

Nebraska's Fence Law and Related Statutes

"It's mandated cooperation between property owners, basically."
Senator Brasch

Nebraska's division fence laws have undergone a number of changes in the last five years, which this memorandum is meant to explain.

Legislative Finding - § 34-101 – Not just fencing in, but fencing out

The Legislature finds the duty of adjoining landowners for the construction and maintenance of division fences to be beneficial to the public interest and welfare. Such benefits are not confined to historical and traditional societal benefits that accrue from the proper constraint of livestock, but also include suppression of civil disputes and public and private nuisances and the protection of public safety. Division fences promote the peace and security of society by the demarcation of rural boundaries, physical separation of conflicting land uses, enhancement of privacy, diminishment of frequency of public burden imposed by incidences of trespass and adverse possession, and the mitigation of impacts of conflicting land use intrusion into those areas of the state devoted to agricultural and horticultural use.

Substance

Neb. Rev. Stat. 34-102:

- Adjoining landowners **shall** construct and maintain **just proportion** of division fence
- *Just proportion* means "equitable allocation"
 - Equitable allocation means an "equal burden" of construction and maintenance, whether in terms of allocation of responsibility for a **portion** of the fence or a share of the costs
- No need for fence if adjoining landowners don't want one
- Unless landowners agree otherwise, fence **shall** be "lawful fence" defined in 34-115(5)
 - At least four wires (not less than #9 fencing wire) between posts no more than a rod apart (with a stake or post between every two posts); at least 4.5' in height, with no more than 12" between wires, measuring from the top
 - If existing fence does not meet this standard, law appears to allow one land to erect new fence that meets this standard and impose equal burden of costs on adjoining landowner
 - What happens when existing landowners have agreed on standard of fence that is less than the §115(5) standard and a new landowner insists on new "standard fence"?
 - If fence does not meet standard, might affect liability for cattle on roads; might be evidence of negligence

34-112

- Responsibility to repair fence is ongoing

34-112.01

- It is not a trespass to enter onto adjoining land to construct, maintain or repair fence, but only to extent reasonably necessary for the construction, maintenance or repair
- Does not allow alterations to adjoining land: cannot remove trees, buildings or other obstacles, or remove personal property, without consent of landowner or a court order

34-NEW – Takes effect September 8, 2011 – Trees and Woody Growth

- Each person who is liable for construction and maintenance of division fence shall maintain his or her portion in good repair, including necessary removal and trimming of trees and woody growth that would or do cause damage or dislocation of fence
- Trees or woody growth “within or encroaching upon” a division fence that cause damage to or dislocation of fence constitute a private nuisance to adjacent landowner’s possessory interest in land
- Questions:
 - How is “his or her portion” determined?
 - “Necessary” to prevent damage and dislocation of fence is the standard

Procedural

34-112.02 – How it is supposed to work.

- Landowner who wishes to construct new fence or maintain/repair existing fence, shall give written notice to “any person liable” for the same: adjoining landowner or occupier
- If landowner doesn’t want contribution, no need for notice
- Notice requests that other owner satisfy his share by performing work or other contribution
- Once notice is given, landowner may “commence or complete” construction, maintenance or repair
- Law doesn’t specify that notice must be given before work is done but implies that it must be given before work is complete
- If other landowner does not answer, can commence action in county court (where land located) after at least seven days from notice (and within one year)
- If landowners cannot agree on “what proportion of a division fence each shall construct, maintain or repair whether by performance or by contribution,” either may file fence dispute action without need for further notice. (Assumes that notice is given by one landowner and the owners then discuss but cannot agree on their shares.)

- Law states that responsibility is equal, so is dispute limited to which proportion? What about necessity of repairs? Need for new fence? Extent of tree
- County court action is modeled on small claims action.
- A fence dispute complaint form is available. (Attached.)
- Clerk will send notice of mediation after a complaint is filed.
- Need not file a complaint before mediation. Can contact Nebraska Farm Mediation Service before filing complaint.

Questions

- Law appears to apply statewide.
- Legislative history states that law does not do away with right hand rule, but nor does law provide for it.
- In doing away with fence viewers, law does not provide for anyone to be a fact finder – actually go out and look at the situation. This is left to rules of litigation.

Mediation

- Mediation is voluntary. Both parties must agree to mediate. (Not clear how court would look on a refusal to mediate.)
- Mediator has no power to bind parties. More like a facilitator – uses mediation tools to help parties reach for resolution.
- Inexpensive, compared to litigation.
- Agreement, if reached, “shall be” entered as a judgment, if agreement is reached after a fence complaint is filed.
- Brochure available.

Related Laws

Neb.Rev.Stat. §§54-401

- Livestock owners liable for damages done by stray and trespassing animals
 - if damages are not result of negligent or willful damage to division fence by person claiming the damages. So this law – the law that imposes liability on livestock owners for damage done by trespassing animals – is tied to fence law: if trespass is a result of damaged party’s failure to maintain his portion of fence, no liability for livestock owner.
- Damaged party has lien upon livestock for damages and costs
- Owner of land can impound the trespassing livestock (distrain)
 - Must let livestock owner know, describe stock, state damages, name arbitrator, and require livestock owner to take away livestock within 48 hours after paying damages (notice form provided in § 54-403)

- If livestock owner (within 48 hours of notice) refuses to pay, or to name his own arbitrator, animals shall be sold when the damages and costs have been filed with county court of damaged landowner
- If they cannot agree on damages, each chooses an arbitrator, and if the chosen arbitrators cannot agree, they choose a third: these men have power of arbitrators
- Arbitrators make an award in writing, payable within five days; if not paid, filed in court and becomes judgment and may be executed against the distrained livestock. Each party may appeal from judgment. Arbitrators allowed two dollars for their services.

Neb.Rev.Stat. § 54-304

- Owner of male animal running at large is liable for damage
- Owner of land on which male animal is straying may take into possession
- Landowner notifies sheriff
- Sheriff notifies owner of animal
- Within 10 days owner of animal must claim him and pay damages assessed by sheriff
- If not, sheriff sells at auction, pays damages (as determined by sheriff) and deposits balance with county treasury

Neb.Rev.Stat. § 37-1012

- Games & Parks has same responsibility for division fence as private landowner except liability same as railroad where recreational trail developed

Neb.Rev.Stat. §74-601 et seq – Railroads and fences

- RR has duty to erect and maintain fences along rights-of-way and cattle guards at all road crossings (fences and gates sufficient to restrain cattle, horses, sheep & hogs; bison, elk, etc. not included)
- Landowner may notify RR of intention to enclose land and request RR build fence along right-of-way; RR shall within 6 months erect fence, and if RR does not, landowner may erect fence and recover costs from RR
- RR that does not fence on both sides of right of way is strictly liable to livestock owner for injury or death to animals

Fences and Adverse Possession/Prescriptive Easements

- Fences can and do play a role in boundary disputes, in adverse possession claims.
- See also Neb.Rev.Stat. § 34-301 – court action to settle disputed corners and boundaries
- Memorandum is available upon request.

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Excerpt from Committee (emphasis added):

SENATOR BRASCH: I do live on a farm and I'm trying to picture our fences right now and there's hot-wire fences and the only time there's a situation where there could be a problem is when we have cattle, our neighbor has cattle, and the fence is down and we have a field of corn right next to that. So good fences are very important, and when we talk about vegetation, we're not very picky on our farm unless it's a thistle or a tree growing in a fence line or something like that. So here the problem is that it's a matter of maintaining the fence and the vegetation, that that issue at this point. That it's a shared responsibility and each has a legal right of way to alleviate that.¹

ART BROWNLEE: Correct. There are so many variations as Senator Carlson is attempting to resolve, that you know, as we say, as we go from one extreme western Omaha to western Nebraska and so many variations and... [LB108]

Excerpt (emphasis added)

SENATOR HARR: I grew up fencing since I was knee-high to a duckling. I think part of the reason I left the state was because I hated fencing so much for college. So I understand your frustration of rebuilding fences. But as I read this statute or proposed statute, a lot of these pictures would fit within the vegetative definition of vegetation. As long as you get to it before it goes to the line, you would be able to go back a real full amount, now that's the issue of what's reasonable. But do you not agree you would be able to cut back some of those even those it's on your neighbor's property to prevent the encroachment? I mean, it would require your watchfulness but you would be able to, do you not agree?

MARK ROEMER: As I read the legislation as being presented, it's my responsibility to keep my vegetation from encroaching upon the neighbor's property, correct. But I would not be able to reach across the neighbor's, the fence line to reduce any vegetation encroachment upon my property.²

¹ Appears to be incorrect understanding of statute; no apparent right to remove vegetation from other owner's land.

² This appears to have it right.