
LR 371

Interim study to examine use of existing fence dispute resolution forums and the utility and options for reinstating a fence viewer mechanism

Staff Report to the Agriculture Committee

December 31, 2018

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LEGISLATIVE RESOLUTION 371 Introduced by Senator Lydia Brasch

PURPOSE: The purpose of this resolution is to compile information regarding the number and nature of fence dispute claims filed pursuant to section 34-112.02 of the Nebraska Revised Statutes since enactment of Legislative Bill 108 in 2007 and the extent to which mediation services have been utilized to resolve fencing disputes. The study shall further examine the utility of, and options for, reinstating a fence viewing mechanism into the Nebraska fence law to provide fact finding and arbitration functions for fencing disputes between adjacent landowners.

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Introduction

The Nebraska Law of Division Fences (§§34-101 et seq.) imposes a shared responsibility of adjacent landowners for the construction and maintenance of partition fences erected on the property line between private lands (the history and purpose of assigning this mutual responsibility is described in further detail in this report). Nebraska’s fence law contains elements common to those of other states by prescribing when a fence is required, the type of fencing required and its value, how responsibility for a fence is allocated, and methodology for compelling neighboring landowners to contribute to the costs and labor of a shared fence line and for resolving disagreement between neighbors regarding whether their fencing obligations have been met.

In 2007, the Legislature made significant changes in the manner in which fencing disputes are resolved. Previously, Nebraska fence law mandated the appointment of fence viewers to arbitrate the dispute and whose decision was binding on both landowners. Fence dispute matters were only litigated if one landowner brought suit to find an adjacent landowner in breach of responsibilities assigned by either private or arbitrated agreement and to order appropriate remedy. LB 108 enacted in 2007 eliminated the fence viewer system and provided for a direct civil cause of action through the filing of a fence dispute claim in county court where the court itself directly applies the obligations of the fence law to the parties. The Legislature has provided for mediation services to be made available and its use encouraged to facilitate landowners reaching private resolution short of litigation, but it uncertain how often mediation has been utilized, or successful when utilized. While these changes addressed flaws with fence viewer arbitration, it has altered the role of the courts with respect to fencing disputes and in perhaps in many cases made essential fact finding and ultimate resolution of fencing disputes more complicated and expensive.

LR 371 directs the Agriculture Committee to review the history of changes to the fence law, examine utilization of fence dispute mechanisms since the significant changes made through enactment of LB 108 in 2007. The resolution also asks the committee to discuss any potential issues with the fence law as it currently exists and to describe options for restoring fence viewing mechanisms should the Legislature wish to someday consider that option. This report prepared by staff is not intended to recommend any revisions to the law, but merely to provide information that might be a useful reference should revisions to the fence law be considered in the future.

Nebraska Fence law: Overview & History

Function of the Fence law

Fence law deals with the regulation of boundaries and fence disputes. Nebraska is typical among Midwestern and western states in prescribing a joint liability among adjoining landowners for the construction, maintenance and repair of division fences. A “division fence” sometimes referred to as a partition fence, is a fence on or very near the boundary line separating adjoining properties. Generally, state fence laws contain a forced-contribution or cost share provision that requires landowners to assume mutual obligation for the costs and labor in the construction and maintenance of a division fence. In addition to assigning a joint liability, fence laws contain the following elements:

- Prescribe means of allocating the responsibility in the event adjacent landowners cannot agree on a just proportion allocation.
- Prescribes means for one landowner to compel a neighboring landowner to perform fencing activities or to enable a landowner to receive compensation for completing fencing tasks that are the delinquent landowner’s responsibility.
- Methodology for determining a) whether an existing fence is sufficiently constructed and/or maintained for purpose of preventing breaching by livestock in the event landowners disagree on adequacy or where such determination is relevant to assigning liability for trespassing animals, and b) reasonable costs for fence construction and repair and the value of fencing.
- Specifies fencing standards which both define and limit the liability of landowners for fencing costs and which determine whether landowners have met their obligations for purposes of assigning liability for trespassing livestock.

Relationship to Herd Laws:

Under the common law of England, a livestock owner has a duty to restrain livestock from running at large and is liable for personal injury or damage to neighboring property caused by roaming animals. The English common law followed colonists to the original settlements in the eastern U.S. and was applied by courts in the states formed from the original colonies when the United States became an independent nation. Additional states formed during early westward expansion largely did not disturb the prevailing common law. However, due to various political, economic and practical considerations, during early settlement periods of the Midwest and western states, territorial and state legislatures altered the common law by adopting open range, or “fence-out,” policies. Under open range rules, any land not enclosed by a fence was considered open to grazing. A crop producer or settler landowner could not claim against a livestock owner for damages caused by trespassing livestock unless the landowner enclosed his or her land with a fence sufficient to prevent livestock from entering, and then often only if the trespass was the result of deliberate damage to the fence. In other words, under open range policies, it is the duty and the burden of a landowner wanting to avoid damage by trespassing livestock to secure their property with fencing.

Beginning in the second half of the 1800s, as populations increased and settlement patterns and land uses intensified, states including Nebraska began reverting to “fence-in” rules. Under fence-in laws,

livestock owners have a duty of reasonable care to contain livestock and can be held liable for damages their wandering livestock cause on the lands of others. States, however, supplemented fence-in rules with partition fence statutes that require joint liability for fences. Although a livestock owner has a duty to prevent trespass of his or her livestock, states have found mutual benefit to adjoining landowners justifying their sharing in fencing construction and maintenance. While the open range is largely a thing of the past, neighboring landowners may continue to each be livestock owners or allow use of their property by livestock. Additionally, states have reasoned that even non-livestock owners continue to gain value by securing their property from livestock. In fact, §54-401 of the Nebraska Herd Law, while assigning a liability of livestock owners for damages their stock cause to property owned by others, qualifies that such liability is mitigated if the damage results from “*negligent or willful damage to the division fence by the person claiming damages.*”¹ Thus, Nebraska statute recognizes both a shared interest and responsibility of landowner for fencing to exclude livestock by limiting a landowner’s right to recover damages if the livestock enter due to the landowner’s own negligence in keeping a division fence in repair.

Fence laws in conjunction with fence-in herd laws reflect the historical and practical necessity for restraining livestock as the open range diminished and converted to diverse private ownership, and livestock production became increasingly juxtaposed with crop production and other conflicting settlement. In recent times, state partition fence laws have come under greater judicial scrutiny as certain categories of rural landowners who may perceive little self interest in livestock fencing argue that if fences are needed to restrain livestock, fencing should be exclusively the duty of livestock owners. In some states, courts have found that compelling non livestock owners to share in fencing costs violates their due process protections or imposes unconstitutional takings². However, Nebraska like many western and Midwestern states does not expressly limit the application of division fence liability only to situations where restraint of livestock is involved. Midwestern courts have upheld the joint liability even where at least one of the parties does not place livestock against the fence. Courts have found societal and individual benefits accruing from partition fences in addition to, and even independent from, their function of restraining livestock, including

- Enhanced landowner privacy
- Demarcation of rural boundaries
- Reduced public burdens associated with incidents of trespass and adverse possession
- Enhanced public safety through physical separation of conflicting land use
- Mitigation of the burdens imposed on production agriculture by conflicting land use intrusion into traditionally agricultural areas

¹ §54-401 was amended by LB 149 in 1983 to add this qualification that limits a landowner’s right to claim against a livestock owner for damages by trespassing livestock. This amendment to the fence law followed *Feine v. Robertson*, 184 Neb. 668 (1969) which found that plaintiff’s negligence in maintenance of a division fence was immaterial to the livestock owner’s liability for destruction of stacked hay on the plaintiff’s land despite the animals entering on the portion of the fence that was the plaintiff’s responsibility that the plaintiff had not kept in good repair. It is unknown whether courts have since applied §54-401 as amended by LB 149 (1983) to deny a damaged landowner compensation where it can be shown trespassing animals breached a fence because the landowner failed to properly maintain his portion.

² For a discussion of the purpose and evolution of state fence laws and constitutional challenges to forced contribution features of state fencing statutes, see Molloy, J & Reid, L; *The Constitutionality of Partition Fence Statutes in the Midwest*; An agricultural law research article of the National Agricultural Law Center. (2004)

Ownership of Division Fences:

As a general rule, a partition or division fence built on a boundary line is owned by the adjoining landowners as tenants in common, until the contrary is shown. However, an adjoining landowner who built the entire partition fence may be considered as the sole owner of the fence, until the other adjoining landowner pays his proper share of the construction, either voluntarily or under statutory compulsion. The adjoining landowners may also by agreement provide that each is the sole owner of that part of the partition fence built or maintained by either landowner. 35A Am. Jur. 2d Fences §13.

This general rule appears to be followed in *Schnakenberg v. Schroeder*, 219 Neb. 813 (1985). While ownership of the fence was not the central issue, the court did speak briefly to ownership, stating that where adjoining landowners have shared responsibility for building and maintaining a division fence, the fence is owned in common between them until such time as by private agreement or by assignment, each takes ownership of a specific portion of the fence. Thus, landowners in Nebraska are largely free to enter agreements between themselves to alter any common law or statutory allocation of responsibility and ownership of division fences. In other words, the court in *Schnakenberg* recognized that assignment of interests and obligations in a division fence are prescribed by statute only in the absence of private agreement to the contrary.

“While the statute provides a procedure for ascertaining and fixing the rights and duties of coterminous proprietors with respect to a division fence, it is not exclusive, but they may by contract adjust their respective rights and obligations.” *Schnakenberg v. Schroeder*, @ 815, quoting *Meyer v. Perkins*, 89 Neb. 59 (1911)

Evolution of the Nebraska Fence law

For purposes of LR 371, it may be useful to review changes made to the fence law over time to arrive at its present form. Prior to 1994, the Nebraska fence law had remained unchanged from a recodification of the fence law statutes in 1929, which recodification itself left intact earlier versions of the law, in some cases dating to the late 1800’s.

Fence law prior to 1994:

The Nebraska fence law in the fence-in era has assigned a duty to adjacent rural landowners to make and maintain a “just proportion” of a division fence between them. However, the statute does not compel construction where neither landowner desires a fence. The statutes did not define just proportion, but it was presumed under most circumstances each assumed a responsibility to construct and maintain half of the fence. The right-hand rule, where each landowner is responsible for that portion of the fence to each landowner’s right hand if they were to meet face-to-face in the middle of the fence, is a customary method by which landowners have often divvied up fencing responsibility. Landowners and courts continue to be free to apply the right hand rule method of achieving just proportion allocation and identification of the specific portion of the fence that was each landowner’s responsibility, but the law does not compel that method. The just proportion standard does not appear to have precluded an allocation other than 50/50, either by private agreement or as assigned by the courts or fence viewers, if such division would have been inequitable (e.g. where terrain might have resulted in a 50/50 division imposing greater burden on one landowner).

Landowners who erected a division fence could demand and recover by civil suit one-half of the reasonable value of a division fence from landowners who shared the fence. A landowner erecting a hog or sheep tight fence could only recover one-half the cost of a standard wire fence unless the adjacent landowner placed hogs or sheep against the fence. The law provided that the value of the fence and portion of the total value to be paid to the erecting landowner was first to be determined by fence viewer panels. Fence viewer panels were further charged with assigning and marking the portion of the fence to be maintained by each landowner

If a person liable to the construction, repair and maintenance of a division fence was negligent in maintaining or repairing his or her portion of the fence, the adjacent landowner could demand in writing that the liable party perform maintenance/repair. If after 4 weeks, the petitioned party failed to perform necessary repair or maintenance work, the complaining landowner could perform the fence work on the adjacent landowner's portion and recover by civil suit the cost incurred in assuming the delinquent landowners responsibility. Additionally, the delinquent party was liable to the complaining landowner for any damages that resulted from the delinquent party's failure to maintain the fence. The amount of such damages and cost of fence maintenance and repair the delinquent landowner was liable for were to be determined by fence viewers.

Prior to 1994, the fence law provided that if a fence dispute arose requiring the appointment of a fence viewer panel, the parties would each appoint one fence viewer apiece and these two fence viewers would select a third. The fence viewers were paid by the parties except that the initiating landowner had to pay all the fence viewer costs upfront but could recover the costs in a civil suit. Fence viewers were paid \$2 per view. Fence viewers served as both a factfinder and an arbitration panel. The written determination of the fence viewers established the rights and obligations of the parties for construction, repair or maintenance of a division fence. Prior to LB882, the Supreme Court had found that recourse to the courts to pursue civil enforcement of a neighbor's fencing obligation was available only after a view was completed.

The fence law provided that unless otherwise agreed to by the parties, the fence would be built to, and landowners would be liable for, the costs of a fence built to "lawful fence" standards. The fence law defined a lawful fence as one meeting specified construction and material standards for rail, board, wire, and living (hedge) fences for adequacy of use as a livestock enclosure. The lawful fence standards presumably are a reference for determining value and for determining whether landowners met their obligations for purposes of determining liability in the event of breach by livestock.

LB 882 (1994):

As noted previously, fence viewing panels historically performed vital fact finding and arbitration roles in the Nebraska fence law scheme. While fence viewing was still valued by most users of the fence law as a relatively informal and cost effective dispute resolution method, a number of criticisms of fence viewing began to emerge.

- It was increasingly difficult to find persons willing to voluntarily serve as fence viewers. There were fewer qualified persons with fencing experience available as farming consolidated, and the smaller pool of remaining persons with fence viewing acumen were more likely to have a

disqualifying connection to one of the parties or were simply reluctant to involve themselves in a private dispute between neighbors;

- Fence viewing as a dispute resolution mechanism arose during a time when the parties to a dispute were both likely to own livestock or were otherwise agricultural landowners who derive direct, tangible benefits to division fences. Increasingly, as conflicting non-agricultural land uses intruded into rural areas and as many farm operations became more specialized in crop production, fence viewing panels were increasingly perceived as biased toward livestock owners.
- Although accepted as complete evidentiary record and dispositive of the duties and obligations of the parties and for the most part parties abided by them, fence viewer orders were not self-executing. Landowners were required to initiate a civil action to compel compliance with fence viewer determinations if either landowner failed to comply.

LB 882 changed the method of appointing fence viewers to provide for the county clerk to maintain a permanent pool of six persons to serve as fence viewers and to assign three from among this pool when a view was requested. Fence viewer compensation was increased to \$30 per dispute plus expenses. It was contemplated that these changes would result in a more professional corps of disinterested persons who could be assigned as needed to fence viewing tasks.

LB 882 also changed the nature of the fence viewer determination. The fence viewer determination was designated an order and became an immediate and direct obligation of the parties. Additionally, if a landowner failed to fulfil his or her obligations under the order within the time prescribed, the fence viewers could provide for execution of the order by engaging the adjacent landowner to perform the fencing activity. In such case, the landowner would deposit with the fence viewers an amount for the fence work. If the defaulting landowner failed to timely reimburse the complaining landowner, the amount was recovered from the defaulting landowner as a special assessment.

LB 776 (1999):

Implementation of the concept of county clerks empaneling a list of six fence viewers available for assignment to individual fence dispute cases proved to be problematic. The effort was impeded by the same difficulties encountered in the parties themselves naming fence viewers--difficulty of finding persons willing, or not disqualified, or to be assigned to a particular case.

LB 776 changed the county clerks' duties to name a panel of fence viewers from which individuals were to be assigned to fence disputes only if a dispute arose. The bill added a qualification that members of a fence viewer panel must be residents of the county where the dispute occurs. Additionally, if the county clerk was unable to appoint a fence viewer panel, the county sheriff would be assigned to perform the view. LB 776 also added an additional category of "lawful fence" to include any fences of unspecified construction deemed capable of resisting breach by livestock.

LB 108 (2007):

LB 108 enacted in 2007 made a number of significant changes to the fence law and provides, with some clarifications, the current structural scheme for asserting fence law obligations. The bill arose from interim study resolution LR 207 introduced after two bills had been introduced in the previous

Legislature to address continuing dissatisfaction with the fence viewer appointment system and the burdens imposed on county clerks to facilitate fence viewer forums.

Changes in the fence law beginning with LB 882 in 1994 created confusion and inconsistency in terms of procedure. In particular, the fence law provided for a right of appeal of fence viewer orders but did not specify an appeal procedure, although a Supreme Court ruling determined that appeals from fence viewer panels were governed by tribunal appeal procedures. Still, the LB 882 revisions introduced evidentiary and procedural ambiguities to guide county clerks, fence viewer panels, and the parties on what records to generate and keep to enable an appeal to be perfected. Additionally, the method of appointing fence viewers involved county clerks in private, and often contentious, civil disputes and increased duties and costs to counties without a corresponding compensation. The enforcement of fence viewer ordered contribution to fencing collected by special assessment was viewed as an unusual and constitutionally suspect exercise of the police power for satisfaction of essentially private civil debts. Finally, the availability of fence viewing as informal and relatively inexpensive forums was viewed as actually encouraging confrontation between landowners rather than first attempting private resolution of fencing disputes short of government intervention.

While LB 108 addressed the narrowly focused issues that were the subject of pending legislation, it is more accurately characterized as a comprehensive modernization of the entirety of the law. Revisions to the fence law brought about by LB 108 include:

- Redefined circumstances when adjoining landowners are assigned shared responsibility for fence construction and maintenance and the proportional contribution each is liable for. LB 108 retained that each landowner make and maintain a “just proportion” but specified that just proportion was an “equal share” allocation only if both landowners utilized the fence for livestock enclosure.
- Applied a geographical and land use test to whether a mutual division fence obligation applied to both adjacent landowners. Within areas zoned primarily for agricultural or horticultural use (incorporating by reference definitional terminology under the greenbelt statute), a shared duty for division fences was assigned to both landowners when either or both properties are used for agricultural use. In all other areas of the state, a shared duty for division fence construction and maintenance applied only when each adjoining property was utilized for agricultural use
- Eliminated fence viewer panels and special assessment procedures for recovery of fencing costs performed to execute fence viewer orders. Instead, LB 108 consolidated and replaced all remaining causes of action to recover costs of construction, maintenance or repair of a division fence that are the responsibility of an adjacent landowner under a new section codified at §34-112.02 as follows:
 - Provides that a landowner gives rise to a cause of action to compel an adjacent landowner to fulfill his or her statutory duties for contribution by first serving upon the adjacent landowner written notice of intent to construct, maintain or repair a division fence. The notice is to contain a request that the adjoining landowner fulfill statutory fencing duties through actual physical construction or financial contribution. Clarifies that after giving notice, a landowner may initiate or complete construction or repairs, in which case the cause of action would be for monetary contribution only.
 - If the adjacent landowner is unresponsive to the written notice, the landowner may commence an action in the county court of the county where the fence is located. Such action must be commence no sooner than 7 days after, but within one year of, giving written notice. The action may be commenced by filing a form for such purpose prescribed by the state court administrator.

Notice and summons of such action are to be given according to procedures modeled upon those specified for actions initiated in small claims court.

- Directs that parties are to receive information regarding mediation services available as alternative dispute resolution, and with consent of both parties, a court may refer to mediation. Harmonizing changes to the Farm Mediation Act are made by sections 1 and 2 of the bill to accommodate acceptance of referred fence disputes.
 - If mediation succeeds in mutually signed agreement, the court enters the agreement as the judgment. Parties pay mediation costs directly to the mediation service. If mediation fails, or the parties do not request mediation, then the case proceeds according to normal civil procedure.
- Inserted a new section codified at §34-112.01 defining a limited right of entry upon adjacent land necessary for fulfilling fencing responsibilities. The fence law currently defines access as confined to that reasonably necessary to carry out activities contemplated under the law. The section further specifically excludes authorization for tree removal or other alteration upon other property, or removal of personal property, without consent of the landowner or court order.

In addition to eliminating the fence viewer panels altogether to be replaced by a direct civil claim procedure, additional revisions were included to address potential vulnerability of compelled contribution to due process and takings challenges. A review of litigation around the nation where courts had ruled that imposing a compelled contribution for division fences on non-livestock owners violated a landowner's due process and takings protections because the obligation could not be justified by a relevant and compelling public policy. This suggested a need to somehow tie the mutual fencing obligation, first enacted to address societal issues present at the end of open range era, to a more modern public policy context. By expressly specifying that within agriculturally zoned areas, the obligation applied to owners of both adjoining properties where at least one was in agricultural use, added an incidental benefit of reinforcing land use planning goals to preserve and enhance areas for agricultural use. Outside of agriculturally zoned areas, the shared responsibility applied only where both adjoining properties were devoted to agricultural use, an acknowledgement that courts had become increasingly hesitant to enforce a compelled contribution from owners of non-ag property for lack of public purpose for the compelled contribution.

Further, by specifying that the allocation need be 50/50 only where both landowners placed livestock against the fence, LB 108 expressly opened the possibility for other allocation where circumstances suggested a 50/50 allocation would be inequitable. While the revision did not preclude 50/50 allocation and it was presumed that a 50/50 allocation would be equitable in most circumstances even where only one landowner had livestock or in the absences of livestock altogether, the revision was intended to give the courts ability to resolve as applied findings of inequity without having to strike the law in its entirety or declare certain classes of property owners exempt from division fence obligations.

The bill also privatized fencing disputes, providing for direct civil enforcement initiated by the parties themselves by a procedure similar to small claims filings. By removing all duties for counties to appoint and assign fence viewers and to collect fence viewer judgements if necessary through special assessment, LB 108 removed the duty for county governments to exercise police powers to compel fence construction, thus removing avenues and arguments that the law denies due process protections.

Lastly, the availability and encouragement of use of mediation was intended to provide parties, particularly those owning adjacent lands with diverse land uses, with opportunities for private resolution of fence disputes short of directly enforcing the obligations imposed by the fence law. The fence law was first enacted at a time in the state's development when adjoining rural landowners were more likely to be

resident owners, to each be livestock owners, as well as each having the skills and means to construct and maintain fencing. That presumption may not always hold as agriculture has evolved and separated into more specialized livestock and cropping operations, more agricultural land is held in absentee ownership, and in some cases commercial and residential land uses at the urban fringe and elsewhere intruding into traditional agricultural areas. In many cases, the optimal resolution might be, for example, one landowner assuming responsibility for physical construction and maintenance and the adjacent landowner fulfilling their division fence obligations by assuming half of the cost. Additionally, mediation might offer a more suitable forum for facilitating resolution of related issues such as necessary removal or trimming of trees and other vegetation and other peripheral agreements that would result in a fair resolution.

LB 667 (2010):

The changes made by LB 108 in 2007 were soon criticized as inserting ambiguity and uncertainty regarding when the fence law applied and how fencing responsibilities were to be allocated. The clarification made by LB 108 that a just proportion allocation was expressly “equal shares” only when both landowners placed livestock against the fence invited interpretation that fencing obligation of non-livestock owners was something other than 50/50 and what that allocation of responsibility was not clear. Further, whether properties lie within an ag zoned areas, and whether uses qualify as agricultural or not, may not be readily apparent. Intervening legislation that repealed definitions of agricultural zoning and agricultural land use for purposes of the greenbelt law that were incorporated by reference for purposes of the fence law added to the uncertainty. This ambiguity undermined the ability for landowners to have a clear indication of their responsibility and rather than deter litigation and promote cooperation it was contributing to intransigence and confrontation.

To address these issues, LB 667 made the following revisions to the fence law:

- Inserted a legislative findings and declaration section (codified at §34-101) enumerating public and societal benefits of mutual fencing obligations that include but go beyond the purpose of constraining livestock.
- Eliminated geographical (zoning) distinction and adjacent land use conditions regarding applicability of fence law obligations to adjacent landowners, essentially returning to traditional silence of the fence law whether adjacent landowner duties under the law are dependent upon the manner in which the adjacent properties are used.
- Eliminated specification that “just proportion” was expressly an equal shares (50/50) allocation when both landowners utilized the fence as a livestock enclosure. Defined “just proportion” to mean an equitable allocation of the portion of the fence to be physically constructed or maintained, or an equitable contribution to fencing costs. Specified that unless otherwise agreed by the parties or otherwise specified in law, an equitable allocation is one that results in equal burden to each landowner.
- Provided that unless otherwise agreed to, the parties were liable for a “wire fence” as defined. Previously, landowners were obligated to the construction and maintenance of any type of “lawful fence”.

The new legislative findings section essentially articulated court rulings in other states that had upheld compelled contribution provisions of those states' fence laws challenged by landowners as unconstitutional violations of due process or takings restrictions since they lacked a public purpose if a landowner had no need of a fence to constrain livestock. These cases have found contemporary societal benefits from the compelled duty to share in fencing obligation that are in addition to and even independent of benefits of livestock restraint.³

While not a primary purpose for the introduction of LB 677, the bill also addressed a longstanding uncertainty regarding the fencing standard landowners are obligated to. Prior to LB 667, the statute held landowners to building or contributing to the costs of a "lawful fence". Because the fence law defines several types of "lawful fences" which vary greatly in the costs of construction and maintenance, it has been uncertain whether this obligated a landowner to build or pay for fences that were far more expensive than standard wire fences to build and maintain. The clarification that a landowner is obligated to build or contribute only to the costs of a lawful wire fence was intended to avoid this inference. Presumably, a landowner wishing to build a more expensive type of fence, whether for practical or ornamental purposes, could still compel a neighbor's contribution, but only recover half the cost of a functional wire fence.

LB 108 (2011):

LB 108 Inserted a new section codified at §34-103 assigning a duty of each person liable for the construction and maintenance of a division fence to maintain the fence in good order, including the necessary removal or trimming of trees and conflicting vegetation. Trees or woody vegetation within or encroaching on a fence line that damage or cause dislocation of a fence is declared a nuisance.

Prior to LB 108, Nebraska fence law has never expressly stated that the rights and obligations for the erection, repair or maintenance of a division fence embrace the necessary removal or trimming of conflicting vegetation within or in immediate proximity to a division fence. Testimony before the agriculture committee had suggested that the necessary management of trees and other vegetation relating to fence construction and management is an increasing point of conflict in relations among adjacent landowners. The Agriculture Committee was made aware of examples of fence law disputes where a party alleged trespass to seek enjoinder of conflicting tree removal, even random growth vegetation having no commercial value, as an obstructive tactic. The diversity of court jurisdiction on actions to enjoin tree/vegetation management (jurisdiction for fence disputes under the fence law are assigned to county courts, equitable actions arising under trespass are assigned to district court), adds significantly to the cost and complexity of resolving fencing disputes.

LB 108 arose from interim study resolution LR 444⁴ introduced during the 2010 session after the Agriculture Committee had considered LB 909 proposing revision to §34-112.01 which defines a limited right of entry onto adjacent land to perform fencing activities. §34-112.01 limits this right of entry to only the extent

³ Particularly instructive as LB 667 was being drafted was *Gavert v. Nabergall*, 539 NW 2d 184 (1995). The Iowa Supreme Court upheld the compelled duty of a landowner who did not own livestock who had claimed the Iowa fence law denied due process and was an unconstitutional taking. The Iowa court found contemporary societal and individual landowner benefits in addition to, and even apart from, the function of fences to constrain livestock. These findings are restated in the legislative declarations section inserted by LB 667.

⁴ A review of case law prepared for purposes of LR444 regarding rights and limitations of landowners to manage vegetation conflicting with a division fence occurring in part or in whole on neighboring property is not published but available from Agriculture Committee staff upon request.

reasonably necessary and expressly excludes the removal of trees, buildings and personal property without consent or court order. LB 909 would have clarified that reasonably necessary entry includes the trimming and removal of trees and other woody vegetation within and in immediate proximity to the fence line to correct or avoid dislocation or damage to a fence. The Committee and its introducer were reluctant to place in statute what might be perceived and acted upon as license for a landowner to enter another’s adjacent property at will to remove vegetation in a manner that impairs trespass protections of adjoining landowner. LB 108 stopped short of inserting entry for purposes of managing conflicting vegetation as a privileged act, but expressly recognized the duty of vegetation management as an element of fence construction and maintenance. Additionally, LB 108 created a private cause of action under nuisance theory to seek equitable relief as a remedy if a landowner fails to manage conflicting vegetation or obstructs the adjoining landowner’s ability to meet this obligation.

LB 766 (2018):

LB 766 revised the procedure for filing a fence dispute claim under S34-112.02. As revised, a landowner preserves recourse to file a fence dispute claim to compel adjacent landowner fulfillment of fence law obligations only if written notice demanding contribution is given prior to beginning construction/repair of a fence. LB 776 also requires a 30-day period for the adjacent landowner to respond to the written notice before a fence dispute claim can be filed, rather than the previous 7 days.

Fence Dispute Claim Utilization

Prior to enactment of LB 108 in 2007, it is difficult to know how often fence dispute mechanisms were utilized by the public. In the event landowners could not agree on fencing responsibilities, the matter would have been submitted to a fence viewer panel. Fence viewing forums would have occurred largely without record and landowners would have largely considered their findings as dispositive and binding. While written determinations of fence viewer panels were to be filed with the office of county clerk, it would be a herculean task to discover if such written documents are still kept by counties.

However, in 2007 the Legislature replaced the fence viewer arbitration system with availability of a direct civil action filed in county court. Under §34-112.02, landowners initiate a claim for fencing contribution by filing a fence dispute claim in the county where the fence is located on a notarized form prescribed by the state court administrator. Pursuant to the committee’s request, the Court Administrator’s office was able to perform a query of the court’s JUSTICE System for all case filings under §34-112.02 since the enactment of LB 108. The results of that inquiry are presented in the following table:

Fence Dispute Filings Pursuant to §34-112.02 By year and county of filing

Calendar Year	County	# filed	Calendar Year	County	# filed
2008	Dawes	1	2013	Custer	1
2008 Total		1	2013 Total		1
2009	Antelope	1	2014	Sheridan	2
	Lancaster	1	2014 Total		2
	McPherson	1	2015	Boyd	2
	Red Willow	1		Thomas	1
	Washington	1		Hooker	1
2009 Total		5	2015 Total		4
2010	Colfax	1	2016	Kimball	1
	Hitchcock	2		Knox	1
	Madison	1		Webster	1
	Pawnee	1	2016 Total		3
	Rock	2	2017	Cherry	1
	Wheeler	1		Custer	1
2010 Total		8		Gage	2
2011 Total		0		Holt	1
2012	Boone	1		Lancaster	1
	Butler	1		Sheridan	1
	Dixon	1	2017 total		7
	Holt	1	2018	Sheridan	1
2012 Total		4	2018 Total (to date)		1
			Total 2008 - 2018		36

Fence dispute filings have been relatively rare, averaging about 3.5 per year. Beginning with calendar year 2008, 36 total fence dispute claims have been filed in 26 different counties. Total annual filings ranged from a high of 8 in calendar year 2010 to none in 2011. No county has had more than 2 filings in any single year. During the period of calendar year 2008 through mid-2018, 4 filings have occurred in Sheridan County, 2 filings in each of Hitchcock, Rock, Boyd, Gage, Holt, Custer and Lancaster Counties,

Fence Dispute Mediation:

As amended in 2007, the fence law provides that upon filing a fence dispute claim, the court shall provide the parties with information regarding the availability of mediation as a means of resolving the dispute. The Farm Mediation Program of the Department of Agriculture and mediation services provided by the Office of Dispute Resolution of the Supreme Court are authorized to accept mediation of fencing disputes referred by the courts. The Farm Mediation Program may also accept fence dispute mediation requests if approached directly by the parties even if a fence dispute claim has not been initiated. After a filing, if the parties accept mediation, the civil litigation is stayed while the parties meet in mediation. If the parties reach agreement, the mediated settlement is entered as the judgement in the case. If the parties do not agree to mediate or fail to reach resolution in mediation, the matter proceeds as a litigation. In response to an inquiry, the Department of Agriculture provided the following information regarding fence dispute mediation activity provided by the Farm Mediation Program.

Nebraska Department of Agriculture Fence Mediation Activity

- 42 fence mediation inquiries received (since 2010)
- 3 cases mediated
 - 1 court referral – agreement reached
 - 1 court recommendation – agreement reached
 - 1 requested directly by parties -- no agreement reached

Only twice since 2010 have the parties to a fence dispute filing chosen to attempt mediation to resolve a fence dispute claim filing. In both cases, a mediated settlement was reached. Only one time have parties requested mediation without a fence dispute claim having been filed. That one case failed to reach agreement.

That the parties only in 2 of the total 36 fence dispute filings since 2007 agreed to attempt to mediate rather than proceeding with litigation is somewhat disappointing. When this option was made available under the LB 108 (2007) revisions to the fence law, it was expected that fence disputes were the type of issue for which mediation would be an attractive and effective mechanism for reaching agreement. Mediation is perceived as a less confrontational and more flexible forum, as well as being far less costly to the parties. Additionally, the substantial changes to the fence law brought about by the LB 108 amendments were driven by recognition that changing patterns of land ownership and land use discussed previously undermined assumptions that the traditional fence law had been based upon, i.e. that both landowners perceived relatively equal tangible value from the restraint of livestock and that each landowner was skilled in and physically capable of performing fencing activities. Agricultural operations have become more specialized in either crop or livestock production, the percentage of land held in absentee ownership has increased, and non-ag land uses have increasingly encroached into farming areas. It was perceived that, under increasingly diverse relationships between neighboring landowners, mediation provided a forum that allowed greater opportunity for parties to reach creative approaches for allocating fencing responsibilities than strict application of fence law principles applied by the courts or previously by fence viewer arbitration.

Since the matter is referred to mediation only if both parties agree, it is not known the number of fence dispute filings where one, but not both parties, would have preferred to attempt to resolve the dispute

through mediation. In the majority of cases, it appears either one or both of the parties perceived an advantage in litigating the matter over negotiating a resolution.

Issues with the current Fence law

The modern Nebraska fence law resulting from enactment of LB 108 in 2007, along with clarifications made with the enactment of LB 667, has achieved relative stability in defining the rights and obligations of adjacent landowners for division fences. However, there remain some aspects of the fence law that may be perceived as problematic in its application and in achieving efficient and equitable resolution of fencing disputes.

Elimination of fence viewers increases the cost and complexity of essential fact finding

In addition to serving as arbitration panels, fence viewers were also relatively efficient factfinders. Compared to litigation forums, fence viewer panels were able to readily form relevant factual conclusions by direct observation of a fence and application of expert judgement informed by relevant lifetime experience. For example, it would have been a function of fence viewers under previous versions of the fence law to determine whether an existing fence, in its current state or with ordinary repairs and maintenance, would be adequate to reliably prevent breaching by livestock and serve other functions of a fence, or whether a fence needed to be replaced entirely. Fence viewers would also have been familiar with the price of fencing materials and labor to reach conclusions regarding reasonable costs to assign, and whether removal or trimming of trees and other woody vegetation in or near the fence line was necessary.

These questions can conceivably be determined in a litigation forum, but reaching such determinations may involve considerable time and expense, including the costs of legal services, to gather and qualify evidence (e.g. pictures, documents, expert affidavits, the appearance of witnesses at trial) for consideration by the court. Under the previous system, essential determinations of fence condition, assignment of responsibilities of landowners for construction and/or repair and maintenance of a fence, and reasonable costs for fencing, were determined by fence viewer arbitration after simple observation. These matters would rarely have been decided in litigation as the matter would not have reached the court except in rare instances of a landowner appealing a fence viewer order. The role of the court in such case would have been primarily to determine whether or not a landowner had met their obligations under the arbitrated agreement except in very rare cases where a party appealed to challenge the fairness or accuracy of the fence viewer decision.

There is an instance where a county court considered whether an existing fence was functional to be an important threshold determination, and that direct observation of the fence was vital to enable the court to reach that determination. In this case, the court convened at the fence site, essentially acting as a fence viewer to arrive at factual conclusions on that question⁵.

Adequacy of notice and opportunity to respond before civil claim may be asserted in court

The Nebraska fence law has long provided a cause of action for a landowner to recover from an adjoining landowner half the cost of initial construction or the costs of repairing/maintaining that portion of an existing fence that was the responsibility of the adjoining landowner. Currently, the manner of pursuing a fence claim is prescribed procedurally in §34-112.02 as follows:

⁵ Bowhay v. Binder, Pawnee County Court; Case # CI10-81 (Sept. 6, 2011)

34-112.02. Division fence; construction, maintenance, or repair; notice; court action authorized; hearing; mediation; costs.

“(1) Whenever a landowner desires to construct a division fence or perform maintenance or repairs to an existing division fence, such landowner shall give written notice of such intention to any person who is liable for the construction, maintenance, or repair of the division fence. . . . The written notice shall request that the person liable for the construction, maintenance, or repair satisfy his or her obligation by performance or by other manner of contribution. After giving written notice, a landowner may commence⁶ construction of a division fence, or commence maintenance or repair upon an existing division fence, in which cases any cause of action under this section and sections 34-102, 34-112, and 34-112.01 shall be an action for contribution.

(2) If notice is given prior to commencing construction, maintenance, or repair of a division fence and the person so notified either fails to respond to such request or refuses such request, the landowner sending notice may commence an action in the county court of the county where the land is located. If the landowners cannot agree what proportion of a division fence each shall construct, maintain, or repair, whether by performance or by contribution, either landowner may commence an action, without further written notice, in the county court of the county where the land is located. . . . A party shall not commence an action under this subsection until thirty days⁷ after giving notice under subsection (1) of this section . . .

The fence law is intended as a remedy of last resort. It was contemplated, if not intended, that landowners would only resort to filing a fence claim unless good faith efforts at reaching agreement were exhausted. §34-112.02 prescribes an attempt at dialogue by requiring a written notice of a landowner’s intent to build or maintain a division fence and to request the adjacent landowner’s contribution in order for a landowner to have recourse to filing a fence dispute claim.

It was further presumed that in most cases absent an urgent need for functional fencing to be in place, landowners would first exhaust private and legal remedies before unilaterally initiating fence construction or repair and later demand reimbursement for half the cost from the adjacent landowner. It is intended that the adjacent landowner have fair opportunity to satisfy their obligations under the fence law, and to mitigate expenses, by performing the requested fence work themselves or to attempt to negotiate a reasonable monetary contribution before actual costs are incurred. However, §34-112.02 as it existed prior to LB 766 enacted in 2018, had been interpreted as allowing a landowner to reserve the right to file a fence dispute claim as long as the notice of request for contribution was given prior to completing work on fence.⁸ As a result, landowners could unilaterally commence construction and not give notice to neighbors until the fence was essentially completed. The Legislature amended §34-112.02 in 2018 to provide that a landowner does not have recourse to file a fence dispute claim unless written notice is given prior to beginning fence construction, repair or maintenance and increased the period for an adjacent landowner to respond to a written notice before a fence dispute claim could be filed from seven to thirty days.

⁶ Prior to enactment of LB 766 in 2018, this sentence read “After giving written notice, a landowner may commence or complete construction of a division fence, or commence or complete maintenance or repair upon an existing division fence

⁷ Prior to enactment of LB 766 in 2018, the waiting period to file a fence dispute claim after giving notice was seven days.

⁸ Campbell v. Schwenke, Lancaster County Court Case # CI17-2697 (Nov. 28, 2017);

Even with this clarification, current law differs materially from previous versions. The fence law prior to 1994 provided that a landowner could unilaterally erect or repair a division fence and demand reimbursement for half the cost by civil suit if necessary if, after thirty days, a neighboring landowner refused or was unresponsive to written request. However, as affirmed in *Schnakenberg v. Schroeder*, absent evidence of a private agreement allocating fencing responsibilities, the courts lacked jurisdiction unless the matter had first been submitted to fence viewers.⁹ A landowner seeking the neighbor's participation would have first summoned a fence viewer panel which would have assigned fencing obligations. An adjacent landowner's duty with regard to the fence would have been established and known to the adjacent landowner prior to receiving written demand from a neighbor that they perform their obligations or later received summons for a civil action against them. The court's role in most cases would have been merely to find whether a landowner had breached his or her obligation under either preexisting private agreement or agreement previously imposed by fence viewer arbitration.

Under the current system, each landowner's equal share obligation is largely statutorily presumed except in rare instances a parties can show that a private agreement exists. Particularly if a landowner unilaterally proceeds with erecting or repairing the entire fence before their neighbor is notified that their participation is requested, the court is placed in a position of simply ordering reimbursement of half the expenses. While the current fence law's option to mediate once a fence dispute filing occurs would facilitate the formation of private agreement and replicate the court only entering and enforcing a private contract, mediation has been rarely used.

The LB 766 amendments which clarify that a landowner does not have recourse to filing a fence dispute claim unless written notice is given to the neighbor prior to beginning fence construction or repair and giving the neighbor 30 days, instead of seven, to respond, is a helpful step in increasing opportunity for private settlement before resorting to litigation. However, the current law still allows a landowner to proceed with fence work within the thirty day waiting period. The Legislature may wish to consider whether it would further strengthen legislative intent to require a landowner to also wait thirty days to unilaterally commence fencing activities as a condition to perfecting the right to initiate a fence dispute claim.

Court Jurisdiction

With enactment of LB 108 in 2007, the Nebraska Legislature assigned original jurisdiction for fence dispute claims to the county courts, with the county court where the land the fence is located on having jurisdiction. As confirmed in *Koutros v. Zerbe*, 287 Neb. 1033 (2014), this does not conflict with Neb. constitutional article V, Sec. 9 which provides that "district courts shall have both chancery and common law jurisdiction . . ." The common law jurisdiction of district courts is beyond the power of the Legislature to limit. Although the Legislature can grant jurisdiction to county courts, the district court maintains concurrent original jurisdiction for common law and equity actions.

An action for contribution for fence construction is not a common-law cause of action. At common law, a land owner could not be compelled to build a portion of a fence, and a party erecting a fence

⁹ The court stated: "Without fence viewer's determination of what proportion of the division fence is the responsibility of which adjoining landowner, it is impossible to determine when an adjoining landowner has neglected or refused to make or repair his proportion of the division fence."

had no common-law right to demand an adjacent landowner's contribution to the labor, materials or cost of fencing. However, the fence law assigns a mutual shared responsibility for division fences and creates a statutory cause of action.

In *Koutrous v. Zerbe*, the plaintiff brought an action in district court claiming breach of contract by the defendant for failure to honor a private agreement to pay for half of a new fence that the plaintiff was to build on the property boundary. The case had been dismissed by the district court on grounds that it lacked jurisdiction, finding that the dispute arose under the fence law which assigns county court exclusive jurisdiction. The Supreme Court found that contract breach is a common law cause of action, and that the Legislature cannot deprive the district courts of jurisdiction. The Court reversed the dismissal and ordered the district court to proceed with trial on the breach of contract claim.

Koutrous does not render the fence law useless as in most cases when a fence dispute arises, the parties do not have a preexisting contractual agreement. It is not the purpose or effect of the fence law to supersede private agreements, nor can it impair contracts. Rather it is to encourage formation of private agreement, and to provide a method to assign obligations for division fence construction and maintenance in the absence of private agreement. Nevertheless, the decision in *Koutros* may add confusion and uncertainty regarding the proper forum for pursuing fence claims and suggests that county courts may lack ability to resolve all relevant issues. The Legislature may wish to study whether the county court is the optimal forum for fence disputes.

Fencing standard and function of "lawful fencing"

Questions have sometimes arisen regarding the standard of fencing that adjacent landowners are held to under the fence law and the consequences of failing to build or maintain fencing meeting minimal standards for a "lawful" fence.

§54-115 of the Nebraska fence law continues to prescribe standards for various types of "lawful fences", including specifications for rail, board, rail and post, pole and post, wire, and hog and sheep tight fencing. Most of the types of rail and board fencing described in the statute have fallen into disuse today as a livestock enclosure on property boundaries. Where they do exist, they are chosen for aesthetic purposes or for boundary demarcation rather than, or in addition to, functional livestock enclosures.

Wire fence consisting of 3-5 barbed wires attached to wooden or steel posts is most commonly utilized whether to contain livestock or for other purposes because it is relatively inexpensive to build and maintain as well as having other functional advantages. Sturdy board fencing, or fencing utilizing metal pipe and steel cable, are often used where animals are kept in dense confinement in corrals or feedlots, but seldom utilized for external fencing or division fences. Hog and sheep tight fencing are also rarely utilized as a division fence although the fence law does provide for sharing the costs of a wire mesh fencing utilized as a hog or sheep enclosure if both landowners utilize the fence for that purpose.

§34-102 of the fence law which assigns a duty of adjacent landowners to responsibility for the construction and maintenance of a division fence, provides that:

“Unless the landowners have agreed otherwise, such fence shall be a wire fence as defined in subdivision (5) of section 34-115.

Section 34-115(5) defines a wire fence as follows:

“A wire fence shall consist of at least four wires, of a size not less than number nine fencing wire, to be well secured to posts, the posts to be at no greater distance than one rod [approximately 16 feet] from each other; and there shall be placed between every two of the posts one stake or post to which the wire shall be attached. Any of such wires may be a barbed wire composed of two or more single wire strands twisted into a cable wire with metal barbs thereon averaging not more than five inches apart, each of such single wire strands to be of a size not less than number twelve and one-half gauge fencing wire.”

Prior to LB 667 enacted in 2010, §34-102 provided more vaguely that the fence shall be a “lawful fence.” The change to specify a default to the four-strand barbed wire fence accurately reflects that wire fencing is an almost universally adopted standard for livestock enclosure. The specification of a wire fence as described serving as the default fencing standard in the absence of agreement to build a different type of fence is intended to avoid interpretation that a landowner could be forced to contribute to much more costly ornamental, extravagant or special needs fencing (e.g. fencing for buffalo or exotic animal enclosure). Additionally, the four-wire fence, as opposed to a wire fence built to lesser standards (e.g. three wires) serves to provide for a fence that is functional for livestock enclosure. Presumably, a landowner could build a fence to higher specification than the wire fencing standard described in the fence law, or build a post or rail fence, but the adjacent landowner would only be liable to contribute at most what a four-wire fence would cost.

There has been some question whether the Legislature effectively negated the continued use of fencing that though not meeting the exact specification of wire fencing, still met the requirements of lawful fencing described in §34-115(7). In addition to the other fencing specifications, §34-115(7) lists as a lawful fence *“All other fences made and constructed of boards, rails, poles, stones, hedge plants, or other material which upon evidence is declared to be as strong and well calculated to protect enclosures and is as effective for resisting breaching stock.”*

This was argued by the plaintiff in *Browhay v. Binder*¹⁰ decided by the Pawnee County Court in 2011. The fence line in question consisted of a remnant row of osage orange trees planted on the property line, which had not been maintained as a true hedge fence, supplemented with barbed wire and steel posts. This type of fencing is not uncommon in the parts of earliest settled portions of eastern Nebraska prior to the availability of barbed wire fencing when early settlers planted osage orange or other types of intertwined plantings to serve as livestock enclosures. Plaintiffs asserted that by specifying wire fencing as the default standard, the Legislature had essentially determined the hedge fence, though nominally conforming to §34-115(7) to be non-conforming, and further argued that he and the defendant had never affirmatively entered into any agreement that the fence would consist of the hedge-wire fence. Therefore, the type of fence required automatically deferred to the statutory standard in the absence of agreement otherwise. The court adhered to case law precedent that agreement can be ascertained from actions of the parties and that in this case, there was notice and agreement that the parties had by acquiescence and conduct agreed to the hedge-wire fence.

¹⁰ See citation at footnote 5

In addition to the hedge-wire fence example, throughout the state, wire fencing that does not conform to the wire standard in §34-115(5), perhaps consisting of only three wires and/or lacking the stakes specified to be placed between the wooden posts¹¹ are common if not preponderant. It is not the purpose of specifying the use of the wire fencing meeting specifications of §34-115(5) absent agreement between the landowners to utilize a lesser or different fencing standard to require landowners to make wholesale replacement of fencing meeting community standards and long acquiesced to by neighboring landowners as adequate. Nor is it intended to change the standard of care in civil actions involving personal injury or property damage caused by escaped livestock to substitute the wire standard in §34-115(5) for the community standards for fencing utilized by the courts to determine whether livestock owners breached duty of reasonable care to restrain livestock.

Right hand rule

The right-hand rule refers to a custom whereby adjacent landowners agree to share responsibility for a division fence by each being responsible for that portion of the fence to the landowner's right if the landowners were to meet face-to-face at the midpoint of the fence line. Many people assume that the right-hand rule is embedded in either the statutory fence law or is a fixed judicial prescription. The Fence law has always merely provided (§34-102) that landowners "*make and maintain a just proportion of the division fence between them.*" While the fence law has never prescribed any particular methodology for achieving a just proportion allocation, the right-hand rule is a customary method by which landowners have often privately divvied up fencing responsibility. Fence viewer panels and the courts have often applied, and continue to be free to apply, the right hand rule, but the law does not compel that method.

Keep in mind that the fence law is only a default mechanism for the legal system to use in the event landowners are unable to agree to an equitable distribution of fencing responsibilities among themselves. In *Schnakenberg V. Schroeder*, 219 Neb. 813 (1985), the court recognized that assignment of interests and obligations in a division fence are prescribed by statute only in the absence of private agreement to the contrary.

"While the statute provides a procedure for ascertaining and fixing the rights and duties of coterminous proprietors with respect to a division fence, it is not exclusive, but they may by contract adjust their respective rights and obligations."

In other words, landowners in Nebraska are largely free to alter any common law or statutory allocation of responsibility and ownership of division fences. For example, some landowners might prefer a left-hand arrangement, some landowners (e.g. absentee landowner) might prefer an arrangement where the absentee landowner provides or pays for materials while the neighbor agrees to take responsibility for construction and maintenance of the entire fence.

¹¹ The wire fence standard in §34-115(5) includes that "*there shall be placed between every two of the posts one stake or post to which the wire shall be attached.*" These intermittent stakes to be placed between the fence posts, serve to maintain the gap between individual wires and prevent sagging of the fence wires between the posts. It is uncertain the extent to which livestock fences in use today have this feature.

The current fence law lacks mechanisms found in previous versions that provided for assigning the portion of the fence that each landowner was responsible for. This is somewhat inconsistent with assumptions of the fence law that a landowner’s right to claim reimbursement from a neighbor is based on a breach of the adjacent landowner’s duty to build or maintain a portion of the fence assigned to them. Additionally, under the herd laws, a landowner’s failure to maintain his or her portion of the fence line can mitigate a neighboring landowner’s liability if cattle breach that portion of a fence. The Legislature may wish to consider creating a rebuttable statutory assumption that assigns ownership and responsibility for division fences by the right-hand rule absent agreement otherwise.

Alternatives for Reinstating Fence viewer Mechanisms

In fulfillment of the resolution, this section concludes with a brief listing of some potential alternatives to reinstate fence viewing as a means of reaching resolution of fencing disputes. The purpose is not to recommend reinstatement of fence viewing or endorse any particular method of doing so, but merely to provide a guide for the Committee or other interested parties wishing to investigate the merits of restoring the utilization of fence viewing forums or functions to settle fencing disputes among neighboring landowners.¹²

Restore Previous Law

Prior to 1994, the fence law provided for the creation of fence viewing panels by each landowner selecting one fence viewer and those two fence viewers selecting a third. There were no qualifications to serve as a fence viewer specified other than fence viewers selected could not be related to the parties or have a personal interest in the outcome. Viewers thus empaneled were endowed by the fence law with authorities to set a date for the view and notify parties, and to compel witnesses and production of evidence. Fence viewer panels acted as a tribunal who produced a written report of their findings and decisions and filed them with the county clerk. This filing became a record of arbitrated agreement. Fence viewers are typically paid a small stipend by the parties.

Court Appointed Fence Viewers

Some states have provided for fence viewers to be appointed by a judge upon application by a party to a fencing dispute. In such case, the court appoints three disinterested persons to perform a view, record findings and recommendations for allocation of fencing responsibilities, and report these back to the court. Upon default of either party to fulfill assigned responsibilities, a landowner would have recourse to request permission from the court to complete construction, repair or maintenance on the entirety of the fence and be awarded a judgement for the value of the materials and labor for completing the work on that part of the fence that was the neighboring landowner's responsibility. The Missouri Fence law (§§272.010 272.370) provides a model for this method.

Legislation was introduced in the 2013 session of the Legislature (LB 339) that would have put in place a hybrid between the Missouri model and the existing direct civil action under the existing Nebraska Fence law. LB 339 would have provided that upon the filing of a fence dispute claim, the court would have appointed a fence viewer panel consisting of three disinterested householder to perform a view and report back to the court its findings and recommendations. The fence viewers findings would have

¹² A fundamental threshold question is whether the purpose of fence viewers is to act as a binding arbitrator, a factfinder, or both. Requiring fence disputes to be settled by fence viewer arbitration would need to be consistent with Article 1, Sec 13 of the state constitution which bars the Legislature from denying access to the courts. There is some uncertainty whether the statutory scheme which mandated fence viewer arbitration prior to 1994 is in violation of Art. 1, Sec. 13 in light of *State v. Nebraska Assn of Public Employees*; 239 Neb. 653 which held that statutes that allowed enforcement of agreements compelling parties to submit future disputes to arbitration without recourse to courts violated this section.

been noted by the court and utilized to form any orders or judgements of the court unless either party objected to the fence viewer findings, in which case, the matter would have proceeded as a civil action.

Private Fence viewing Services

Private arbitration is not uncommon. The concept is to encourage farming or livestock organizations to make fence viewing services available to the public. While this does not compel parties to enter arbitration, parties would be free to voluntarily agree to submit a dispute to a fence viewing panel and to bind themselves. This would provide a method for parties to form agreement and create a record of that agreement. Such private agreement would be enforceable through the courts under ordinary common law avenues of seeking judicial enforcement of private contracts.