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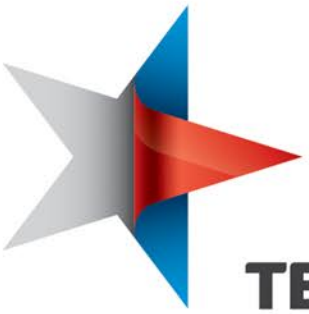

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Texas Pipeline Easement Negotiation Checklist

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In response to the oil and gas boom in Texas, pipelines are rapidly being built to ensure line space for the increased production. As of 2012, there were more than 366,000 miles of oil and gas pipelines crisscrossing the state.

Pipelines are usually built across private lands after the pipeline company obtains an easement (the right to use a specified portion of the property of another) from the landowner. Although the monetary compensation is certainly an important factor for a landowner to consider, the nonmonetary terms of the easement may be, in some cases, more important and more valuable. It is critical to include in the written easement agreement any statement or promise made by the company or it likely will not be enforceable.

The following checklist is certainly not exhaustive, and any landowner negotiating an easement agreement should hire an attorney to represent his or her interests. **This list is not a substitute for legal advice.** Each property is unique, and the following considerations may not apply the same way to different properties because of their specific use and characteristics. Although this list is based on a pipeline easement, these terms may also be helpful in negotiating other easements, such as those for electric or transmission lines, water, wastewater, drainage, or related infrastructure easements.

☐ **Determine whether eminent domain power exists.** Before beginning negotiations, determine whether the pipeline company has eminent domain power. An entity holding power of eminent domain has the right to take private property for a public use upon payment of adequate compensation to the landowner, even without the landowner's consent. A landowner dealing with a company that does not have eminent domain power is in a much stronger negotiation position. In that case, if the company does not agree to the landowner's terms, it may not legally acquire the easement. If the company has eminent domain power, however, and an agreement cannot be reached, the company could still obtain the easement through eminent domain by filing a condemnation proceeding in court. To understand the positions of the parties, make this determination at the outset of negotiations.

To get this information:

- Ask the company for a copy of the statute that grants them eminent domain power.
- Find out if the company is validly registered with the State Comptroller's office as having eminent domain power.

- If the pipeline company claims eminent domain power because it is a common carrier pipeline (a pipeline-for-hire), request evidence supporting its common carrier status.
- For transmission lines, obtain a copy of the company's Certificate of Convenience and Necessity from the Public Utility Commission. It explains what condemnation power the company has and may provide additional information about the proposed project.

☐ **Identify the parties.** Include the names and addresses of the landowner and the company acquiring the easement. Require the pipeline company to designate a specific contact person in case any issues arise and to provide the landowner with a notice in a set period (such as 30 days) if the designated contact person changes.

☐ **Determine compensation.** Specify the compensation the company will make for the easement, including when the payment is due. Generally, payment is based per foot, per acre, or per rod (a rod is 16.5 feet) of the pipeline, but may also be a set sum rather than tied to a measurement. Consider seeking payment per square foot rather than per foot or per rod to be adequately compensated for the entire area the company will use. If the company wants a temporary work area on the property in addition to the actual easement area, seek additional compensation for the temporary use of this area.

In addition to a damage payment for the portion of the land used, Texas courts recognize remainder damages (the decreased value of the remainder of the property outside of the easement strip) because of an easement on the property. This is important when the easement agreement limits some or all of the future surface use over the easement area. Consider these types of damages when calculating compensation.

Finally, discuss with an accountant how the payment will be described or structured. The payment description as an easement purchase versus a payment combined with remainder damages may have tax consequences.

- ☐ **See that the easement is specific, not blanket.** Easement agreements often state that a pipeline will be laid "over and across" the landowner's property. This is a blanket easement that allows the company to place the line anywhere on the property, even if the company verbally promised to place the line in a certain location. To avoid this issue, define a specific easement area and have the company survey it and any temporary work areas. Make that survey an exhibit (documented evidence) to the easement. Also consider requiring a specific setback distance from any buildings or structures if this is a potential issue.

- ☐ **Grant a nonexclusive easement.** Reserve the right to grant additional easements to other parties within the easement area. For example, if another pipeline company wants to place a line on the property, the landowner may want the right to have the line placed within the same easement, rather than having two separate easements across the property.

- ☐ **Check restrictive covenants.** The easement may be planned for property that is subject to restrictive covenants, which might specify the required location and depth of any pipelines. Check any restrictive covenants to determine how they might apply.

- ☐ **Limit the easement agreement to only one pipeline.** Many proposed easement agreements seek to allow the company to "lay lines" or "construct pipelines" across the property. Limit the easement agreement to allow only one line on the property. Also, prohibit the company from assigning or granting rights to another party to lay an additional pipeline in the easement. With this term included, the landowner retains the right to negotiate and receive payment for all additional lines to be added to the easement area, rather than receiving just a one-time payment for an easement that could allow additional lines in the future.

- ☐ **Limit the types of products run through the line.** In addition to restricting the easement to a single line, seek to limit that line to carrying

a single product. For example, a landowner might grant the right to lay a natural gas pipeline, but if the company later wants to flow carbon dioxide through the line, a second easement would be necessary. At minimum, a landowner should know what products are running through the line.

- ☐ **Determine the permissible pipeline diameter and pressure.** Generally, a landowner wants a smaller, lower-pressure line and a company wants the right to place the largest, highest-pressure line it may ever need. During negotiations, seek an agreement that the line will not exceed a certain diameter and specific pressure to help alleviate safety concerns.

- ☐ **Determine the width of the easement.** Widths are often described in two measurements, a temporary construction easement (generally 50 feet or wider) and a permanent pipeline easement (typically ranging from 20 to 50 feet). Limit both of these measurements to the narrowest width possible to control the amount of land used or damaged by the easement. Also, determine a date by which the temporary pipeline easement will terminate and provide for damages if the company extends this deadline.

- ☐ **Require a specific pipeline depth.** In the past, many easements stated that the pipeline would be "plow depth." Avoid this type

of nonspecific, subjective term. Easements usually stipulate that the line will be buried 36 inches below the ground, the depth that Texas law requires. If a pipeline is buried at 36 inches, erosion will eventually make the line too shallow to comply with state law. In light of this, have the line buried to at least 48 inches deep, or stipulate that the company maintain the 36-inch depth.

☐ **Specify what surface facilities, if any, are permitted.** Even underground pipelines require some surface facilities such as cleaning stations, compressor units, and pump stations at points along the line. Require a pipeline company to either waive all surface facilities on the property or specify exactly how many surface facilities will be allowed, their size, type, and location. If surface facilities will be placed on the property, negotiate additional compensation.

☐ **Reserve surface use.** Retain the right to use as much of the easement area as necessary. For example, once an underground pipeline is in place, the landowner may want to graze his cows on the property, including the surface above the pipeline. Similar consideration applies to the landowner's ability to place roadways, ponds or tanks, and water lines across the easement.

☐ **Provide property access for the landowner.** It is not uncommon to install a pipeline beneath an entry road or driveway to the landowner's property. State in the agreement that the company will provide access to the landowner's property during the pipeline installation, as well as after the construction is completed.

☐ **Limit access to the easement.** A landowner can limit the company's access to the easement in a number of ways:

- Require that notice be given before entry.
- Set certain times or days when entry is not permitted.
- Determine where company employees may enter and exit the property.
- Designate what roads may be used while on the property.
- Prohibit any fishing or hunting on the easement or any of the landowner's property by the company or any of its employees, agents, or contractors without landowner permission.

If there are no limitations in the easement agreement, the company can enter the easement at any time for any purpose.

☐ **Request the use of the double ditch method.** The double ditch method requires the company to dig the pipeline trench so that the topsoil remains separate from the subsurface soil and is placed back on top of the subsoil when the construction is completed and the line buried.

☐ **Include the right to damages for construction, maintenance, repair, replacement, and removal.** Require the company to be responsible for damages caused not only during construction, but also during future maintenance, repair, and replacement activities. Also, include any limitations or notice requirements desired for the company's maintenance schedule. For example, a farmer growing crops near the pipeline may want written notice before any pesticide or herbicide is sprayed on the easement area.

☐ **Set specific restoration standards.** To ensure that the easement area is properly restored, state the company's responsibilities regarding repairs. How will the disturbed area over the pipeline be treated after the pipeline has been installed? Will the operator remedy any changes to the slope of the land or replace the topsoil? Will the reseeding be done with native grass or is a special type of seed required? Address these issues in detail. Consider setting a measurable standard to ensure that repairs are adequate or appoint a neutral third party to inspect the land after the damages have been repaired to determine if the repairs are sufficient.

- ☐ **Request payment for damages.** Because pipeline easements generally last a long time, request an up-front payment for damages or require the company to post a bond so that money is available for future damages. This provides some protection to the landowner in the event the company disappears before making damage repairs. Additionally, require that repairs to the surface of the easement be done when the construction is completed as well as when the easement terminates.

- ☐ **Specify fencing requirements.** Require the pipeline company to fence the easement area according to specifications such as the type of fence to be built, the number and type of H-braces to be installed, and the tinsel strength of the wire.

- ☐ **Include repairs or improvements to existing roadways.** Constructing a pipeline requires significant equipment and vehicle traffic. If the company will use any roads owned by the landowner or will construct roads across the landowner's property, require that it restore or improve the roads when the construction is finished.

- ☐ **Determine maintenance responsibilities.** Define whether the company or the landowner is responsible for surface maintenance over the pipeline, such as mowing or removing weeds and overhanging limbs.

- ☐ **Define when the easement will terminate.** From a landowner's perspective, this is perhaps the most important provision of an easement agreement. There are several circumstances under which an easement might terminate under Texas law, but abandonment is the most common concern for landowners with pipeline easements.

  Under Texas law, an easement is considered abandoned if there is non-use by the company (an objective test) and the company indicates an intent not to use the line in the future (a subjective test). Under this rule, it is difficult for a landowner to prove the subjective test in order to have the easement terminate due to abandonment.

  Instead of relying on the general rule, set a specific, objective standard for when the easement will end. This could be a specific time in the future (for example, the easement will last for 10 years) or may be a statement that if the pipeline company does not flow product through the line for a certain period (for example, 1 year), it is considered abandoned and the easement terminates. Whatever the standard, including it in the agreement prevents easements from lasting into eternity. Further, require that the company provide a release of the easement so it can be recorded in the public record when the easement ends.

- ☐ **State the requirements for removing facilities.** Require the company to remove all lines and structures after termination of the easement or forfeit them to the landowner. Also, state that any damages caused by this removal will be the responsibility of the company.

- ☐ **Determine remedies for violating the easement agreement.** If a company violates the easement agreement, the landowner can file a lawsuit to terminate the agreement, but the court will require that the violation is "material" before granting termination of the agreement. Whether a violation is material is determined on a case-by-case basis on the specific facts at issue. This causes two potential problems: (1) the landowner must go to court, which is expensive and time-consuming, and (2) the violation must be material for termination to be permitted.

To avoid these issues, consider two options:

First, the landowner may be able to define what violations are deemed material and state that in the agreement. For example, the agreement could state that "employees shall be permitted on the easement only and if they leave the easement and enter the landowner's property, this shall constitute a material breach." This material breach would permit the landowner to terminate the agreement without court action.

Second, require conditions in the agreement by stating "or the agreement shall terminate without further action by the landowner." For example, the agreement could say, "employees shall be permitted on the easement only. If they leave the easement and enter the landowner's property, this shall constitute trespass and the agreement shall terminate."

Under either of these scenarios, the landowner knows precisely when he or she may terminate the agreement, rather than having to wait for a judicial determination of material.

☐ **Include liability and indemnification provisions.** Incorporate liability and indemnification responsibility in the easement agreement. Provide that the landowner is not liable for any acts, omissions, or damages caused by the company, its agents, contractors, or employees. Further, stipulate that if any claim is made against the landowner by any party related to the pipeline or surface facilities, any of the company's activities, or any environmental laws, the company will hold the landowner harmless and state that this includes paying any judgment against the landowner and providing a defense to the landowner without charge.

☐ **List the landowner as "additional insured" on the company insurance policy.** Require the pipeline company to list the landowner as an "additional insured" on its insurance policy. This is not usually a major cost to the company and may allow the landowner the protections of the company's insurance policy if he or she is sued based on something related to the pipeline.

☐ **Do not be responsible for warranty of title.** Frequently, standard easement agreements require the landowner to warrant title (the landowner promises that there are no other unknown owners or encumbrances on the property). Because the pipeline company is in a better position to conduct a title search and make sure they are negotiating with all the right parties, the landowner should not take the risk of warranting title. If the company goes through the condemnation process, Texas law does not allow it to obtain a warranty of title, so there should be no reason to require this term in a negotiated agreement.

☐ **Limit the terms of transferability.** Specify whether the company can assign its rights under the agreement to a third party. Request that no assignment be made without prior written consent of the landowner, state that any assignee will be held to the terms of the original agreement between the landowner and the company, and state that the company will remain liable in the event of a breach of the agreement by the assignee. At a minimum, require notification before an assignment occurs.

☐ **Request a most-favored-nations clause.** Although pipeline companies dislike these requests, ask for a most-favored-nations clause. This provides that if any other landowner in the area negotiates a more favorable deal

within a certain timeframe, the landowner is given the benefit of the more favorable deal.

- ☐ **Seek payment for negotiation costs.** Because the landowner may incur significant costs during the negotiation process, including appraiser costs, fees for forestry or agricultural experts, surveyor expenses, and attorney's fees, require the company to pay all or a portion of these costs.
- ☐ **Use a choice-of-law provision.** A choice-of-law provision allows the parties to determine which state's law will govern the agreement in the event of a dispute. For example, a pipeline company headquartered in another state may try to require that the law in their home state apply to any dispute involving the easement agreement. Generally, courts enforce these clauses as long as they are not against public policy and are reasonably related to the contract. Because many laws vary by state and a choice-of-law provision could significantly impact rights under the agreement, consult with an attorney to determine which options are the most advantageous to the landowner.
- ☐ **Include a forum clause.** A forum clause provides that a dispute over the agreement will be heard in a particular location or court. Include a requirement that any lawsuit be filed in the county where the land is located or the landowner lives. This can significantly lower litigation and travel costs and ensures that if a jury trial occurs, the jury will be made up of local citizens.
- ☐ **Understand dispute resolution clauses.** These types of clauses limit the time and expense of a court action in the event of a dispute. There are two primary types of dispute resolution: arbitration and mediation. In arbitration, a third party arbitrator (usually an attorney) hears evidence and delivers a decision. If the arbitration is "binding," that judgment is final, absent evidence of fraud by the arbitrator. Mediation involves a neutral third party who works with the landowner and the company to reach a mutually acceptable resolution. If both parties refuse to agree to settle, the case goes to court. Understanding the difference between these options is important; consult with an attorney to determine which option is best. A dispute resolution clause should identify how the arbitrator or mediator is selected.
- ☐ **Review by a licensed attorney.** A licensed attorney familiar with easement negotiation issues should review all pipeline easement agreements. Although hiring an attorney who specializes in representing landowners in these types of transactions may be an additional cost, it could save money in the long run by preventing a dispute from arising because of an unclear or inadequate easement agreement.
- ☐ **Money-saving tip.** Because most attorneys bill by the hour, a client can save considerable fees by doing as much legwork as possible before going to the attorney's office. For example, a landowner could collect necessary documents such as the legal description or sketch of the property, saving the attorney the time of locating that information. Moreover, a landowner could prepare a first draft of the easement agreement using this checklist. This would save the attorney the effort of starting from scratch and allow him or her to simply edit the draft prepared by the landowner.

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FIVE STRANDS:

A Landowner's Guide to Fence Law in Texas

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Preface

The initial version of this book arose out of a late-afternoon call from a rural county in Texas. Two landowners could not agree on a fencing question and called the county for help. The county judge called us, and after a few minutes of discussion regarding the question, we realized that Texas landowners need a field guide for fencing questions. We work with Texas landowners, and we get more questions about fencing than any other topic. And, while there are thousands of miles of barbed wire across the state, we lack an easy-to-use resource to answer the everyday questions that arise between landowners. Another lengthy law book would not fit in the glove box of a pickup, so we kept this short and easy-to-follow. It may not answer every question, but it should cover most. And, remember, the law will never substitute for an understanding between two neighbors over a cup of coffee.

This second edition includes updates and new material that arose out of wild fence law questions we receive regularly. The first edition was printed and used by tens of thousands of landowners, sheriffs, county officials, and real estate professionals. Lastly, many groups who printed this book made donations to Texas 4-H and FFA foundations to support youth in agriculture.

—The Authors

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Introduction

The old saying "good fences make good neighbors" still applies today. But in our view, good neighbors make the best fences. Texas has thousands of miles of fences. With the vast majority of these fences located along boundary lines and roadways, disputes do arise. Unfortunately, there are many misconceptions and dead guesses about fence laws. Who is liable when vehicles on a roadway hit livestock? What are a landowner's rights if another person's livestock are on his or her property? Who is responsible when it comes to building and maintaining fences? This book gives landowners and livestock owners a background on how Texas fence laws originated, explains the current laws they should know, and details a few common fence dispute scenarios and solutions.

Liability for Livestock on the Roadway

To understand Texas' current approach to fence law as it relates to liability in the event of an accident, one must first understand the concepts of open range versus closed range.

Open Range vs. Closed Range

Texas is an open range state, tracing its roots back to the trail drives and cattle barons of the 1800s. Open range means exactly that—livestock owners are not required to fence in their livestock to prevent them from roaming at large. The Texas Supreme Court supported the open range policy more than a century ago when it stated, "if the cattle of one person wander upon the [unenclosed] lands of another...they are not trespassers, and the owner is not liable for any damage that they may inflict."[1] The Texas Supreme Court reaffirmed this more recently, stating that "[i]t is the right of every owner of domestic animals in this state...to allow them to run at large."[2] While the common law of open range is still in effect, there are two exceptions that have changed large portions of the state from open range to closed range: (1) the passage of local county ordinances (stock laws), and (2) the development of U.S. and state highways and a state statute deeming property adjacent to these roadways closed range.

Local Stock Laws

As Texas developed, laws changed and counties enacted restrictions on open range. Such closed range laws make livestock owners responsible for fencing in their livestock on their property. The Texas Legislature allows local governments to pass stock laws that modify the law for that location from the common law rule of open range to closed range.[3] These stock laws are created by election where local voters consider a proposed stock law, which can apply to all or a portion of a county. Every stock law specifies that certain species of animals (such as cattle, horses, jacks, jennies, and sheep) may not run at large within the limits of the specific county or area. The stock law replaces the common law rule of open range, making the applicable portion of the county closed range. Livestock owners in counties that have a stock law (now a closed range area) have a duty to prevent

their livestock from running at large, usually by maintaining a fence to keep their livestock on their property. Failure to do so may result in civil penalties, and, in certain instances, may also constitute a Class C misdemeanor.[4]

Because each local stock law is unique, the following questions are crucial when evaluating the law in a particular county:

- Does a stock law exist in the county?
- Which animal species does the law cover?
- Did the animal owner meet the required standard outlined in the local stock law?

Does a stock law exist in my county?

Unfortunately, there is not currently an accurate consolidated list of which Texas counties are still considered open range or closed range. Since many of these stock law elections occurred between 1910 and 1930, it may take extensive research to determine the status of one's county. The best option is to contact the county sheriff's office, county attorney, county Extension agent, or ask the county clerk to search the election records to determine if a local stock-option election has been held to make the county "closed range." For examples of stock laws, see pages 22 and 23 in the Appendix.

Once a person determines whether a stock law exists in a particular county, it is then critical to determine whether the law applies to the entire county, or only to particular areas within the county. For example, some laws are limited to certain precincts within a given county.

For reasons that are left to mystery, in 1981, the Texas Legislature exempted some counties from holding a county-wide election to adopt a local stock law regarding running cattle at large. These counties include Andrews, Coke, Culberson, Hardin, Hemphill, Hudspeth, Jasper, Jefferson, Kenedy, Kinney, La Salle, Loving, Motley, Newton, Presidio, Roberts, Schleicher, Terry, Tyler, Upton, Wharton, and Yoakum.[5] Though no court has interpreted this statute, the language suggests that although these counties may not pass a county-wide stock law for cattle, individual precincts within the counties may be able to do so.

Which animal species does the law cover?

If a stock law exists, the next step is to determine which livestock species it covers. The Texas Agriculture Code allows stock laws to

regulate cattle, domestic turkeys, donkeys, goats, hogs, horses, jacks, jennets, mules, or sheep.[6] Based on the particular stock law, it is possible that the same area may be closed range for horses and donkeys, but open range for cattle, for example. The statute also requires separate stock laws for each livestock species (one for cattle, one for horses, and one for other animals). In fact, in an opinion issued by the Texas Attorney General, stock laws that are not separated by species may be regarded as ineffective.[7] This result may depend on the date on which the stock law was passed.[8]

Have I met the standard outlined in the local stock law?

In a county with a stock law, a livestock owner may not permit his or her animals to run at large. If a third party is injured, a livestock owner is liable only if he or she permitted the livestock to run free. Texas courts have interpreted "permit" to mean to expressly or "formally consent" or to "give leave," and that merely making it possible for an animal to run at large is insufficient to impose liability on a livestock owner. Permit does not refer to the "temporary escape" of animals. Rather, "it refers to animals allowed as a matter of course to graze and move about freely in an unconfined area."[9] In determining an owner's liability for livestock roaming at large, courts look to the owner's actions because an animal in the roadway does not automatically constitute a violation of a stock law.

Some examples of livestock owner actions that might result in liability include:

- leaving a gate open,
- authorizing a lessee to allow cattle to run at large,
- having notice that the livestock were out in the roadway and failing to remove the livestock,
- having knowledge that livestock previously escaped from the property, or
- failing to maintain the fences surrounding the pasture.

U.S. and State Highways

Land along U.S. and state highways in Texas is always considered closed range. State law requires landowners with property adjacent to U.S. and state highways to prevent their livestock from running at large on the highway. The Texas Supreme Court affirmed this approach, applying the "knowingly permit" standard in a 2020 case where a bull was hit on a state highway.[10] The Texas Agriculture Code states that "[a] person who owns or has responsibility for the control of a horse, mule, donkey, cow, bull, steer, hog, sheep, or goat may not knowingly permit the animal to traverse or roam at large, unattended, on the right-of-way of a highway."[11] In addition to potential civil penalties, a person who knowingly permits an animal to run at large also commits a Class C misdemeanor, with each day an animal is permitted to run at large constituting a separate offense.[12]

To determine the scope of this statute, it is necessary to define:

- what constitutes a highway, and
- what "knowingly permit" means.

What constitutes a highway?

For purposes of this statute, a "highway" is defined as all U.S. and state highways but does not include a numbered farm-to-market or ranch road.[13] Thus, all state and U.S. highways are closed range under Texas law, but farm-to-market or ranch roads are open range unless a local stock law modifies the area in which the farm-to-market road or ranch road is located.[14]

What does "knowingly permit" mean?

For U.S. and state highways, a livestock owner may not "knowingly permit" his or her animals to run at large. This standard is higher (more favorable to the livestock owner) than the "permit" standard found under the stock law statute. Texas courts have defined "knowingly permit" as an awareness or understanding, acting deliberately or consciously, and most recently as acting "with knowledge that his conduct is reasonably certain to cause the result."[15]

In analyzing whether a person "knowingly permitted" livestock to run at large, courts undertake a very fact-specific analysis. For example, a court ruled a livestock owner acted knowingly when:

- he was aware that the fences were unable to withstand rainfalls;
- he knew cattle had escaped through the weak fences during rainstorms many times before the accident;
- the police had previously informed him his cattle were on the roadway, and
- he did not inspect the fences before the accident occurred.[16]

Conversely, a livestock owner who keeps his gate locked and chained and has no prior knowledge of his cattle escaping on a roadway was not deemed to have acted "knowingly."[17]

Road/Highway Liability Examples

The law regarding closed and open range comes into play most often when a vehicle strikes livestock on a roadway. In the event of an accident, local stock laws and the statute regarding U.S. and state

highways determine whether a livestock owner may be liable to an injured motorist.

The following examples include various scenarios of accidents with livestock on a roadway and the basic rules for determining potential livestock owner liability:

- ***An accident occurs in an open range county on a U.S. or state highway.*** *The livestock owner may be liable if the owner knowingly permitted the livestock to get on the roadway.*
- ***An accident occurs in a county that has adopted a stock law on a U.S. or state highway.*** *The livestock owner may be liable if the party knowingly permitted the cattle to get on the roadway.*
- ***An accident occurs in an open range county on a farm-to-market road or smaller roadway.*** *The livestock owner has no duty to prevent livestock from entering the roadway by their natural behavior. Thus, the owner would not be liable.*
- ***An accident occurs in a county that has adopted a stock law on a farm-to-market road or smaller roadway.*** *The livestock owner may be liable if the party permitted the cattle to get on the highway.*

The "Double Closed Range" Situation

In 2020, an interesting question came before the Texas Supreme Court—where an accident occurs on a state or U.S. highway (imposing a "knowingly permit" standard) in a county with a stock law (imposing a "permit" standard), which standard applies?

In *Pruski v. Garcia*,[18] the Texas Supreme Court faced this very question after a bull was hit on State Highway 123 in Wilson County and the motorist sued the owner of the bull. Wilson County passed a stock law in 2010, prohibiting cattle owners from "permitting" cattle to run at large. The bull owner argued that in order for him to have any liability to the motorist, the motorist had to prove the owner "knowingly permitted" the bull to run at large per the state and U.S. highways statute (a higher or more difficult standard to prove). Conversely, the injured driver argued that because the collision occurred in a county with a stock law, he only needed to prove the bull owner "permitted" the animal to run at large (a lower or easier standard to prove).

The Texas Supreme Court sided with the bull owner, holding that in a situation where both the state and U.S. highways statute and a local stock law are in place, it is the higher "knowingly permit" standard from the state and U.S. highways statute that will apply. This was a favorable ruling for livestock owners across the state.

Cattle on Certain County Roads

There is one additional statutory provision of which livestock owners should be aware involving cattle on certain county roads. The Texas Agriculture Code Section 143.003 states, "cattle on a county road are not considered to be running at large" if the county road meets these two elements: (1) the road separates two tracts of land under common ownership or lease; and (2) the road contains a cattle guard constructed as authorized under the Texas Transportation Code Section 251.009 that serves as part of the fencing of the two tracts.

Thus, if a county has a stock law prohibiting owners from permitting cattle to run at large, provided these two factors are met, cattle would not be considered as "running at large" if they were on the county road at issue.

Landowners and Emergency Responders

Landowners are not liable "for damages arising from an incident or accident caused by livestock of the landowner due to an act or omission of a firefighter or a peace officer who has entered the landowner's property with or without the permission of the landowner, regardless of whether the damage occurs on the landowner's property."[19] For example, if emergency responders must cut a portion of fence alongside a highway to put out a fire, the landowner will not be liable if any livestock escape onto the highway.

Liability for Livestock on Neighboring Land

In addition to disputes between livestock owners and motorists regarding livestock and fences, questions often arise between neighboring landowners regarding the obligations they owe one another concerning fences and livestock.

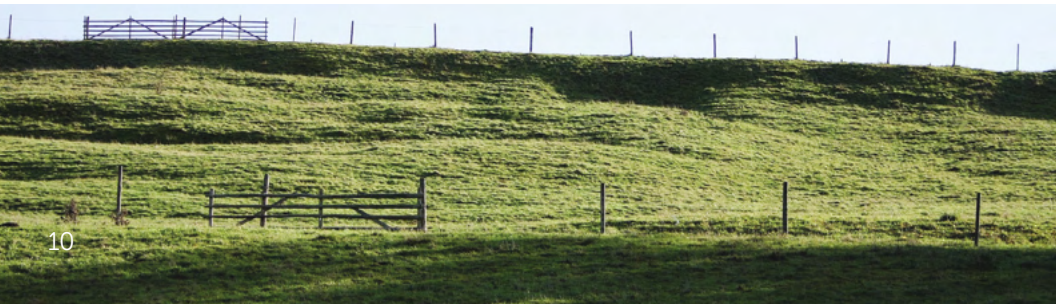
My neighbor's cattle are on my land. How do I remove them?

Once again, the answer depends on whether this situation occurs in an open range county or in one that has passed a stock law making it a closed range.

Open Range

In an open range county, if a landowner wants to preclude grazing animals from entering his or her property, the landowner is responsible for building a sufficient fence. (What constitutes a sufficient fence will be outlined below.) According to the Texas Supreme Court, "[i]t follows that one who desires to secure his lands against the encroachments of livestock running at large, either upon the open range or in an adjoining field or pasture, must throw around it an [enclosure] sufficient to prevent the entry of all ordinary animals of the class intended to be excluded. If he does not, the owner of animals that may encroach upon it will not be held liable for any damage that may result from such encroachment."[20] Thus, generally speaking, if a landowner fails to build a sufficient fence in an open range area, he or she has no recourse against a livestock owner when animals enter his or her property.

However, there are limited exceptions to this general rule. First, a neighboring landowner may be allowed to recover damages for trespass when a livestock owner intentionally drives the livestock



onto the neighbor's property.[21] Second, if a livestock owner knows his or her livestock are breachy, diseased, or vicious, the livestock owner has the obligation to prevent the animals from running at large even in an open range area.[22] Third, if a landowner in an open range county builds a sufficient fence as defined by statute, and the livestock of another still get on his or her property, the landowner may be able to recover crop or property damages from the animal's owner.

What is a sufficient fence under the Texas Agricultural Code?

The Texas Agriculture Code establishes the requirements for a "sufficient fence." However, these fencing standards apply only in open range counties where fences are meant to keep livestock "out" rather than "in."[23] These sufficient fence standards do not apply in a closed range county, nor can they be used to determine negligence or liability in a roadway accident situation.

In an open range county, it is the landowner's duty to build fences that keep animals of another off the landowner's property. The sufficient fence standard in the Agriculture Code determines if a landowner who built a fence to keep livestock off his or her property can recover property or crop damage from an animal's owner if the animal got onto the landowner's property.

Section 143.028 provides the following guidelines:

> *(a) A person is not required to fence against animals that are not permitted to run at large. Except as otherwise provided by this section, a fence is sufficient for purposes of this chapter if it is sufficient to keep out ordinary livestock permitted to run at large.*
>
> *(b) In order to be sufficient, a fence must be at least four feet high and comply with the following requirements:*
>
> 1. *A barbed wire fence must consist of three wires on posts no more than 30 feet apart, with one or more stays between every two posts;*
> 2. *A picket fence must consist of pickets that are not more than six inches apart;*
> 3. *A board fence must consist of three boards not less than five inches wide and one inch thick; and*
> 4. *A rail fence must consist of four rails.*[24]

Thus, for landowners in an open range county, meeting these sufficient fence requirements may allow recovery for trespassing animals.

Closed Range

In a county that has passed a stock law (making it a closed range), livestock owners must restrain their livestock by fencing them "in" their property. Allowing livestock (that are covered by the stock law) to run at large in a closed range county is a violation of the stock law. Nevertheless, the grass does tend to be greener on the other side and livestock may get out on occasion. Understanding this, the Texas Supreme Court explained, "animals may often escape without fault on the part of their owners, when the latter will be guilty of no offense against the law…the mere fact that an animal is at large is not necessarily a violation."[25]

In a closed range county, a landowner may be able to recover damages from a livestock owner whose animals come onto the landowner's property if the livestock owner failed to meet the requirements of the closed range county—not to "permit" animals to run at large. Thus, if a livestock owner did permit his or her animals to run at large, he or she may be liable. However, if the livestock owner did not so "permit," and the livestock still got out, there may be no recovery under the law.

In most cases, the livestock that have escaped and entered another's land are there by accident. Notifying the livestock's owner and helping the owner retrieve the livestock off one's property is the best course of action.

Lessee Liability

Many Texas livestock producers lease the land they run their livestock on. This presents a question of who is responsible for fencing the land the livestock run on—the landowner or the lessee? Absent an agreement allocating responsibility between the landowner and the lessee, these laws could apply to both the landowner and the lessee who runs the livestock on a ranch. Because of the potential liability a landowner may face even if they don't own the livestock, it is highly recommended that those leasing their property get a lease agreement in writing that (1) allocates the responsibility for inspecting and maintaining fences, (2) includes indemnification of the landowner, and (3) requires the lessee to carry insurance in a certain amount. For more information on grazing lease agreements, Texas A&M AgriLife Extension has a *Ranchers' Agricultural Leasing Handbook* available at AgriLife Learn and an *Online Ranchers Leasing Workshop* course option available as well.

Stray livestock are on my land. How do I remove them? (Estray laws)

If the livestock on one's property belong to an unknown owner or the owner is uncooperative or difficult, there is a statutory procedure for dealing with stray livestock.

Under Chapter 142 of the Texas Agriculture Code, a landowner who finds stray or "estray" livestock on his or her property should "as soon as reasonably possible, report the presence of the estray to the sheriff of the county in which the estray is discovered."[26] Providing the location, number, and a description of the stray livestock helps the sheriff's office find the true owner and remove the livestock. Once stray livestock are reported, the sheriff will attempt to contact the owner. If the owner is found, he or she may recover the livestock in accordance with the procedures set forth by statute. If an owner is not found or fails to redeem the livestock within 5 days, the sheriff will impound the animal. If the animal is not recovered from impound, the sheriff will sell the animal at public auction.

Just because stray livestock are on one's land does not mean the landowner can automatically claim them or remove them by other methods. Disposing of estrays outside of the procedure in Chapter 142 may be considered livestock theft.

In addition to contacting the sheriff pursuant to the Texas Agriculture Code, another option may be to contact the Texas & Southwestern Cattle Raisers Special Ranger for the particular area, as they may be able to help handle estray issues as well.

One interesting question regarding the estray law recently came up. Does the estray law apply in open range counties? In other words, if the open range law allows livestock to roam at large, does the sheriff have an obligation under the estray law in an open range county? That very question arose in Presidio County. And in 2019, a Texas Attorney General Opinion held the estray law does, in fact, apply in every county in Texas, regardless of its open or closed range status.[27] So even in an open range county, the sheriff has the authority to gather up and impound lost or stray livestock.

Responsibility for Building and Maintaining Fences

As a starting point, having an accurate survey that shows the correct boundary line is paramount when building boundary fences. Without a survey showing where property lines end and begin, fence building is an inaccurate guess and could lead to future headaches.

Perimeter Fence between a Landowner and a State Highway

In Texas, all U.S. and state highways are closed range. The Texas Agriculture Code states, "[a] person who owns or has responsibility for the control of a horse, mule, donkey, cow, bull, steer, hog, sheep, or goat may not knowingly permit the animal to traverse or roam at large, unattended, on the right-of-way of a highway."[28] To keep livestock off of interstates and state highways, it is the landowner's responsibility to build/maintain a fence along an interstate or state highway. However, if a landowner does not intend to have any livestock on his or her property, there is no independent obligation to build a fence.

Building and Maintaining a Boundary Fence Between Neighbors

Frequently, questions arise regarding whether neighboring landowners must share in the costs of building and maintaining boundary fences. A landowner in Texas has no legal obligation to share in the costs or future maintenance of a fence built by his or her neighbor on the dividing property line, unless he or she has agreed to do so. If any such agreement is made, it should be done in writing in order to be enforceable. Even if a boundary fence is destroyed by natural causes, a neighbor still has no obligation to contribute toward its reconstruction.[29]

The Texas Supreme Court has held, "if one proprietor [encloses] his land, putting his fence upon his line, the owner of the adjacent land may avail himself of the advantage thereby afforded him of [enclosing] his own land without incurring any liability to account for the use of his neighbor's fence."[30] However, if the neighboring landowner does not participate in the costs of erecting the fence,

it is not considered a commonly owned fence. Rather, it is the exclusive property of the builder.[31] Similarly, if a fence is built not on the property line, but instead on one landowner's property, then the fence is also considered exclusive property of that landowner.

If the neighbors agree that each will maintain a portion of the fence, such agreement is legally binding and can be enforced.[32] These agreements are rare but may be extremely useful for neighboring landowners to specify their rights and obligations regarding fences before an issue arises. Once neighbors reach a friendly agreement, it should be written down, a copy kept by each landowner, and recorded in the county deed records.

Clearing Brush to Build a Fence on a Boundary Line

Sometimes a landowner building a fence along a boundary line must clear brush on both his or her own property and the neighbor's property. If this is necessary, the landowner should always seek permission from the neighbor before entering his or her property and before clearing any brush. Without such permission, entering a neighbor's property and removing the brush could be considered trespassing and subject the acting landowner to damages. It is always better to ask for permission ahead of time. If permission is denied, the landowner may have to back the fence up on his or her property.

Removal of Adjoining Fences Statute

It is worth noting that the Texas Legislature passed a law in 1981 that governs the removal of adjoining fences, although there have been no reported cases applying or interpreting the statute to date.[33] Essentially, this statute provides three requirements.

First, absent mutual consent by the parties, a person may not unilaterally remove a separating or dividing fence in which the person is a joint owner.[34]

Second, a person who owns an interest in a fence that is attached to a fence owned or controlled in whole or part by another person must give 6 months' written notice to the owner of the other fence prior to removing his or her attached fence.[35]

Third, a person who owns a fence wholly on his or her own property may require the owner of an attached fence to disconnect and withdraw the attached fence by giving 6 months' written notice.[36]

Trimming a Tree Hanging over a Property Line

Assume a tree grows on the neighbor's property, but the limbs and branches overhang another's land. What rights do the parties have in that situation? In Texas, the location of the trunk of the tree determines who owns it, even if the roots or branches grow onto an adjoining neighbor's land. A landowner has the right to trim or cut off the limbs or branches of boundary trees or shrubbery that reach onto his or her property, as long as no damage to the other adjoining landowner occurs. However, the limbs or branches can be cut back only to the property line. The tree's owner is responsible for any damages caused to the adjacent owner from falling branches or roots. It is in the best interest of the tree's owner to control the growth of the tree so it does not create a source of potential damage to the neighboring landowner.

Adverse Possession

Adverse possession, commonly referred to as squatters' rights, is a legal concept that concerns many Texas landowners. Essentially, if one person uses the property of another exclusively, openly, and notoriously for a certain amount of time (generally speaking, 10 years) without permission, the person using the land may be entitled

to claim ownership of the property through adverse possession. The risk of adverse possession encourages landowners to make regular use of and inspect their property. It is very difficult in Texas to take someone's land by adverse possession. Although rare, this situation may arise periodically in the context of fencing.

For example, assume a landowner's fence is just inside his property line and his neighbor grazes livestock on the few feet of land belonging to the landowner, but not included within the fenced-in area. While that land does not technically belong to the neighbor who is using it, if several factors are met, the neighboring landowner may actually be able to seek title to that property. In order for someone to lawfully gain possession of land by adverse possession, there must be

- a visible appropriation and possession of the property,
- that is open and notorious,
- peaceable,
- under a claim of right,
- adverse and hostile to the claim of the owner, and
- consistent and continuous for the duration of the statutory period.[37]

Each of these elements requires in-depth legal analysis beyond the scope of this handbook to determine if they exist in a particular case.

One key element a neighbor using another's land would have to prove is the use was made "under a claim of right." The neighboring landowner would have to prove he or she "designedly enclosed" the property for his or her own use in order to adequately give notice to the record owner of the hostile claim.[38] Using a boundary fence line example, if Neighbor A builds his fence inside his property line, Neighbor B's cattle occasionally grazing on the land is not going to be enough to gain title. However, if Neighbor B builds his own fence just outside the current fence (and on the property of Neighbor A), that is more likely to be the sort of evidence that could be used to show Neighbor A had sufficient notice that Neighbor B was staking a hostile claim to that strip of land. Simply grazing livestock on the contested land is not enough to gain possession by adverse possession.[39]

A good practice if a person builds a fence off of the property line is to enter into a boundary line agreement with the neighbor indicating the fence is not on the property line, both parties understand this, and there will be no claim of adverse possession due to this fact. This type of agreement should be in writing and filed in the deed records.

Responsibility for Fencing Around Oil and Gas Operations

The mineral estate is dominant to the surface estate, meaning a mineral owner or lessee has the implied right to use as much of the surface as is reasonably necessary to produce the minerals, without permission from or payment to the surface owner. In Texas, oil and gas companies have the right to enter private property and locate their production facilities under the "reasonable right to use the surface." Oil and gas companies are under no legal obligation to place a fence around their operations in order to protect a surface owner's livestock.

"In the absence of a lease provision to the contrary, the only duty owed by the operator of an oil lease to the owner or lessee of the surface, who is pasturing cattle, is not to injure such cattle intentionally, willfully, or wantonly. There is no duty on the part of an operator to put fences around his operations."[40] A 2022 decision from the Eastland Court of Appeals highlights this, finding no liability for an oil company when over 100 cows were killed after being exposed to oil and saltwater after getting through a hotwire fence into a tank battery area.[41]

If livestock are injured, a landowner may have legal claims if there is evidence that the oil and gas operator:

- acted in an intentional, willful, or wanton manner to injure the livestock;
- acted negligently in producing the minerals; or
- used more of the surface than was reasonably necessary.

However, because each of these claims will likely be difficult to prove, the landowner is much better off to include contractual provisions that require the operator to fence off operations to protect livestock (ideally in the oil and gas lease itself). In the absence of a lease provision, communication with the oil and gas operator is key and likely the best course. The operator may be willing to put up a fence around its facilities in order to avoid potential liability.

Conclusion

Texas fence law can be a confusing area of law where much misinformation exists. Taking the time to review this handbook will allow landowners and livestock owners to understand the basic concepts and responsibilities that exist related to fences. As we've stated previously, in most situations, there is no substitute for sitting down and working these issues out over a cup of coffee. Good luck, and keep the wires tight!

Appendix

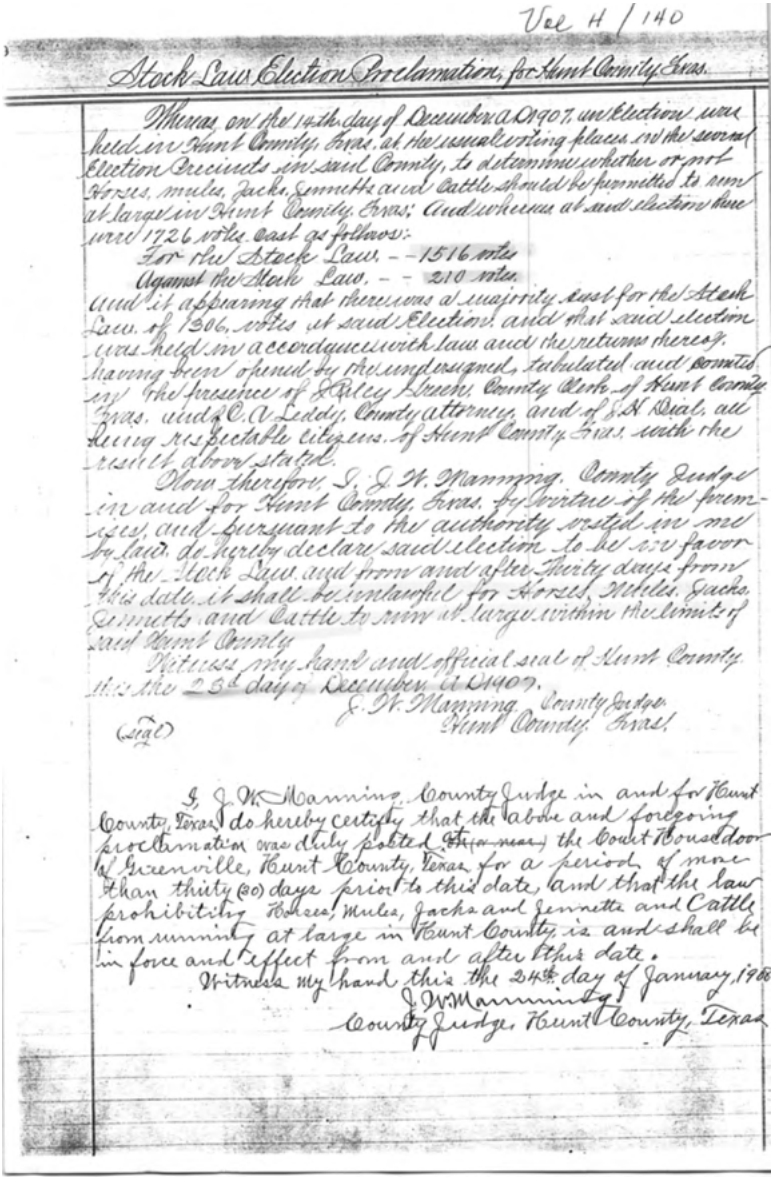
Landowner Maintenance Checklist

- Inspect and repair fences regularly.
- Check livestock frequently to be sure none have escaped.
- Keep records of when inspections are conducted.
- Carry liability insurance.
- Get to know neighbors.
- In case of emergency, share contact information with neighbors and county officials (sheriff).
- Be aware of the Texas & Southwestern Cattle Raisers Special Ranger for the area.

Stock Law Examples

The following examples are local stock laws passed in Hunt County, Texas, in 1907. These laws were often handwritten and included in the minutes of commissioner's court meetings held nearly a century ago. Unfortunately, there is no published compilation or other way to quickly and efficiently look up Texas stock laws.

Hunt County Stock Law



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Stock Law Election Proclamation, for Hunt County Texas.

Whereas, on the 14th day of December A.D. 1907, an election was held in Hunt County, Texas, at the usual voting places and the several Election Precincts in said County, to determine whether or not Horses, mules, Jacks, Jennetts and Cattle should be permitted to run at large in Hunt County, Texas: And whereas at said election there were 1726 votes cast as follows:

For the Stock Law. -- 1516 votes

Against the Stock Law. -- 210 votes.

and it appearing that there was a majority cast for the Stock Law, of 1306 votes at said Election and that said election was held in accordance with law and the returns thereof having been opened by the undersigned, tabulated and canvassed in the presence of Bailey Green, County Clerk of Hunt County Texas, and C. A. Leddy, County attorney, and of J. N. Veal, all being respectable citizens of Hunt County Texas, with the result above stated.

Now therefore, I, J. W. Manning, County Judge in and for Hunt County, Texas, by virtue of the premises, and pursuant to the authority vested in me by law, do hereby declare said election to be in favor of the Stock Law, and from and after thirty days from this date, it shall be unlawful for Horses, Mules, Jacks, Jennetts and Cattle to run at large within the limits of said Hunt County.

Witness my hand and official seal of Hunt County this the 23d day of December A.D. 1907.

J. W. Manning, County Judge, Hunt County, Texas.

(Seal)

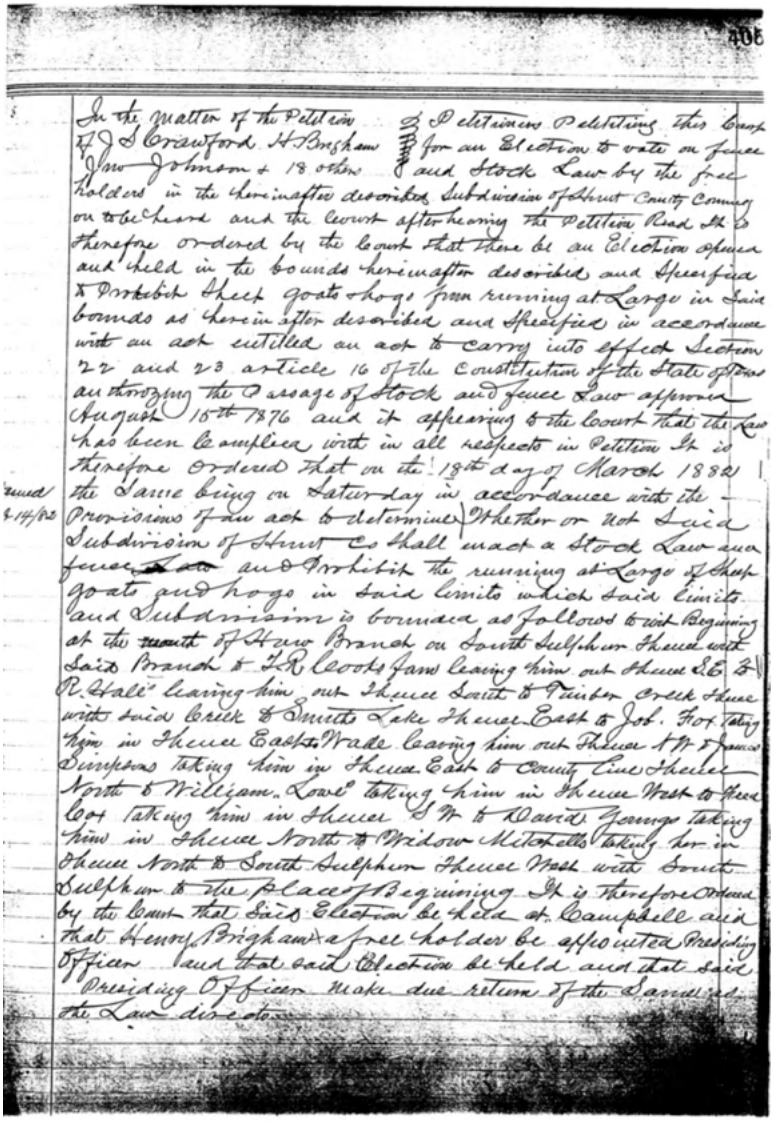
I, J. W. Manning, County Judge in and for Hunt County, Texas, do hereby certify that the above and foregoing proclamation was duly posted at three places, to-wit: the Court House door of Greenville, Hunt County, Texas for a period of more than thirty (30) days prior to this date, and that the law prohibiting Horses, Mules, Jacks and Jennetts and Cattle from running at large in Hunt County, is and shall be in force and effect from and after this date.

Witness my hand this the 24th day of January, 1908.

J. W. Manning

County Judge, Hunt County, Texas

Courtesy of Hunt County Courthouse, Greenville, Texas



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In the matter of the Petition of J S Crawford H Brigham Jno Johnson & 18 others } J Petitioners Petitioning this Court for an Election to vote on Fence and Stock Law by the free holders in the hereinafter described Subdivision of Hunt County Coming on to be heard and the Court after hearing the Petition Read &c is therefore ordered by the Court that there be an Election opened and held in the bounds hereinafter described and Specified & Prohibit Sheep Goats & Hogs from running at Large in said bounds as hereinafter described and Specified in accordance with an act entitled an act to carry into effect Section 22 and 23 article 16 of the Constitution of the State of Texas authorizing the Passage of Stock and Fence Laws approved August 16th 1876 and it appearing to the Court that the Law has been complied with in all respects in Petition &c it is therefore Ordered that on the 18th day of March 1882 the same being on Saturday in accordance with the Provisions of an act to determine Whether or Not Said Subdivision of Hunt Co shall enact a Stock Law and fence ~~Law~~ and Prohibit the running at Large of Sheep Goats and hogs in said limits which said limits and Subdivision is bounded as Followes to wit Beginning at the mouth of Hawo Branch on South Sulphur Thence with Said Branch & I R Cooks fence leaving him out Thence E & R Hall's leaving him out Thence South & Pecan Creek Thence with said Creek & South Lake Thence East to Jos. Fox taking him in Thence East to Wade leaving him out Thence N W & James Simpsons taking him in Thence East to County Line Thence North to William Loves taking him in Thence West to Thos Cox taking him in Thence S W to David Youngs taking him in Thence North to Widow Mitchells taking her in Thence North & South Sulphur Thence West with South Sulphur to the Place of Beginning It is therefore Ordered by the Court that said Election be held at Campbells and that Henry Brigham a free holder be appointed Presiding Officer and that said Election be held and that said Presiding Officer make due return of the Same as the Law directs

Issued 2/14/82

Notes

[1] *Clarendon Land, Inv. & Agency Co. v. McClelland,* 23 S.W. 576, 577 (Tex. 1893).

[2] *Gibbs v. Jackson,* 990 S.W.2d 745, 747 (Tex. 1999).

[3] TEX. AGRIC. CODE ANN. §§ 143.021–028, 033–077, 082.

[4] TEX. AGRIC. CODE ANN. § 143.034, 082.

[5] TEX. AGRIC. CODE ANN. § 143.072.

[6] TEX. AGRIC. CODE ANN. §§ 143.021, 071.

[7] Tex. Att'y Gen. Op. No. GA-0093 (2003).

[8] *Ceniceros v. Pletcher,* No. 07-15-00427-CV, 2017 WL 2829325 (Tex. App.–Amarillo June 29, 2017).

[9] *Pruski v. Garcia,* 594 S.W.3d 322, 326 (Tex. 2020).

[10] *Id.* at 323.

[11] TEX. AGRIC. CODE ANN. § 143.102.

[12] TEX. AGRIC. CODE ANN. § 143.108.

[13] TEX. AGRIC. CODE ANN. § 143.102 (It is important to note the statute also specifies that the portion of Recreation Road Number 255 located in Newton County between State Highway 87 and the boundary line with Jasper County is deemed a "highway" under this statute, making it closed range).

[14] TEX. AGRIC. CODE ANN. § 143.101–102.

[15] *Pruski,* 594 S.W.3d at 327; BLACK'S LAW DICTIONARY 888 (8th ed. 2006).

[16] *Weaver v. Brink,* 613 S.W.2d 581, 583–84 (Tex. App.—Waco 1981).

[17] *Evans v. Hendrix,* No. 10-10-00356-CV, 2011 WL 3621337, at *4 (Tex. App.—Waco Aug. 17, 2011).

[18] *Pruski,* 563 S.W.3d at 330.

[19] TEX. CIV. PRAC. & REM. CODE ANN. § 75.006(b).

[20] *Clarendon Land,* 23 S.W. at 577.

[21] *Clarendon Land,* 23 S.W. at 577.

[22] *Id.*

[23] TEX. AGRIC. CODE ANN. § 143.028(a).

[24] TEX. AGRIC. CODE ANN. § 143.028(a),(b)(1)–(4).

[25] *Tex. & Pac. Ry. Co. v. Webb,* 114 S.W. 1171, 1173 (Tex. 1908).

[26] TEX. AGRIC. CODE ANN. § 142.003(a).

[27] Tex. Att'y Gen. Op. No. KP-0278 (2019).

[28] TEX. AGRIC. CODE ANN. § 143.102.

[29] *Griffin v. Sansom,* 72 S.W. 864, 864 (Tex. Civ. App. 1903).
[30] *Nolan v. Mendere,* 14 S.W. 167, 168 (Tex. 1890).
[31] *Conner v. Joy,* 150 S.W. 485, 485 (Tex. App.—Fort Worth 1912).
[32] *Adair v. Stallings,* 165 S.W. 140, 141–42 (Tex. App.—Amarillo 1914).
[33] TEX. AGRIC. CODE ANN. § 143.121–123.
[34] TEX. AGRIC. CODE ANN. § 143.121(1).
[35] TEX. AGRIC. CODE ANN. § 143.122.
[36] TEX. AGRIC. CODE ANN. § 143.123.
[37] Statutory periods vary with the claim (anywhere between 3 and 25 years).
[38] *McDonnold v. Weinacht,* 465 S.W.2d 136, 144 (Tex. 1987).
[39] *Perkins v. McGehee,* 133 S.W.3d 287, 292 (Tex. App.—Fort Worth 2004).
[40] *Santana Oil Co. v. Henderson,* 855 S.W.2d 888, 889-90 (Tex. App.—El Paso 1993).
[41] *Foote v. Texcel Exploration, Inc.,* 640 S.W.3d 574 (Tex. App.—Eastland 2022).

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HOW LANDOWNERS CAN PROTECT THEMSELVES FROM LIABILITY

Tiffany Dowell Lashmet*

A common concern for Texas landowners is how to protect themselves from liability if someone is injured on their property. There is no silver bullet that ensures a landowner will not ever be liable for anything, and there is nothing landowners can do to make it impossible for another person to file a lawsuit against them. However, landowners can significantly limit their chances of being held liable or limit the financial burden of a judgment against them by taking the following steps before an injury occurs.

CARRY LIABILITY INSURANCE

Every landowner should have a liability insurance policy that covers every activity taking place on the property. If a landowner has a farm and ranch policy, but also conducts other activities such as a roadside fruit stand or guided hunts, he or she should confirm that the additional activities are covered by the provisions of the farm and ranch policy. An endorsement may be needed for the additional activities.

How much insurance a landowner should carry depends on the amount of risk associated with the operation. For example, a farm in the middle of nowhere that does not host any sort of events or have any guests would likely need a lower coverage amount than a farm that has a pumpkin patch and corn maze every fall with thousands of guests. Talk through the details of your operation with your insurance agent to determine the right level of coverage and type of policy you need. Landowners involved in recreational activities should consider carrying at least the amount of coverage mentioned in the Texas Recreational Use Statute. (See Tex. Civ. Prac. & Remedies Code Chapter 75.)

IDENTIFY DANGEROUS CONDITIONS ON THE LAND AND PROVIDE WARNINGS OR MAKE THEM SAFE

When a person is injured due to a condition on the property, a "premises liability claim" is often brought against the landowner. Texas law places injured parties into one of three categories to determine whether the defendant is liable to the injured party in a premises liability case. A landowner owes a certain level of duty to each category. If the level of duty is met, the landowner is not liable. If the landowner fails to meet the required duty, he or she can be held liable for the injury.

Texas law recognizes the following three categories and duty levels:

- **Trespasser:** A trespasser is a person who enters the property without permission. The duty owed by a landowner is not to intentionally injure or act with gross negligence.

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- **Licensee:** A licensee is a person who enters the property for their own benefit. The duty owed by a landowner is to warn or make safe any dangerous conditions the landowner knows about that might not be obvious to the licensee.
- **Invitee:** An invitee is a person who enters the property for mutual benefit for themselves and the landowner. The duty owed by a landowner is to warn or make safe dangerous conditions the landowner knows about or should have known about with a reasonable inspection.

For example, a deep hole covered with tree limbs could be considered a dangerous condition. For a trespasser, unless the landowner knew of the situation and had evidence of many people being injured, intentionally created the situation, or some other egregious facts, he or she would likely not be liable since the landowner did not act intentionally or with gross negligence. For a licensee, the question would be whether the landowner actually knew about the hole and, if so, whether he warned the licensee about the hidden danger. For an invitee, the question would be whether the landowner actually knew of the hole, or if the landowner would have known about it if he or she had done a reasonable inspection.

As the law makes clear, these are very fact-specific questions. The most prudent approach for a landowner is to determine whether there are dangerous conditions on their property and, if so, warn people about those conditions or make them safe. There is no set requirement for how warnings may be given, but if the landowner is entering into any type of lease or contract, identifying dangerous conditions in that type of document is useful.

OBTAIN WRITTEN LIABILITY RELEASES FROM ANYONE ENTERING THE PROPERTY

Liability releases (also called liability waivers) are documents signed by guests agreeing that they will not hold a landowner liable for injuries that occur on the property. Releases usually identify the activity involved, list common dangers associated with that type of activity, and state that the signer understands those risks and agrees not to sue the landowner for negligence.

Texas courts will generally enforce this type of waiver if drafted in a manner that meets the legal requirements for such documents. In Texas, waivers must be express and conspicuous. This means that specific language must be included that expressly waives liability for negligence claims and the waiver may not be hidden in the fine print where a signer is unlikely to read it. One caveat to this is that there is some question as to whether these releases are enforceable when signed by a parent on behalf of a minor child. The Texas Supreme Court has never answered this question. Given the complex nature of these releases and the importance of having one that is enforceable, a landowner should seek the assistance of an attorney to draft a proper waiver. Spending the money up front to do so can certainly pay off in the long run if a lawsuit can be avoided.

ENSURE THAT ALL LIMITED LIABILITY STATUTES APPLY TO THE OPERATION

Many states have limited liability statutes protecting landowners from liability if certain conditions are met. In Texas, three such statutes apply: the Texas Recreational Use Statute, the Texas Agritourism Act, and the Texas Farm Animal Liability Act. While the scope and requirements of each statute differ, they each offer essential, limited liability protections for Texas landowners.

- The Texas Recreational Use Statute (Tex. Civ. Prac. & Remedies Code Chapter 75) provides that a landowner is not liable except for intentional acts or gross negligence if the person injured was there for a recreational purpose and the landowner either charged no fee, did not charge more than a certain amount, or carried a sufficient level of insurance. In other words, this statute results in the standard of duty owed to a trespasser being applied to recreational guests.
- The Texas Agritourism Act (Tex. Civil Prac. & Remedies Code Chapter 75A) states that landowners are not liable for injuries that occur during activities on agricultural land for recreational or educational purposes, regardless of compensation, if the landowner either hung a required sign or obtained signed release language.
- The Texas Farm Animal Liability Act (Tex. Civil Prac. & Remedies Code Chapter 87) offers liability protection for a farm animal owner if a farm animal activity participant is injured during a farm animal activity and is a result of an inherent risk of that activity. As of September 1, 2021, all farm and ranch owners and lessees must hang a sign pursuant to the statute to qualify for these protections. Texas landowners should carefully review the details of these statutes and ensure they take the steps necessary for the statutes to apply to their operations.

USE A LIMITED LIABILITY BUSINESS ENTITY STRUCTURE

Landowners may want to consider putting their business (or a particular part of the business) into a business entity that offers limited liability. This could include a limited liability company, limited partnership, corporation, or a trust. When formed correctly and handled properly, these types of entities can provide limited liability for a landowner if an injury occurs on property owned by the entity. For example, if someone gets injured on property owned by an LLC of which Bob is a member, Bob would not be personally liable for the injuries. Conversely, if Bob owned the land in his own name, his personal assets could be subject to liability if an injury were to occur. Many considerations go into whether a business entity is right for an operation and, if so, which entity to select. Consult with an accountant and attorney in your area to help make the right decision for your operation.

The risk of being sued or held liable for injuries occurring on their property is a real concern for Texas landowners. However, taking responsible steps can limit their liability and protect their operations.

Understanding and Evaluating Carbon Contracts
Tiffany Dowell Lashmet, Texas A&M AgriLife Extension

Carbon contracts have been a popular topic of conversation for farmers and ranchers around the country. As with any agreement, several legal and economic issues arise and should be carefully considered by producers before entering into a carbon contract. A critical consideration is producers and landowners should never rely on verbal representations made by anyone related to a contract; assume only the written contractual terms will be enforceable. Remember, this is new territory and many unknowns still exist about the carbon market and these carbon agreements. I highly recommend engaging an attorney to review any carbon contract prior to signing.

Key Concepts

When reviewing a carbon contract, producers and landowners may notice it seems to speak a different language than most agricultural contracts. Understanding some of the basic concepts related to carbon contracts is an important starting place. Importantly, each contract will likely have specific definitions of these terms. It is critical for landowners and producers to carefully review the definitions in any contract before signing.

Additionality – The concept of additionality refers to some companies only paying for new carbon-sequestering practices. If additionality is required, the farmer or rancher would have to undertake a new practice—such as converting from conventional farming to no-till farming, for example, to qualify. A producer who has already adopted carbon-sequestering practices would need to seek a contract that pays for these previously adopted practices or allows a look-back period and does not have an additionality requirement.

Carbon market – Currently, most carbon markets are voluntary programs where brokers essentially serve as an intermediary between companies seeking carbon credits and farmers and ranchers willing to generate these credits. A producer agrees to undertake certain practices which sequester carbon or reduce carbon emissions, the company pays the producer, and then claims the carbon credit generated by the producer helps to offset the carbon footprint of the company.

Carbon practices – These are farming or ranching practices having the ability to reduce carbon emissions and/or sequester carbon. The most common carbon practices include no-till farming, planting cover crops, crop rotation, planting buffer strips, and regenerative grazing.
Carbon credit – A carbon credit is a frequently used measurement unit to quantify carbon. Typically, one carbon credit is equal to one metric ton of carbon or carbon equivalent that is sequestered.
Carbon emissions – The release of carbon into the atmosphere.
Carbon sequestration – The process of capturing carbon from the atmosphere.
Permanence – The length of time a carbon reduction lasts. Some contracts may require a producer to abstain from certain activities for an extended period of time to ensure the continuation of storing carbon that has been sequestered.
Stacking – The concept of stacking refers to one producer enrolling the same land in more than one program or contract. Many contracts prohibit stacking, meaning the producer may enter into only one carbon contract for a specific piece of property. The breadth of a stacking prohibition can vary greatly by contract, with some prohibiting only other carbon contracts, while others may prohibit participation in any government programs as well.
Verification – The process of confirming carbon reduction or sequestration.

Key Contract Terms to Consider

Control of Land – Brokers or companies seeking carbon agreements will likely require some proof the party entering into the contract either owns or controls the land. This may include a copy of a written lease agreement, for example. Some companies or brokers may require both the tenant and the landowner sign any contractual agreement. This is particularly true if the lease in place is for a shorter timeframe than the carbon contract will be.
Data ownership – Data collection is a requirement for any carbon contract, and a carbon agreement should address issues related to the ownership and use of such data. Issues like who will be given access to the data, how the data may be used, and who has ownership rights in the data should all be addressed.
Indemnification – Indemnification clauses essentially shift potential liability and costs from one party in the contract to another. These clauses are an agreement to reimburse another party for damages they sustained as a result of the indemnifying party's actions. It is critical to analyze the breadth of an indemnity clause. First, indemnification clauses should be mutual, meaning each party agrees to indemnify the other. Second, some provisions may be so broadly written as to require a

landowner to indemnify the company for any damages or injury which are not a result of the developer's contract, including actions taken by third parties over whom the landowner has no control.

Impact on energy production – Producers should carefully consider what impact a carbon contract may have on energy production on the land. Depending on the mineral ownership or the potential energy production activities, this may require identifying carve out areas where oil or gas wells, or potentially even wind turbines or solar panels can be placed.

Land title implications – Producers should be careful to determine if there are contractual provisions that may impact their ability to sell or otherwise transfer ownership of the land. For example, contracts may allow the purchaser to place a restrictive covenant or a lien on the property, or require the landowner to enter into a conservation easement for the term of the contract. Certainly, these types of limitations could impact the marketability and potential sales price for the land.

Negotiation costs – Some companies and brokers are offering to pay a certain portion of a producer's legal fees associated with negotiating a carbon contract. This would likely be an agreement separate from the contract itself but might be worth producers requesting from the company or broker. Regardless, a producer should consider using an attorney to assist with reviewing or drafting any carbon contract.

Other allowable uses – Producers may wish to make other uses of the property at issue in a carbon contract. Many farms and ranches have added various agritourism activities as ways to diversify income. For example, many producers may wish to reserve the right to hunt or fish on the land. The contract should address any desired allowable uses for the producer to ensure both parties are on the same page.

Payment – The payment provisions of the contract are extremely important for the producer. There are several different potential payment methods which could be included in an agreement. There could be a per-acre payment for adopting certain carbon practices. There could be a payment per metric ton of carbon as measured and verified. Another option could be a payment based on the carbon market at an identified time. Producers should ensure the contract sets forth the exact details about how payment will be calculated. For any contracts based on actual carbon sequestered, producers should investigate the amount of carbon likely to be sequestered in their particular area. For example, agronomists report the amount of carbon likely to be sequestered in the Texas Panhandle and South Plains to be far less than the one ton of carbon per year it takes to create a carbon credit. Also

important is to determine what costs or expenses may be deducted from the producer's payment. Ensure the provision also addresses when and how payments will be made.

Parties – A producer should certainly do his or her homework to investigate any party with whom they will enter into a carbon agreement. Understand the party's position in the market. Many contracts are being offered by brokers or aggregators, but there are also ag retailers offering these types of contracts. Try to speak to other producers who have entered into contracts with the company to ask about their experience.

Penalties – All contracts contain penalties if certain conditions are not met. It is important to understand these penalties and the risk associated with them. For example, if a party agrees to undertake a certain practice but there is an external reason such as weather preventing them from doing so for an amount of time, there could be a specific penalty for that. Some contracts may require a certain increase in the amount of carbon in the soil and include a penalty if that amount is not realized or is released during the term of the contract. Carefully review the contract to understand under which circumstances a producer could potentially be liable if this occurs. Contracts will likely also contain early termination penalties if the producer is unable to comply with the contractual requirements for the term of the contract.

Required practices – An agreement will set forth the required practices a producer agrees to undertake as part of the contract. Again, this differs by contract and must be carefully reviewed. Some contracts may list very specific requirements, while others may contain a more general description such as conservation practices. Producers should be careful to analyze the additional costs which may come with adopting a required practice as compared to the potential carbon contract payment they would receive. Finally, producers should pay attention to whether the required practices are set through the entire contract, or whether they may change from year to year.

Stacking prohibition – Often, carbon contracts will include a prohibition on stacking—meaning a producer may not enroll the same land in multiple carbon contracts or programs. It is important to carefully review any stacking prohibitions in a contract, as some may be worded broadly enough to prohibit participation in other government programs as well, such as EQIP or CRP, for example.

Standard legal clauses – There are several standard legal clauses that are common in most contracts.

- **Attorney's fee provision** – Generally, regardless of outcome, parties in a lawsuit pay their own attorney's fees. One way to modify this approach is if parties to a contract agree the prevailing party may recover his or her reasonable attorney's fees.
- **Choice of Law** – A choice of law provision is an agreement between the parties to a contract as to which state's law will govern the agreement. For example, if a farmer in Texas signs a contract with a broker in California, they could agree on either Texas or California law as being applicable to the contract.
- **Dispute Resolution** – Many contracts include a dispute resolution clause. Frequently, this is either an agreement to participate in mediation or arbitration. Mediation allows the parties to meet with a third-party mediator in an attempt to resolve their dispute. If no agreement is reached between the parties, then either party may proceed to file a lawsuit in court. Arbitration, typically, is agreeing to have a dispute heard before an arbitrator rather than in court. Both approaches are designed to be more efficient means than trial to resolve disputes, but each have different pros and cons to consider.
- **Insurance** – The producer likely wants to ensure the purchaser has an insurance policy and seek to be added as an "additional insured" on this policy. Additionally, the producer may seek a waiver of subrogation, which essentially is a clause stating the purchaser's insurance company will not seek recovery from the landowner for negligence.
- **Venue** – A venue clause states where any legal dispute over the contract must be filed. For example, a farmer could request any legal dispute be filed in his or her home county.

Term of the agreement – It is important to understand the length of the contractual agreement. An agreement will likely set forth a given number of years practices must be undertaken. Keep in mind that lengthy contracts may have estate planning implications as well. Some agreements may require the continuation of identified practices even once the term of the agreement ends to ensure permanence. Also watch for any opt out provisions, allowing parties to terminate the contract prior to the end date if certain requirements are met. Some contracts allow either party to cancel merely by giving notice. Others may require certain conditions to be met. On the other hand, there could be provisions allowing for extensions to be granted, so watch for those provisions as well.

Verification – Provisions regarding measurement and verification are some of the most important in a carbon agreement. As an initial matter, the contract should set forth exactly what is being included in the measurements. For example, will the verifier simply measure the carbon in the soil, or will the entire system be looked at, including the impacts of livestock on the property or the impacts of using nitrogen

fertilizer, for example? Understanding exactly what will be measured is critical. Next, parties should agree upon who will conduct any testing and verification, what methodology will be used to do so, and when and where such data collection will occur. Some contracts may offer payments based on modeling, while others will take actual measurements. Measurements may be done in a number of ways including algorithmically, by taking actual physical soil samples, and by using satellites. The manner in which samples are taken can have impacts on the results, and considerations related to the time of year (and even time of day), location in the field, and soil depth are all important to consider and understand. Parties should consider who will bear the costs of the data collection and verification, and generally, these costs falls to the purchaser. Finally, the producer may want to ensure there is a provision allowing an audit of the data and payments to ensure requirements are being followed and a process for how a producer can challenge or appeal determinations they believe are inaccurate.