

January 2008
- by Roger McEowen*

Overview

Issues involving partition fences are the cause of many disputes between Iowa landowners. Partition fences mark property boundaries between adjacent landowners. Iowa has numerous statutes which govern fencing matters. This article addresses the major areas of contention.

Where Is a Fence to Be Built?

A partition fence is to be built on the property line between adjacent tracts of land.¹ This rule applies to both agricultural land and land within a city. Because Iowa has a specific statute addressing partition fence location, a local ordinance requiring fences to be located any place other than on the property line is unenforceable.²

Is there a Duty to Erect and Maintain Fences?

In Iowa, with one exception,³ a landowner does not have a legal duty to build a partition fence. However, a landowner can be compelled to contribute to the creation or maintenance of a partition fence upon the written request of an adjacent owner.⁴ A landowner can also be compelled to build or maintain a partition fence on the basis of an agreement – such as utilization of the “right-hand rule.” That’s an informal arrangement by which the landowners face one another at the mid-point of the fence and agree to maintain their share of the fence to their respective right-hand sides.

For a written fence agreement that details the allocation of fence maintenance and/or

construction, two options exist: (1) adjacent owners can enter into a written agreement, or (2) adjacent owners can request an order from the fence-viewers (township trustees) allocating responsibility between the parties.

The use of a written fence agreement worked out by adjacent owners is often overlooked, but Iowa law does allow owners of adjoining parcels to file an agreement with the county recorder of deeds to make an agreement binding.⁵ Such an agreement, upon recordation, is binding upon the original parties, their heirs and subsequent owners. If adjacent owners cannot come to a mutual agreement, however, the township trustees (acting in their capacity as fence viewers) can be called upon to settle the dispute. State law specifically authorizes township trustees, acting as fence viewers⁶, to decide partition fence controversies and render opinions that will be binding upon current and subsequent owners.⁷

The Fence Dispute Resolution Process

If the statutory process for resolving fence disputes is invoked, a four-step process is involved:

- **Step 1** - the complaining landowner must make a written request to the other landowner for the erection of a fence.
- **Step 2** - if Step 1 does not resolve the matter, the complaining landowner must make a formal request to the township trustees to resolve the dispute.⁸

- **Step 3** - the trustees must give five days written notice to all adjoining landowners that are liable for the erection or maintenance of the partition fence concerning time and place of the hearing.⁹
- **Step 4** - the fence viewers meet and issue a written order that allocates responsibility for maintenance or erection of the partition fence.¹⁰

The fence viewers are to divide responsibility for building and maintaining partition fences equally between the parties regardless of which party gains primary benefit from the fence construction.¹¹ As mentioned above, the decision of the fence viewers is binding. However, a landowner can appeal to the local district court by filing a notice of appeal within 20 days after the fence viewers render their decision, and filing an appeal bond.¹²

Absent an appeal, landowners must construct or maintain their assigned portion of fence as decided by the fence viewers. If a party fails to comply with the decision of the fence viewers,¹³ disaffected landowners can request that the fence viewers build or maintain the fence. But, the party (or parties) requesting the fence viewers to do so must pay a deposit to cover the fence building expense, which will be reimbursed upon collection from the party in default.¹⁴ When the fence work is completed, the landowner in default will have ten days to make the required payments. If payment is not made, the amount will be assessed as property taxes on the disputed property.¹⁵

What kind of fence can be required?

Iowa law generally requires the erection of a “legal” fence. Several options qualify as legal fence under Iowa law: rails, boards, or most commonly— three barbed wires.¹⁶ If a landowner pastures sheep or swine, a fence can also be required to be tight.¹⁷ A tight fence requires the landowner to add woven wires to the partition fence to restrain sheep and swine.¹⁸

Partition fences and livestock owners

Iowa is a common-law, fence-in jurisdiction. This means that a farmer has a responsibility to fence in their own livestock. Iowa does, however, follow a conditional fence-out theory. Thus, if an animal escapes as a consequence of negligent fence maintenance by adjacent landowners, the neighboring landowner will not be able to recover damages to their property by the trespassing animal.¹⁹ Essentially, Iowa places a duty on the non-livestock owner to maintain their portion of the fence and limits the overall reach of the “fence-in” theory. As noted above, adjacent landowners are equally responsible for building and maintaining partition fences.

Livestock owners must fence and control animals under their care. A livestock owner is liable for the damages caused by their trespassing animals if the trespass is caused by the owner’s negligence.²⁰ The concept of “distrain” may also come into play. Distrain allows a person to take possession of trespassing livestock until the costs of distrain (e.g., the cost of keeping and caring for the livestock and any damages that they caused) are paid.²¹

A livestock owner may also be liable for damages to third parties, such as motorists who suffer harm from trespassing animals. In Iowa, a common law duty exists to prevent animals from entering a public roadway despite the fact the formal fence-in statute was repealed in 1994.²² As a result, a livestock owner has a duty of ordinary care to prevent injuries and is liable to the extent that injuries were reasonable foreseeable. For example, in a 2004 Iowa Supreme Court opinion, a ranch failed to inspect the fence and take precautions necessary to protect motorists from stray horses.²³ The ranch argued that the statutory repeal of the fence-in requirement relieved them of this responsibility.²⁴ The Court disagreed, and noted that the common law imposed a duty of reasonable care upon livestock owners to restrain livestock.²⁵

Adjacent landowners also may bear liability for livestock if a trespass results from negligent maintenance of partition fence.²⁶ If a legal duty to construct a fence does not exist, adjacent landowners will not incur liability.²⁷ When a legal duty to maintain legal fence exists from a written agreement or order of the fence viewers, negligence by an adjacent landowner can lead to liability for damage to third parties.²⁸ If both parties, however,

fail to maintain a fence and a third party is injured, negligence will be a jury question. In lease situations, Iowa courts have held that landlords bear no responsibility for damage caused by a tenant's livestock.²⁹

Under Iowa law, a "habitual trespass" occurs when livestock escape their enclosure at least three times in a 12-month period and trespass onto the same neighboring landowner or the same public road each time.³⁰ In that event, the local government may (either on its own initiative or upon receipt of a complaint) make a finding as to whether a habitual trespass has occurred. If so, the disaffected neighboring landowner can make written request of the livestock owner that the livestock owner build a fence. If such a fence is not built within 30 days of receiving the request, the matter can be submitted to the fence viewers. The neighboring landowner is not liable for building or maintaining the fence unless the neighboring landowner is an adjacent landowner.

What if a fence has been improperly located?

If it is discovered that a fence has been improperly located, but it has been treated as the boundary by the adjacent owners landowners there may be a strong interest in allowing the fence to remain in its current position. Iowa law recognizes this fact and allows a misplaced fence to continue to serve as the legal boundary between adjacent landowners – irrespective of what a subsequent survey may indicate is the actual true boundary. In Iowa, once a fence has been utilized as the boundary for a period of 10 years, the fence can establish the boundary even though a later survey indicates the fence is not on the surveyed line.³¹ This concept is known as a "boundary by acquiescence." The adjacent owners didn't know where the true property line was, but simply acquiesced in the existing fence line as the actual boundary by either farming or grazing cattle up to the fence. Once a court determines that, based on the evidence, the fence has been treated as a boundary for 10 years, the fence becomes the true boundary.³²

A similar concept is where a misplaced fence can become the true boundary under via a prescriptive easement (by prescription). A prescriptive easement can arise when the adjacent owners know where the true boundary is, know that the existing fence is not on the line, but continue to use the

fence as the property line. In that situation, one of the adjacent owners is actually allowing the other adjacent owner to use some of their property that they wouldn't otherwise be able to use if the fence were in the correct location. The party that is benefitting from the misplaced fence can establish a prescriptive easement by showing that they have openly and notoriously possessed the land, adversely under a claim of right, and have had continuous and exclusive use for the statutory period (10 years).³³

Open and notorious possession requires that a landowner have used the property in a similar as fashion as the true owner, which is established by acts such as improving or maintaining the land.³⁴ That possession be adverse and under a claim means that the landowner has made an innocent mistake in locating the boundary and had believed that the fence was on the proper location when erected.³⁵ Continuous use for the statutory period requires that a landowner's use has not interrupted by another party for the statutory period – 10 years.³⁶ Exclusive use by the landowner claiming the easement is not required, as "mere casual intrusion by others on the property" does not invalidate the continuity required for a prescriptive easement to be established.³⁷ If these elements are established, the fence will continue to serve as the border between landowners as a result of a prescriptive easement.

Constitutional issues

In recent years, the constitutionality of requiring a landowner to erect and maintain partition fencing has been questioned. As the trend towards a more urban society continues, the validity of fencing statutes will likely be challenged on a more frequent basis. Some states have formally taken the position that compelling a property owner that does not own livestock to contribute to the erection or maintenance of a fence is unconstitutional (on Fifth Amendment grounds as a taking of private property without "just compensation").³⁸ However, Iowa has not taken this view.³⁹ The Iowa Supreme Court has held it constitutional to require landowners to share in the expense of creating a partition fence. In a 1995 case, an urban resident complained that requiring contribution for a fence which provided him no benefit was unconstitutional. But, the Court disagreed, noting that Iowa is an agricultural state,

and that the burden on the non-livestock owner was minimal.

Conclusion

The old maxim remains true – “Good fences make good neighbors.” So, to avoid fencing disputes, the best practice is to maintain communication with neighbors. But it is also helpful to have an understanding of the basic principles of Iowa fence law. It is also helpful to remember that many potential conflicts can be resolved in advance through written fence agreements between the parties. If that approach doesn’t work, the fence viewers can be called upon to make a decision. Regardless of which method is used, it is apparent that fences will continue to aid the agricultural interests of Iowa for the foreseeable future.

*Leonard Dolezal Professor in Agricultural Law, Iowa State University, Ames, Iowa, and Director of the ISU Center for Agricultural Law and Taxation. Member of the IA, KS and NE Bars.

¹ IOWA CODE § 359A.16.

² See, e.g., *Gravert v. Nebergall*, 539 N.W.2d 184 (Iowa 1995)(local home rule does not pre-empt a specific state statute relating to fences; agricultural land immaterial).

³ See IOWA CODE §169C.6 (2007).

⁴ IOWA CODE § 359A.1A (2006).

⁵ IOWA CODE § 359A.13 (2006).

⁶ IOWA CODE §359.17.

⁷ IOWA CODE § 359A.3 (2006).

⁸ *Id.*

⁹ *Id.*

¹⁰ IOWA CODE § 359.A4 (2006).

¹¹ See *Duncalf v. Ritscher Farms, Inc.*, 627 N.W.2d 906 (Iowa 2001).

¹² IOWA CODE § 359A.23 (2006).

¹³ The parties must complete the fence work within the timeframe established by the fence viewers in their decision. Default occurs if a responsible party does not complete assigned work within 30 days of the completion date established by the fence viewers.

¹⁴ IOWA CODE § 359A.4 (2006).

¹⁵ IOWA CODE § 359A.6 (2006).

¹⁶ IOWA CODE § 359A.18 (2006).

¹⁷ IOWA CODE § 359A.21 (2006).

¹⁸ IOWA CODE § 359A.20 (2006).

¹⁹ *Noble v. Chase*, 60 Iowa 261, 14 N.W. 299 (1882).

²⁰ IOWA CODE § 169C.4 (2006).

²¹ IOWA CODE § 169.C1 (2006).

²² See, e.g., *Klobnak v. Wildwood Hills, Inc.*, 688 N.W.2d 799 (Iowa 2004).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Mossman v. Amana Society*, 494 N.W.2d 676 (Iowa 1993).

²⁷ *Jacobs v. Stover*, 243 N.W.2d 642 (Iowa 1976).

²⁸ See, e.g., *Mossman v. Amana Society*, 494 N.W.2d 676 (Iowa 1993)(railroad liable for negligent care of fence, which lead calf to escape and injure motorist).

²⁹ *Byers v. Evans*, 436 N.W.2d 654 (Iowa Ct. App. 1988)(landlord had no duty to exercise control over fences constructed by tenant).

³⁰ Iowa Code §169C.6 (2007).

³¹ Iowa Code §650.6 (2006).

³² Iowa Code § 650.14. See also *Heer v. Thola*, 613 N.W.2d 558 (Iowa 2000) (establishment of title via acquiescence occurs upon court finding that particular boundary has been acquiesced in for statutory period); *Lucas v. Forrester*, No. 6-688/05-1847, 2007 Iowa App. LEXIS 192 (Iowa Ct. App. Feb. 28, 2007)(same); *Feldmann v. Ostwinkle*, No. 05-1157, 2006 Iowa App. LEXIS 196 (Iowa Ct. App. Mar. 1, 2006) (same); *Post v. Barnette*, No. 7-506/07-0097, 2007 Iowa App. LEXIS 1219 (Iowa Ct. App. Nov. 15, 2007) (plaintiff failed to establish by clear evidence the location of a “definite line” required to find a boundary pursuant to Iowa Code §650.14).

³³ IOWA CODE § 564.1 (2006).

³⁴ See, e.g., *Johnson v. Kaster*, 637 N.W.2d 174, 179 (Iowa 2001).

³⁵ *Collins Trust v. Alamakee County Bd. of Supervisors*, 599 N.W.2d 460 (Iowa 1999).

³⁶ IOWA CODE § 564.1 (2006).

³⁷ *Johnson v. Kaster*, 637 N.W.2d 174 (Iowa 2001).

³⁸ *Choquette v. Perrault*, 153 Vt. 45, 589 A.2d 455 (1989)(requiring non-livestock owners to build and maintain fences constituted a compensable taking under the Fifth Amendment).

³⁹ *Gravert v. Nebergall*, 539 N.W.2d 184 (Iowa 1995).