative liability state, a jury usually assigns each party a percentage of responsibility," explains Thomas. "In a contributory liability state, one party — either the landlord or the tenant — probably gets socked for the whole thing."

Other factors can muddy the water in situations like the one described, making it even more important for landowners and tenants to protect themselves.

"It's incumbent upon a landlord to make clear who is responsible for fences on the property in a lease with a tenant," states Arthur, who recommends putting terms of the agreement in writing.

"A lease agreement can be an overriding factor if it clearly assigns duties and responsibilities, including responsibility for maintaining fence and preventing cattle escape and trespass," adds Thomas. "It doesn't guarantee total immunity, but it sure helps." **HW**

