A Reprint from *Tierra Grande*, the Real Estate Center Journal

The Perils of Deer-Proof Fencing

By Judon Fambrough

South Texas is noted for its trophy deer. Habitat management, genetic enhancement and deer-proof fencing contribute to the development of superior animals. Ranchers garner $7,000 to $10,000 for allowing hunters to harvest a trophy animal. Consequently, deer-proof fencing raises legal as well as financial issues.

First, indigenous species of wildlife such as white-tailed deer, turkeys and bob white belong to the state of Texas. They are not the personal property of the landowner. They are viewed as free in nature under the common law. Deer-proof fences interfere with the animal's common-law right to roam freely about the land.

The only right property owners possess with regard to indigenous animals is the right to harvest or hunt them in accordance with the state game laws. This right is transferred to others via the hunting lease. Property owners provide (or sell) the opportunity or space to pursue state-owned animals.

Arguably, deer-proof fencing is illegal because it impedes an animal's right to roam freely. So far, no Texas appellate cases have addressed the issue.

Second, ranchers commit a trespass when they herd deer off neighboring land. In South Texas, helicopters are often used to herd the deer off neighboring property before completing a deer-proof fence. Running a $10,000 animal off one property and onto another that is being fenced breeds contempt. But is the practice illegal? If the landowner suffers an economic loss because of the trespass, it is.

Certainly, losing the right to receive $10,000 for a harvested trophy deer represents an economic loss. The loss is not of the animal but of the opportunity to pursue it.

But can a trespass occur via a helicopter that never touches the ground? The answer is yes. Any invasion of a property right is a trespass. With real property, a trespass occurs when a person enters another's land without consent. A trespass may be committed on, beneath or above the surface of the earth *(City of Arlington v. City of Fort Worth, 873 S.W. 2d 765).*

The case of *Schronk v. Gilliam, 380 S.W.2d 743*, decided by the Waco Court of Appeals in 1964, addressed aerial trespass. It involved crop dusting, not deer herding. The pilot unintentionally and nonnegligently destroyed the plaintiff's crops and pastures while spraying. The plaintiff successfully sued for trespass and damages.

The appellate court held a landowner's property rights extend a minimum height above the ground. The height, absent contrary legislation, extends to the landowner's present use or to what can be reasonably used by the landowner. In the crop-dusting case, the trespass occurred when the plane entered the airspace immediately above the plaintiff's land and interfered with the use and enjoyment of the property.

The same argument can be made concerning herding or scaring deer off neighboring property. If the helicopter pilot flies low enough to scare the deer, it must be low enough to interfere with the landowner's reasonable use of the property.

Damages for the trespass can be severe. In addition to the lost revenue from harvesting or attempting to harvest the animals, the landowner may recover punitive or exemplary damages when the trespass was committed maliciously or in wanton disregard for the plaintiff's rights (*Williams v. Garnett, 608 SW2d 794.*) A jury could easily find herding trophy animals off a neighbor's property to be a malicious and wanton disregard of another's property rights.

Third, by building a deer-proof fence, ranchers face a possible significant increase in property taxes. The chief appraiser could view the fence as an improvement and increase the rancher's property tax assessment even though the rancher qualifies for open-space or agricultural-use appraisal. The discretion lies with the chief appraiser.

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Tierra Grande (ISSN 1070-0234), formerly *Real Estate Center Journal*, is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115. Subscriptions are free to Texas real estate licensees. Other subscribers, $20 per year.