

## Iowa Fence Requirements: A Legal Review

📅 July 27, 2016 | 👤 Kristine A. Tidgren



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### Background

Iowa fence law has long sought to protect agricultural interests. Iowa fencing statutes date from earliest times, predating the Iowa Code of 1851. Of the current Iowa fence statute, Iowa Code ch. 359A, the Iowa Supreme Court has stated, “It is difficult to imagine a more deeply rooted Iowa statutory provision.”<sup>[i]</sup>

### Partition Fence Requirements

Iowa landowners have no common law duty to fence their property.<sup>[ii]</sup> Instead, Iowa Code § 359A.1A imposes a *conditional* statutory duty:

Respective owners of adjoining tracts of land shall upon **written request** of either owner be compelled to erect and maintain partition fences, or contribute thereto, and keep the same in good repair throughout the

year.

Consequently, if one landowner sends a “written request” to an adjoining landowner, asking that a partition fence be erected or maintained, that adjoining landowner **must** erect, maintain, or contribute to the cost of that fence. It is important to realize that this obligation does not flow from livestock ownership. A landowner owning no livestock can require an adjacent landowner to erect and maintain a partition fence. Likewise, a landowner owning livestock can require his non-livestock-owning neighbor to contribute to erecting and maintaining the partition fence.

## Constitutionality of Partition Fence Requirement

Although this aspect of the law has been challenged as unconstitutional, the Iowa Supreme Court upheld the provision in a 1995 decision, finding that even though livestock owners were the primary beneficiaries, the law benefitted all landowners.<sup>[iii]</sup> Specifically, the court found that the statute served a broader purpose of mediating boundary, fence, and trespass disputes, and that it offered these general benefits:

- Freedom from intrusion by livestock
- Freedom from trespassing neighbors
- Elimination of devil’s lanes
- Diminution of lawsuits
- Discouragement of litigation dealing with boundaries
- Increase in value of all land by fostering agriculture

Six years later, the Court again affirmed the constitutionality of the provision, finding, “Under the plain language of Iowa Code § 359A.1, the duty to maintain partition fences must be shared by adjoining landowners once such relief is demanded.”<sup>[iv]</sup>

Once the duty to build or maintain a partition fence is triggered, the costs of the partition fence are to be shared equally. Fence viewers (those tasked with settling disputes under the statute) are charged with apportioning the shared costs of partition fences so as to equalize the burden.<sup>[v]</sup> This does not always mean equal fence length. Where certain areas of a fence are more expensive to build or maintain, for example, one landowner may be responsible for fewer feet of more expensive fence.

In determining how to apportion fence responsibilities under the statute, many landowners have traditionally applied the **right hand rule**: *two adjoining property owners, facing each other at the center of the fence along their shared property boundary, each agree to build the right half from the center of the property to the end of the property line.*

While this is an acceptable practice, it is not based in statutory or case law. Thus, it is not a required method of allocation.

# Location of the Partition Fence

A person building the partition fence may lay it upon the line between the person and the adjacent owners and has the right to remove it as if it were wholly on his own land.<sup>[vi]</sup> This means that an adjacent landowner won't be trespassing if entitled to remove the fence. It does not mean that he has the right to remove a partition fence without permission. Even if the partition fence stands wholly upon one side of the division line, the provisions of partition fences apply.<sup>[vii]</sup>

## Fence Requirements

Six options exist for building a "lawful fence" under Iowa Code § 359A.18. This is the type of fence that is sufficient to constitute a partition fence, if required. The six options are set forth below. Notice that the last option is somewhat of a "catch-all," granting the fence viewers discretion.

- **Three rails** of good substantial material fastened in or to good substantial posts not more than ten feet apart.
- **Three boards** not less than six inches wide and three-quarters of an inch thick, fastened in or to good substantial posts not more than eight feet apart.
- **Three wires**, barbed with not less than thirty-six iron barbs of two points each, or twenty-six iron barbs of four points each, on each rod of wire, or of four wires, two thus barbed and two smooth, the wires to be firmly fastened to posts not more than two rods apart, with not less than two stays between posts, or with posts not more than one rod apart without such stays, the top wire to be not more than fifty-four nor less than forty-eight inches in height.
- **Wire** either wholly or in part, substantially built and kept in good repair, the lowest or bottom rail, wire, or board not more than twenty nor less than sixteen inches from the ground, the top rail, wire, or board to be between forty-eight and fifty-four inches in height and the middle rail, wire, or board not less than twelve nor more than eighteen inches above the bottom rail, wire, or board.
- A fence consisting of **four parallel, coated steel, smooth high-tensile wire** which meets requirements adopted by ASTM (American society for testing and materials) international, including but not limited to requirements relating to the grade, tensile strength, elongation, dimensions, and tolerances of the wire. The wire must be firmly fastened to plastic, metal, or wooden posts securely planted in the earth. The posts shall not be more than two rods apart. The top wire shall be at least forty inches in height.
- **Any other kind of fence which the fence viewers consider to be equivalent** to a lawful fence or which meets standards established by the department of agriculture and land stewardship by rule as equivalent to a lawful fence.

## Hedge

The statute provides that if a partition fence is a **hedge**<sup>[viii]</sup>, the owner must trim or cut it back twice during each year, the first time during June and the last time during September, to within 5 feet from the ground, unless the

owners otherwise agree in writing. Such a writing, to be valid, must be filed with and recorded by the township clerk.

## Tight Fence

Sometimes, a standard lawful fence is not sufficient. The law provides that all partition fences **may be made tight by the party desiring it**, and when that party's portion is so completed, the **adjoining landowner must follow suit**.<sup>[ix]</sup> A tight fence must be "securely fastened to good substantial posts, set firmly in the ground, not more than 20 feet apart."<sup>[x]</sup>

.In addition, Iowa law<sup>[xi]</sup> provides that all **tight partition fences** shall consist of one of the following:

- Not less than twenty-six inches of substantial woven wire on the bottom, with three strands of barbed wire with not less than thirty-six barbs of at least two points to the rod, on top, the top wire to be not less than forty-eight inches, nor more than fifty-four inches high.
- Good substantial woven wire not less than forty-eight inches nor more than fifty-four inches high with one barbed wire of not less than thirty-six barbs of two points to the rod, not more than four inches above said woven wire.
- Any other kind of fence which the fence viewers consider to be equivalent to a tight partition fence or which meets standards established by the department of agriculture and land stewardship by rule as equivalent to a tight partition fence.

A special provision exists for tight fences relating to sheep or swine. Where adjoining owners or occupants of land use the land for pasturing **sheep or swine**, each "shall keep that one's share of the partition fence in such condition as shall restrain such sheep or swine."<sup>[xii]</sup>

## Livestock and Fences

At common law, landowners had a duty to fence in their livestock and restrain it from running at large. If they failed to fence in their livestock, they could face strict liability for damage caused by trespassing animals. That law evolved to require landowners to *fence out* animals by means of a lawful fence before they could collect damages for animal trespass. Iowa now follows a *fence-in theory and a conditional fence-out theory*. This means that livestock owners generally have a duty to fence-in their livestock; however, neighboring landowners sometimes have a duty to fence the livestock out stemming from their statutory obligation to build a partition fence.

Iowa Code §169C.4, which was enacted in 1997, makes livestock owners liable for damages caused by trespassing livestock, **except where livestock trespass through a partition fence not maintained as required under Iowa Code ch. 359A**. In other words, livestock owners are relieved from liability if the trespass was through a neighbor's fence not maintained as required by Iowa Code § 359A. In addition to statutory liability, livestock owners

are subject to standard tort liability for escaping livestock<sup>[xiii]</sup>, as are neighboring landowners required to maintain a partition fence.<sup>[xiv]</sup>

## Habitual Trespass

The other instance where an Iowa landowner has a statutory duty to build or maintain a fence is where his livestock **habitually trespasses** onto neighboring land or onto a public road.<sup>[xv]</sup> Habitual trespass is established when a non-adjacent neighbor notifies law enforcement of livestock straying onto his or her property on three or more separate occasions in a 12-month period. Once properly documented, the non-adjacent neighbor may demand that the landowner erect or maintain a fence. That landowner can then turn to his or her adjacent owner to contribute to the cost of the fence under Iowa Code ch. 359A. If the livestock owner refuses to build or maintain the fence, the non-adjacent neighbor may enlist the fence viewers to settle the dispute. In this case, the county supervisors will step in to build and then assess a tax if the livestock owner refuses to build and pay for the fence.

### Written Fence Agreement

The Iowa fence statute allows adjoining owners to enter into a written agreement determining the portion of partition fences between their lands which shall be erected and maintained by each. The agreement must describe the lands and the parts of the fences so assigned. If that writing is signed and acknowledged by each landowner and filed and recorded in the office of the county recorder where the lands are situated, it will be binding on the makers, heirs, and subsequent owners.<sup>[xvi]</sup> It is enforceable in district court.<sup>[xvii]</sup> Case law also provides that the parties can intend the agreement to be a covenant that runs with the land.<sup>[xviii]</sup>

When drafting a fence agreement, parties must remember that this is a binding agreement for all time unless both parties agree to change it. Parties should think about the terrain of the land and its impact on cost. Equal distance may not be equitable. Parties should also ensure that the fence is currently in the proper place or the agreement could inadvertently create a boundary by acquiescence. The agreement may also place time limits on required maintenance or construction.

### Partition Fence Disputes

Iowa law grants **fence viewers** the power to determine controversies arising under Iowa Code ch. 359A.<sup>[xix]</sup> These fence viewers are the township trustees, three or five registered voters of the township. <sup>[xx]</sup> Fence viewers are granted special authority to resolve controversies involving tight fences, as well.<sup>[xxi]</sup>

## Initiating a Complaint

If an adjacent landowner does not respond to a written request to erect or maintain a partition fence, the complaining landowner can make a request to the fence viewers to resolve the dispute. Although the statute does not specify the form of the request, it is best for the request to be in writing.<sup>[xxii]</sup> The fence viewers must then give 5 days' written notice to all adjoining landowner(s) liable for the erection, maintenance, rebuilding, trimming, or cutting back, or repairing of a partition fence, or to pay for an existing hedge or fence.<sup>[xxiii]</sup> This notice must prescribe the time and place of meeting to hear and determine the matter.

## Meeting

Fence viewers will meet with the parties at the site at the prescribed time, after which they will issue a written order setting forth:

the obligations, rights, and duties of the respective parties in such matter, and assign to each owner the part which the owner shall erect, maintain, rebuild, trim or cut back, or pay for, and fix the value thereof, and prescribe the time within which the same shall be completed or paid for, and, in case of repair, may specify the kind of repairs to be made.<sup>[xxiv]</sup>

## Order

All orders and decisions made by the fence viewers shall be in writing, signed by at least two of them, and filed with the township clerk.<sup>[xxv]</sup> The township clerk must then certify a copy to the county recorder, who records the order in the name of each adjoining landowner.<sup>[xxvi]</sup> The order, like the recorded written agreement, is binding on the makers, heirs, and subsequent grantees.<sup>[xxvii]</sup>

## Appeal

Either party may appeal the fence viewers' order to the district court by filing a notice of appeal with the clerk of court within 20 days after the rendition of the order.<sup>[xxviii]</sup> The appealing party must file an appeal bond in an amount approved by the township clerk. The township clerk must then file the original papers with the district court, certifying them as original. After the appeal concludes, the clerk certifies the judgment to the county recorder.

## Default of Performance

If there is no appeal, but a landowner fails to comply with the order within 30 days, the fence viewers "shall cause the fence to be erected, rebuilt or repaired."<sup>[xxix]</sup> First, however, the complaining landowner must deposit the cost of the repair or completion, as well as the amount of the fees of the fence viewers and costs associated with the default.<sup>[xxx]</sup> If the defaulting landowner does not pay within 10 days, the amount will be assessed by the county treasurer against the defaulting landowner. This assessment shall be a lien on the property until paid.<sup>[xxxi]</sup> Once the defaulting landowner pays, the complaining landowner will get a deposit refund.<sup>[xxxii]</sup>

If the lands of the adjoining owners are in different townships, the clerk of the township of the complaining landowner shall select two trustees from that township, and the clerk of the other township shall select one.<sup>[xxxiii]</sup> Orders are filed in both townships (and counties if they happen to be in different counties as well).

### **Fence in the Wrong Place**

If a landowner mistakenly builds a fence on another owner's land, the landowner may go upon the land and remove the fence (or other improvement), but he or she must first pay for any soil damage.<sup>[xxxiv]</sup> If the parties cannot agree as to damages, the fence viewers can settle the matter.

### **Railway Fences Required**

Iowa Code § 327G.3 provides that all railway corporations owning or operating a line of railway within the state shall construct, maintain, and keep in repair a fence on each side of the right-of-way, to prevent livestock getting upon the tracks. These fences may be made hog tight upon a written request of a landowner.<sup>[xxxv]</sup>

### **Boundary Disputes**

It is important to note that fence viewers do not have jurisdiction to settle boundary disputes. These are matters that must be adjudicated through the courts.

## **Boundary by Acquiescence**

Common law has long provided that if parties acquiesce or "mutually recognize" for a period of at least 10 years that a fence is the boundary line between them, it becomes the boundary line. The courts have determined that acquiescence can be inferred from the "silence or inaction of one party who knows of the boundary line claimed by the other and fails to dispute it for a ten-year period."<sup>[xxxvi]</sup>

Iowa Code ch. 650 has codified the doctrine of acquiescence, by which a boundary line contrary to a property's legal description may be established.

Iowa Code § 650.14 provides:

If it is found that the boundaries and corners alleged to have been recognized and acquiesced in for 10 years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently

established.

Although often filed as or called “quiet title” actions, the boundary by acquiescence claim can be a “special action” Iowa Code chapter 650 proceeding, heard on appeal as an ordinary action.<sup>[xxxvii]</sup>

The only necessary pleading is the petition describing the land involved, the interest of the respective parties, and asking that certain corners and boundaries be established. The issue of acquiescence may be tried *before* a commission is appointed, in the discretion of the court.<sup>[xxxviii]</sup>

The establishment of title by acquiescence is effective only on a finding by the court that the requirements for acquiescence have been met. This finding must also establish a definite line. This is so even if the prerequisites for title by acquiescence have been in existence for some time.<sup>[xxxix]</sup>

### **Trees in Fence Row**

In Iowa, if the limbs of trees overhang the land of a neighbor, he may cut them off at the line, and, if the roots penetrate the neighbor's soil, he may dig them out, but “that is the extent to which he may carry his objection.”<sup>[x]</sup> “Line trees,” trees standing directly on the boundary between lands of adjoining owners, are usually considered common property, which neither may destroy without the consent of the other. Landowners who improperly clear trees from his or her neighbor’s property can be liable for trespass and large damages meant to compensate for the value of the lost trees.<sup>[xi]</sup>

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[i] *Gravert v. Nebergall*, 539 N.W.2d 1184 (Iowa 1995).

[ii] *Longfellow v. Saylor*, 737 N.W.2d 148 (Iowa 2007).

[iii] *Gravert v. Nebergall*, 539 N.W.2d 1184 (Iowa 1995).

[iv] *Duncalf v. Ritscher Farms, Inc.*, 627 N.W.2d 906 (Iowa 2001).

[v] *Id.*



[vi] Iowa Code § 359A.16.

[vii] Iowa Code § 359A.17.

[viii] Iowa Code § 359A.2.

[ix] Iowa Code § 359A.19.

[x] *Id.*

[xi] Iowa Code § 359A.20.

[xii] Iowa Code § 359A.21.

[xiii] *Klobnak v. Wildwood Hills, Inc.*, 688 N.W.2d 799 (Iowa 2004).

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

[xv] Iowa Code § 169C.6.

[xvi] Iowa Code § 359A.12.

[xvii] See, e.g., *Brookview Farms LLC v. Wennes*, 873 N.W.2d 775 (Iowa Ct. App. 2015).

[xviii] *Longfellow v. Saylor*, 737 N.W.2d 148 (Iowa 2007).

[xix] Iowa Code § 359A.3.

[xx] Iowa Code § 359.17.1.

[xxi] Iowa Code § 359A.22.

[xxii] A sample request form can be found at [http://www.winneshiekcounty.org/uploads/PDF\\_File\\_31798969.pdf](http://www.winneshiekcounty.org/uploads/PDF_File_31798969.pdf)  
↗ (last accessed 7/27/2016).

[xxiii] Iowa Code § 359A.3.

[xxiv] Iowa Code § 359A.4.

[xxv] Iowa Code § 359A.8.

[xxvi] Iowa Code § 359A.10.

[xxvii] Iowa Code § 359A.13.

[xxviii] Iowa Code § 359A.23.

[xxix] Iowa Code § 359A.6.

[xxx] Iowa Code § 359A.4.

[xxxi] Iowa Code § 359A.6.

[xxxii] Iowa Code § 359A.4.

[xxxiii] Iowa Code § 359A.14.

[xxxiv] Iowa Code § 359A.15.

[xxxv] Iowa Code § 327G.5.

[xxxvi] *Ollinger v. Bennett*, 562 N.W.2d 167 (Iowa 1997).

[xxxvii] *Id.*

[xxxviii] Iowa Code § 650.6.

[xxxix] *Heer v. Thola*, 613 N.W.2d 658 (Iowa 2000).

[xl] *Harndon v. Stultz*, 100 N.W. 329 (Iowa 1904).

[xli] See, e.g., *Buhr v. Mayer's Digging Co.*, No. 15-0211 (Iowa Ct. App. March 9, 2016) and *Lackman v. Muff*, No. 14-1150 (Iowa Ct. App. April 22, 2015).

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