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New 2010 Division Fence Law

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CORNHUSKER ECONOMICS

New 2010 Division Fence Law

The 2010 Unicameral revised Nebraska's division fence statutes. This newsletter discusses the changes made to Nebraska's division fence statutes by LB (Legislative Bill) 667. The primary change is that the cost of a wire division fence is split 50-50 in all cases, except where the neighbors have agreed to a different division of the fence cost.

For many years, Nebraska has been a fence-in state, in which livestock owners are liable for any damages caused by trespassing livestock. This trespass liability created an obligation on the part of livestock owners to restrain the animals, but not a specific requirement that the animals be fenced in. The other major approach taken in western states is the fencing-out or open-range rule. Under fencing out, livestock owners are not liable for any damages resulting from trespassing livestock. So, if e.g., farmers wanted to keep the neighbor's cattle out of their fields they had to fence the neighbor's cattle out (thus, the "fencing out" rule).

The Nebraska division fence statutes gave livestock owners (and any other landowner) the ability to require the neighboring landowner to pay for part of the division fence through the fence viewer process. The division fence statutes for many years made the cost split 50-50 when both landowners had livestock, but fence viewers would determine a just division of the cost if both landowners did not have livestock. The only way to require a neighbor to pay for part of a division fence was through the fence viewer process.

The fence viewer process was originally established in 1886, but was repealed in 2007. Under the fence viewer process each landowner would pick a fence viewer, and the two viewers selected would pick the third. The three fence viewers would determine what share each landowner had to pay for the

Market Report	Yr Ago	4 Wks Ago	5/28/10
<u>Livestock and Products,</u>			
<u>Weekly Average</u>			
Nebraska Slaughter Steers, 35-65% Choice, Live Weight.	\$84.45	\$98.59	\$93.89
Nebraska Feeder Steers, Med. & Large Frame, 550-600 lb.	117.45	134.61	125.07
Nebraska Feeder Steers, Med. & Large Frame 750-800 lb.	102.86	114.14	110.34
Choice Boxed Beef, 600-750 lb. Carcass.	146.60	170.08	165.76
Western Corn Belt Base Hog Price Carcass, Negotiated.	59.22	82.69	76.50
Feeder Pigs, National Direct 50 lbs, FOB.	*	*	*
Pork Carcass Cutout, 185 lb. Carcass, 51-52% Lean.	59.18	89.97	87.47
Slaughter Lambs, Ch. & Pr., Heavy, Wooled, South Dakota, Direct.	*	*	123.00
National Carcass Lamb Cutout, FOB.	253.15	295.78	315.45
<u>Crops,</u>			
<u>Daily Spot Prices</u>			
Wheat, No. 1, H.W. Imperial, bu.	6.46	3.90	3.49
Corn, No. 2, Yellow Omaha, bu.	4.26	3.60	3.41
Soybeans, No. 1, Yellow Omaha, bu.	12.25	9.82	9.50
Grain Sorghum, No. 2, Yellow Dorchester, cwt.	6.68	5.70	5.46
Oats, No. 2, Heavy Minneapolis, MN, bu.	2.59	2.05	1.91
<u>Feed</u>			
Alfalfa, Large Square Bales, Good to Premium, RFV 160-185 Northeast Nebraska, ton.	*	135.00	140.00
Alfalfa, Large Rounds, Good Platte Valley, ton.	*	92.50	67.50
Grass Hay, Large Rounds, Premium Nebraska, ton.	*	*	67.50
Dried Distillers Grains, 10% Moisture, Nebraska Average.	152.50	107.00	113.00
Wet Distillers Grains, 65-70% Moisture, Nebraska Average.	49.50	36.00	34.50
*No Market			



fence, and how fence maintenance would be shared. The common approach for dividing the responsibility for fence maintenance – then and now – is the “right hand rule.” Each landowner would face the other in the middle of the fence and would be responsible for the half of the fence to their right. If the neighbor didn’t take care of his portion of the fence, the other neighbor could repair the fence and collect those costs in private litigation.

Changes to the fence viewer system began in 1994, when the responsibility of selecting the three fence viewers was given to the local county clerk. County officials did not care for this responsibility as it basically put them in the middle of a fence dispute. Ultimately, the fence viewer process was repealed altogether in 2007, when it was replaced by a litigation process where the parties went to court or mediation if they could not agree on the fencing issue. This process was not changed by LB667.

Under LB667, the costs of constructing and maintaining a division fence are divided 50-50, even if only one landowner owns livestock. If a landowner wants to build a division fence or repair an existing fence, he must give written notice to the neighbor. If the neighbor does not agree, the landowner files a suit in County Court. If the parties agree, the judge may refer the case to mediation. Otherwise, it goes to trial. LB667 does specify that a barbed wire fence is the default division fence unless both landowners agree to a different type of fence.

The likely result of the 2010 division fence statutes is that once they realize they will have to pay 50 percent of a new division fence, most landowners will pay their share or else build their half of the fence as per the right hand rule. Hopefully, most landowners will also agree to the right hand rule approach for fence maintenance, which would simplify fence maintenance disputes. If a neighbor is not maintaining his half of the fence, the other landowner can notify the neighbor of the need for repair. If the neighbor does not agree, then off to court they go. I would ex-

pect that most attorneys would be able to convince their clients to settle the case, but one never knows. The only likely reason to force a lawsuit would be to gain some concessions from the fence builder to maintain existing trees or shrubs, or other fence construction issues.

The issue of whether the requirement that a landowner without livestock be required to pay for part of a fence to keep the neighbor’s livestock off his land has been challenged in court. In New York and Vermont the State Supreme Courts ruled that such a requirement was unconstitutional as against the non-livestock owning landowner. *Sweeney v. Murphy*, 334 N.Y.S.2d 239, affirmed 294 N.E.2d 855 (1973); *Choquette v. Perrault*, 569 A.2d 455 (Vt. 1989). However, courts in Virginia and Iowa have upheld the legality of division fence statutes similar to Nebraska’s. *Holly Hill Farm v. Rowe*, 404 S.E.2d 48 (Va. 1991); *Gravert v. Nebergall*, 539 N.W.2d 194 (Iowa 1995). These cases, as a minimum suggest that the 50-50 split of LB667’s division fence costs might be unconstitutional. See generally Terrence J. Centner, *Reforming Outdated Fence Law Provisions: Good Fences Make Good Neighbors Only If They Are Fair*, 12 J. Envtl. Law & Lit. 267 (1997).

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