

Nebraska's Fence Law and Related Statutes

LB 108 was enacted into law on March 7, 2007. Any dispute commenced prior to that date falls under old law.

Substance

Neb. Rev. Stat. 34-102:

- Adjoining landowners **shall** construct and maintain **just proportion** of division fence
- If both landowners use fence to confine livestock, then equal share of responsibility
- No need for fence if adjoining landowners don't want one
- Unless landowners agree otherwise, fence shall be "lawful fence"
 - 34-115: at least four wires (not less than #9) between posts no more than a rod apart (with a stake or post between every two posts)
 - 34-116: at least 4.5 feet in height and no more than one foot between wires
 - Importance – if fence does not meet standard, might affect liability for cattle on roads; might be negligence
- Law applies
 - only where either or both lands are zoned agricultural or horticultural and either or both are used for such purpose
 - in all other areas of state (not zoned), law applies when both lands used for Ag or horticulture
 - Presumably, in unzoned area, where only one landowner uses land for Ag or horticultural purpose, then that owner is responsible for the entire fence

34-112

- Responsibility to repair fence is continuing

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 (three or six feet?)
- This allowance does **not** encompass alterations to land – cannot remove trees, buildings or other obstacles, or remove personal property, without consent of landowner or a court order

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, unless law does not apply (unzoned, only one Ag use)

- 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" the work
- 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 after at least seven days from notice (and within one year)
- If landowners cannot agree on proportionate share of responsibility, 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.)
- 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.

What law does not do?

- Law does not define "just proportion."
- Obvious implication is that if only one adjoining landowners uses fence to confine livestock then he will be responsible for more than half of construction/maintenance.
- Does not define "equal share" where both confine livestock.
- 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. Sometimes like a referee; sometimes an arm-twister.
- 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

- Not enough time to discuss this area of the law, but want to mention that 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 made available.

Prepared by:

*Joe M. Hawbaker
Hawbaker Law Office
Omaha, Nebraska*

2008/on behalf of Farm Law Project, Legal Aid of Nebraska