

# Agricultural ECONOMICS

Legal Affairs

## Indiana Farm Fence Laws

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### Introduction

Many questions and problems arise on Hoosier farms concerning the duties and rights associated with partition (line) fences. Fence law provisions are in the Indiana law (IC 32-26-9). This publication discusses a few key points concerning line fences and related legal issues, including liability for escaped animals, and closes with a discussion of adverse possession. Landowners should, however, consult the township trustee and may need a lawyer's assistance when they have problems concerning line fences, damages caused by animals, or location of property lines.

### Line Fence Law

Indiana law makes it a duty for landowners outside corporate town or city limits to separate "agricultural land" from that of their adjoining neighbor by a partition fence (IC 32-26-9-2)—but only if one or both of the adjoining parcels is "agricultural land." The law, as amended in 2003, says, "'agricultural land' means land that is:

- (1) Zoned or otherwise designated as agricultural land;
- (2) Used for growing crops or raising livestock; or
- (3) Reserved for conservation."

Further, the law states that it "shall be liberally construed in favor of the objects and purposes for

which it is enacted and shall apply to all agricultural land, whether enclosed or unenclosed, cultivated or uncultivated, wild or wood lot" (IC 32-26-9-5).

The law states that unless there is a recorded agreement to the contrary, a landowner shall build the right one-half of the line fence determined by standing on his or her own property and facing the adjoining neighbor's property. If a landowner has constructed and maintained one-half of a given partition fence other than his right one-half for five or more years, then the right one-half rule may be ignored. A partition



fence is to be placed on the line dividing the properties (IC 32-26-9-2-(a)(3)).

Generally, the law supports special agreements, even when oral, between adjoining landowners for fence maintenance. However, for agreements to be binding (covenants running with the land) on subsequent landowners, they should be in writing and recorded. Covenants in deeds concerning the maintenance of fences have been held by Indiana courts to be binding on future as well as current landowners.

Landowners may agree not to have or maintain a partition fence. This situation may endure indefinitely or until the neighboring landowner asks for a fence. The duty to build or repair arises with a request.

If an adjoining landowner refuses to construct or maintain his or her share of a line fence, the other landowner can seek the assistance of the trustee of the township in which the line fence is located. But first the landowner seeking assistance must build or repair his or her share and provide a notice to build or repair to the neighbor. If, after 20 days, the neighbor has not built the fence, then the township trustee may be contacted for assistance. The trustee has a reasonable time to determine the probable cost of the project and to notify the nonperforming landowner. If the notified landowner does not perform the work in 20 days, the trustee is required to have the work performed. The law provides for costs to be collected, along with property taxes of the non-performing landowner, after a certified statement is presented to the county auditor.

While many farmers build alternative fences, the law is “all fences of every structure must be sufficiently tight and strong to hold hogs, sheep, cattle, mules, and horses” (IC 32-26-9-3 (f)). Minimum required height is stated as 4 feet for wire, pickets, or boards; 4 1/2 feet for rail fence; and 5 feet for worm rails.

Where a ditch or creek crosses the division line, the fence across it may entail unusual expense such as a floodgate. If the property owners cannot agree on sharing expenses for this special construction or maintenance, the trustee is required

to appoint three disinterested parties to resolve the matter by apportioning expenses. This is the case even though the situation exists on the half of the boundary belonging to one landowner. If a ditch or creek is on the dividing line, such that a fence cannot be maintained on the line, then each landowner is required to construct and maintain a separate “line” fence.

If a landowner wishes to remove a segment of a line fence, his neighbor is entitled to six-months’ notice to protect a growing crop (IC 32-26-2-18). While the neighbor may not object to the fence being removed, he or she is entitled to its protection for an unharvested crop, even though six months may have elapsed after notice (IC 32-26-2-20).

Hedge or live fences along highways (outside cities and towns) that could block the view of traffic at intersections and curves are required to be trimmed at least once annually to no more than 5 feet in height. If a landowner or tenant ignores this rule after notice from a township trustee or highway superintendent or Indiana Department of Transportation, one of these authorities with jurisdiction is required to do the trimming. The nonperforming landowner is billed for the costs along with property taxes. (IC 32-26-9-4(c)).

## Fencing the Railroad Rights-of-Way

Indiana law requires all railroads to construct and maintain fences along rights-of-way sufficient to prevent livestock from getting onto the tracks. Railroads are required to fence the entire distance between their right-of-way and the abutting farmer’s land that is entitled to a fence. A railroad need not fence through “unimproved and unenclosed lands” such as wooded land. But, if the landowner has enclosed the other three sides of the area bounded by a rail right-of-way, then the railroad, upon request, is compelled to provide a fence along the tracks in order to complete the enclosure.



When a railroad fails to build or maintain a fence desired by an adjacent landowner, the landowner may build or repair the fence and follow procedures in the law to obtain reimbursement of costs, including attorney fees.

If right-of-way fences are not constructed or maintained properly, then the railroad is liable to the landowner for all damages that may result, including, but not limited to, livestock killed or injured on the railroad track. If the railroad raises an “entry where no fence required” defense, courts have required railroads to prove that an injured animal entered the right-of-way at a point where no fence was required.

## Fencing Highway Rights-of-Way, Public Parks, and Forests

Interstate highways and other specified roadways are limited access, which normally implies fencing of all rights-of-way. Limited access right-of-way fences will be constructed by the state at federal and state expense and maintained by them even though the farmer may benefit. However, such fences are in place to restrict access for safety and for protection of the right-of-way. The fact that farmers may prefer no fences at all in order to avoid equipment damage may be irrelevant. Variances may be granted to avoid having a fence fronting a business or other property in the case of non-interstate, limited access roads. Safety along and integrity of a right-of-way must be maintained in order to allow a variance to continue.

When roads and highways are not limited access, the fencing of the rights-of-way is all at the expense of the abutting property owner. In specific cases, a fence may be built by the state as part of the compensation for right-of-way acquisition. But in these cases, the fence becomes the property and responsibility of the abutting owner.

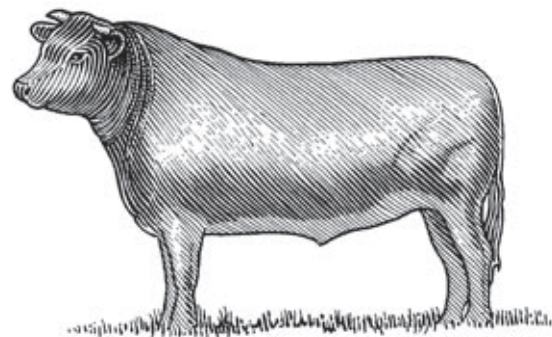
Indiana state park policy is to share costs with neighboring landowners when a fence is needed for livestock. Signs rather than fences are used to mark boundaries, unless signs are inadequate for the situation.

National parks and forests normally do not fence their boundaries and do not come under the state law on fencing. They may fence at the government’s expense when it is needed to protect a specific development or area. While they will share expenses for a survey, they will not share expenses with a farmer who needs a fence for livestock. In fact, a federal court case in West Virginia required the landowner to enclose his property to avoid violating federal regulations against his livestock being on the public property. This case and prior cases have held that the federal government was not bound by the state law covering cost sharing. There is no law requiring the U.S. to fence its park and forest properties.

## Liability for Animals

Under common law (before or without statutes), landowners had no duty to fence their land unless they maintained animals on the premises. A keeper of animals was under a duty to keep them enclosed. If the animals escaped from their owner’s property, the owner was liable for damages caused by the animals. In 1887, Indiana placed this rule into a statute. It is the law today that:

If any domestic animal breaks into an enclosure or wanders upon the lands of another, the person injured thereby, shall recover the amount of damages done: ... it shall not be necessary to allege or prove the existence of a lawful fence in order to recover for damages done. (IC 32-26-2-2(b))



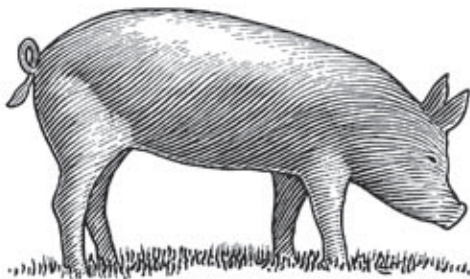
Indiana law provides for an election by each township of a “fencing-out” or “fencing-in” law. “Fencing-out” is the open-range option, whereby the landowner must build fences on his own if he

desires to keep animals off his land. Under a fencing-out option, the injured party would have to prove that livestock broke through his lawful fence before damages could be recovered.

Although the above option exists, all of Indiana is under modified fencing-in law, with adjoining landowners sharing in the construction and maintenance of line fences—where at least one of landowners has “agricultural land.” Indiana’s line fence law is an exception to the basic rule of fencing-in. Unless neither of the adjoining landowners has “agricultural land,” **a landowner is compelled to help build and maintain a share of a lawful line fences, even if it is only to keep his neighbor’s livestock from trespassing.** The requirement to share in the construction and maintenance of a line fence has an element of the fencing-out rule.

But the livestock owner (landowner or tenant) has a duty to keep animals off the roadways with appropriate “exterior” farmstead fences. Animals might escape from a farmstead, travel down a roadway, and enter a neighbor’s field where there is no gate or exterior fence. The farmer without livestock has no duty to build an exterior fence. Because the basic law requires fencing-in one’s own livestock, the farmer may be strictly liable for the trespasses of his animals.

According to past litigation, if animals go through a line fence and damage a neighbor’s property, whether or not the animal keeper is liable for damages should depend upon who was responsible for the portion of line fence that permitted passage. It is possible that the neighbor with damages was at fault in not maintaining his or her portion of the line fence. It seems



reasonable that this should be the rule, in order to place a penalty upon the landowner who did not maintain his or her share of the fence. Adjoining landowners must have adequate notice, as explained above, to repair a fence before livestock are turned against an inadequate fence. **Patience, neighborliness, good judgment, and legal counsel may be necessary to avoid liability, even when landowners think they are within their rights.**

It may be difficult or impossible to determine which part of the fence the animal escaped through. In that case, the animal keeper (or his or her insurer) likely will be held responsible for damages. Because of the cost of investigations and disputes, reasonable damages may be paid by an insurance company without substantial inquiry into the facts to determine fault.

Indiana law permits a property owner to “take-up” animals that are trespassing and hold them until proper compensation is offered for damages and the cost of keeping the animal(s). The statute requires the township trustee to appoint two disinterested parties, if requested, to determine the damages. If the owner of the animal(s) offers an amount to settle and subsequent court proceedings award no more than the settlement offered, the party claiming damages is assessed the court costs.

Landlords and farm operators need adequate liability insurance, because trespassing animals can lead to tenant and landowner liability. However, an owner of an escaped animal may not be liable for damages to motor vehicles or for injury to motorists. Court cases in Indiana and in other states indicate that if the animal owner shows that: (1) he or she was not aware that the animal(s) had escaped and (2) the fences were in good repair, the animal owner or landlord may not be liable.

## Adverse Possession

By mistake, line fences may be a distance from the true boundary line. Indiana case law has held just as the statute states, that a line fence is to be placed on the boundary (survey) line (IC 32-26-9-

2(a)(3)). A fence may have been erected under an erroneous assumption about the location of a boundary line and have stood for many years without a question. Landowners should be aware that an adjoining neighbor may acquire a strip or segment of their land when after several years it is found that the fence has a landowner's land on the neighbor's side.

Adverse possession theory and a "quiet title" lawsuit are legal measures that can be used to resolve such disputes. If the use of someone else's land is what the court may view as open, continuous, distinctive and exclusive, adverse, and notorious for at least 10 years, title may be established by adverse possession.<sup>1</sup> And a landowner may assert a claim under adverse possession by adding periods of time during which a disputed strip was adversely occupied by prior owners by the tacking time periods. Once these elements are established to the satisfaction of a judge or jury, fee simple title to the disputed tract is conferred to the claimant (neighbor) by operation of the law thus extinguishing title in the original (record) owner.

An adverse possessor may prevail without knowledge of the mistake until adjoining neighbors raise the issue. The adverse possessor merely needs to use the land as if it were his or hers. If the possessor knows there is a disagreement, he may win out by simply using the property for at least 10 years. Note that adversity cannot be established when there is consensual use—e.g., under a lease or an easement.

If the adjoining landowner accepts the erroneous boundary, whether knowing or not knowing it is wrong, the law, after 10 years, may give the property to the adverse possessor. However, if a landowner believes another possesses his or her land, he or she may bring a lawsuit to quiet title.

Either adjoining landowner can bring a quiet title lawsuit to let a court decide who is entitled to the disputed land. The landowner who claims the loss of land must not let the 10-year statutory

period elapse, or else the possessor's rights may be irrefutable. Once a court renders a judgment, this determines who has marketable title in the disputed strip or portion of land. A lawsuit and judgment may be necessary to clear the record, even if it appears that all the requirements of adverse possession have been satisfied.

A 1982 Indiana Appellate Court case established that ownership to a strip of land could shift to a neighbor where there was an agreement by the abutting neighbors to treat a fence as a legal boundary line. Further, ownership can shift to the possessor of the strip of land even though the property was not held for the statutory period (10 years) required under the theory of adverse possession. This was held to be binding on subsequent owners as long as no fraud could be shown to be present.

## Conclusion

It is important that all parties know their rights and duties under the law. It is generally costly in terms of both dollars and human relationships to exercise the full recourse offered by the courts and the law. Because most people value good relationships with their neighbors, often a compromise may be best.

### *Acknowledgments*

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<sup>1</sup> An Indiana law, IC 32-21-7-1, requires an adverse possessor to show that he or she paid the property taxes. However, Indiana case law may make an exception for strips along a fence line. To research the case law, see *Fralely v. Minger*, 786 N.E. 2d 288, (Ind. Ct. App., 2003).



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