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Agriculture Committee  
January 26, 2010

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[LB909]

The Committee on Agriculture met at 1:30 p.m. on Tuesday, January 26, 2010, in Room 2102 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB909. Senators present: Tom Carlson, Chairperson; Annette Dubas, Vice Chairperson; Brenda Council; Merton "Cap" Dierks; Russ Karpisek; Scott Price; and Norman Wallman. Senators absent: Ken Schilz. [LB909]

RICK LEONARD: (RECORDER MALFUNCTION--TESTIMONY LOST)...the reason we put this provision into the fence law is that in previous versions, LB108 eliminated a fence resolution system that we had in place at one time. We had a fence arbitration system in which fence viewers could be appointed to resolve issues between neighbors regarding fencing. One of the issues that fence viewers would commonly address, and fencing responsibilities the fence viewers would assign, would be the necessary addressing of obstructing vegetation that may impair the ability to construct the fence properly or impair its function, potentially damage the fence. With that authority you have that order from the fence viewer even though the fence laws never expressly provided defense against the landowner of an incidental trespass that occurs when you perform fencing obligations, that the potential to have a fence review order was deemed to be potential to provide that defense. The goal of this bill in the language that we inserted, the fence law has always previously been...never been specific, prohibit nor with regard to the removal of trees. With the right of entry we may have inadvertently gone too far and created a presumption that the ability to address the vegetation in trees in the fence line is not part of the practice of building fences. I think we'll have testimony today...that we have a landowner whose actually who's involved in the dispute that will talk about his experience and the necessity of addressing vegetation in some cases that is necessary to build a fence. The goal of this bill would simply restore us back to what exists in our prior fence law where we don't avoid any presumption that the addressing of vegetation, potentially including trees, is not part of the fencing practice. That's the end of my...that will be the end of my presentation. I'd answer questions. [LB909]

SENATOR CARLSON: Okay, thank you, Mr. Leonard. You've heard the testimony. Any questions? Okay. Thank you for your presentation and we'll proceed with proponents first for the bill? So don't be bashful, step up. [LB909]

PETE McClymont: Chairman Carlson and members of the Agriculture Committee, I'm Pete McClymont, P-e-t-e M-c-C-l-y-m-o-n-t. I'm here representing our membership in support of LB909. Obviously, as Mr. Leonard has stated, it's very straightforward. Last year in our testimony on LB667 we had a testifier from Kearney County and we also have another member from Jefferson County. And in their disputes they have this issue involved in their legal case in trying to resolve their disputes. So it's a common occurrence in fence disputes. Our board was in town last week and voted to support this

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bill. So one point of clarification I'd give to you as the Ag Committee is that Senator Sullivan's bill, LB667, was introduced to this committee last year. We had the hearing and in that hearing Senator Sullivan's hope was that we would work on it in the interim. We did. We had affected groups come in and talk about that, so our board voted to make LB667 one of our priority bills for this session. So we discussed many issues on LB667 in the interim and so with that, this was an issue that was separate. We think it's important but it would be our hope as a membership that if LB909 does come out of this committee and gets passed on to General File, if there was no opposition to be addressed on the floor, and today at this hearing on LB909, that on Select File if it would make it easier it would be our support to have both bills combined and we would be behind that. Our whole focus right now for LB667 is to have that legislation passed, but we still do support this. And with that, I'd be happy to answer any questions if the committee has any. [LB909]

SENATOR CARLSON: Okay. Thanks for your testimony. Any questions of Mr. McClymont? Okay. Thank you. [LB909]

PETE McCLYMONT: Thanks. [LB909]

SENATOR CARLSON: Next testifier. [LB909]

JIM PAPPAS: Mr. Chairman, committee members, my name is Jim Pappas, J-i-m P-a-p-p-a-s. I'm representing Independent Cattlemen of Nebraska and unlike the person that testified before me, since you're Chairman of this committee and this is your bill, we'll support your bill by yourself. You do not have to combine it with another bill. We wholeheartedly support this concept and the changes in...upcoming changes of fencing law, one of the reasons because there's been coming more and more absentee landowners across the state of Nebraska. And a lot of times absentee landowners don't have the concern about fences that a owner/operator would of one particular part. One part of the bill I would like to see if, maybe it's clarified the way it's written, but when they talk about trimming the vegetation within the immediate proximity of the fence line, would that include living or nonliving or both type of vegetative matter? Reference in point would be if you had a division fence across the waterway, if you had a branch or something that came floating down the stream and hung up on it or was on that if it was a dead branch, is that the same thing as vegetative they could go in and remove that? [LB909]

SENATOR CARLSON: Okay. You've asked a question. We'll address that as we go along, so. [LB909]

JIM PAPPAS: That would be the only question I have of the bill. [LB909]

SENATOR CARLSON: We've taken your concern. Okay. [LB909]

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JIM PAPPAS: That it could come up somewhere, and just so it's clarified. [LB909]

SENATOR CARLSON: Okay. Is that it? [LB909]

JIM PAPPAS: Uh-huh. [LB909]

SENATOR CARLSON: All right. Any questions of Mr. Pappas? Okay. Thank you. [LB909]

MARK ROEMER: (Exhibit 1) My name is Mark Roemer, M-a-r-k R-o-e-m-e-r, and like the two before me were, I'm a proponent of this bill. The handouts are kind of a follow along thing proposal my wife and I made up over the last couple of days to make it a little bit easier to conceptualize what the problems can be. And briefly I was born and raised at the three corners of Burt, Dodge and Cuming County. Presently, I'm eight miles directly west of the state Capitol. If you look out the window to the west, you'll see my farm. So I've had quite a little bit experience in construction before I became a farmer, had to make the money first. However, in this environment, this is my first rodeo. The division of fences and for the purposes of today, we'll talk about legal fences as outlined in LB108. And I believe they're a good idea because they reduce liability for animals and people. As a livestock producer myself, my primary concern is to have safe livestock, not for myself but for the livestock themselves as well. And it also helps keeps insurance rates low for myself and other people, that safer means cheaper. And division of fences also stimulate an economy. Some of these things have not yet been realized in our ag economy. There's a lot of available grazing that isn't used simply because we don't have decent fences. It also promotes animal husbandry. That stimulate economy, that's a buzzword. It's not meant to stimulate legal firms or insurance firms. LB909 does, and LB667 also helps establish the fact that Nebraska is a very important livestock producing state. However, the use of our lands more for recreational and urban spread are creating some increased problems. Urban growth naturally means zoning changes, and as the advent of the Internet has grown over the past, more and more people move into rural areas and do not have an appreciation for livestock, as you are well aware. The goal of these fences is to provide a minimum of standards and long-term solutions to, hopefully, increase livestock industry in the state of Nebraska. Along with that there are some maintenance issues that need to be realized and dealt with. The better you build it, the longer it would last. However, anything without maintenance can and does create problems. That brings us to the issue of the day which is trees and shrubs, trees which are the largest and costliest problem of maintenance in fence lines. The longer you ignore the problem, the larger and more costly the problem becomes. A definition of a tree is that it's perennial woody vegetation, and that's taken right out of the dictionary. They are not native to historic state of Nebraska. Prehistoric, I understand, they were here but to the historic state of Nebraska, trees were not a part of our environment. Therefore, trees cannot be automatically grandfathered into existence. There's two

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types of trees, typically, that I wish to address, and I'll divide them into two different categories. Those which were intentionally planted. These would be windbreaks, shelterbelts, ornamental trees, pretty things, more functional trees. And those which are volunteer. Those would be naturally propagated such as the cottonwood, Chinese elm, things of that nature. Back to the intentionally planted trees, if you were going to intentionally plant a tree you should have enough foresight to think that this tree will not become a problem in the future and I draw attention to the second page, second picture in the handout. Sorry, it would be the third. These are trees that are planted on property lines and underneath power lines. These trees are problems. I watched the gentleman plant these trees on my...on adjacent property of mine and I went, you know, some day you're going to regret that. Well, some day came about three weeks ago when he had eight foot snowdrifts over his lane, so. But the power line is having to deal with these issues as well. Back to the volunteer trees which is my primary source of injury. Birds and animals tend to help propagate the seeding of these trees primarily in all fence lines, not just division fences. A lot of these are mulberries, hackberries, other berries like plum, chokecherry, things of that nature. All of these perennial woody vegetation, trees and shrubs, can be considered invasive as we found out in the Republican Valley area. Some are even noxious, such as locust or poison sumac. These, as I said, become much, much more expensive to control when there is no maintenance or no continual effort to keep them where they belong or away from where they belong. My experience with fences are quite extensive. I've done quite a little bit of new construction work which I thoroughly enjoy. It looks so nice when it's done and don't have to worry about it for a period of years. More often than not, that's the result of building new roads or creating fences around subdivisions to protect people from my animals or my animals from the people. I'm also naturally involved with the repair of those fences when vehicles crash through them or animals run through them. Deer are a problem, fire. When we're controlling our excess vegetation, for example, with Nine-Mile Prairie to the west of town or CRP grasses, or old age. Sometimes you need to replace the rotten corner post or some wire that's getting stretched. A lot of our fences are much, much older than I am. Then there's also storm damage, ice breaking tree limbs off, falling on top of the fences, and other types of tree damage. These can be a real concern. Overhanging branches over fences and the snap-bang, here it comes on top of the fence, which creates an avenue for the livestock to get out of the controlled area. And as we know, once one of them gets out, the rest are soon to follow. Sometimes this happens in the wintertime, sometimes it happens in the summertime, allowing for potential liability. Not to say that I have a lot of work to do, I am the farmer's lowest producer but I do have seventeen and a half miles of livestock fence in Lancaster County. That was the last count and I quit counting. It's kind of like birthdays. The 2007 law was a step in the right direction from my perspective to help alleviate some of the vague language that we had experienced in the past. And probably more important than anything else, it was something that was needed to get us off of dead center from where we had been. Where we had been was...I don't want to recall it antiquated fence laws, but it would have been the laws of common sense, primarily that took care of us. And

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you'd stand in the middle of the fence line and everything to the right was yours. And that worked for a great number of years and a good long period of time. And I do follow and understand and recognize why the issue of the county clerks and the county departments to not want to hold those positions as fence viewers. I do understand the reasoning for that. However, it did leave a void and unfortunately the people now that seem to be left to make the decisions are not necessarily the mediators but, unfortunately, lawyers, or above that, the appeals systems. And those are extremely expensive and extremely time consuming. Time is probably more important to us than anything else. If I can find something easier to do without running into resistance, trust me, I'll do it. So if I'm worried about a fence or a division fence or something saying, you know, that could get me in trouble with the law, I'm not going to go there. I'm just, you know, do something else. I don't think this benefits the state of Nebraska the attitude that I've experienced benefits the state of Nebraska, for a long-term economic or livestock perspective. One of the things that I've noticed in raising cattle is normally the amount of profit from a cow-calf operation ends up being nearly identical to the number of days a year that that animal uses primarily unusable forage, grazing of cornstalks, grazing of wheat stubble, grazing of soybean stocks. When I do my net income from those operations at the end of the year, it works out to be about \$1 per head per day that I don't have them in a pasture or I don't have them in a confined situation. And that typically ends up being approximately \$30 per acre per year that I receive as net income due to being able to graze on wanted vegetation, i.e. cornstalks. That's significant when you consider the amount of cornstalk country in the state of Nebraska. Not to say that everybody should do that, however, that isn't...that is a huge economic...potential economic increase for our state. The primary reason that isn't done more often in my experience and in my opinion, is that it is difficult to put up a hot wire, electrical wire which is certainly not a legal fence nor is it certainly anything that can be expected to withstand snowstorms in Nebraska. In the fences that are in existence they are old, out of maintenance, overgrown and not capable of holding livestock in. I've been addressing that for the last 15 years that I've been a farmer is to year by year do a little bit of work on the fences, day by day. It's a daunting task and it's one that you do the easiest stuff first. However, there reaches a point in time when you pick up another piece of ground, which has been my experience, and the fences haven't been worked on for the last 50, 60, 70, 80 years, and you've just got to be able to deal with it. You've got to be able to make it right the way it was originally intended, which after all, was without trees. I'd like to offer my experiences, you know...before I do that I'd like to bring to your attention in the handout is Section 39-1812 and Section 39-1813 of the Nebraska Statutes. Of the difficulty...and this is primarily...and it's nearly the day I was born, 1957, but this recognizes that the counties had an issue with trees, shrubs, and they were posing public hazards. And this is the counties way of requiring the landowner to reduce public hazards. A very good, very well-written law. I would say that it isn't very often utilized. I've never had the county come to me and tell me to clean up my act, but then again, they have the right to do that without any ifs, ands, or buts. My experiences along with LB667, which I also at this time would like to say I fervently support, it really does help

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us to look forward to the future for future generations and say that livestock will be important in our communities. This isn't an issue that's going to go away. The fences I fixed today I can expect to be in use for generations to come. So to mend the old or to ignore the issue would be a disservice to future generations. We're presently enjoined...I'm a managing partner in Prairie Star Land, LLC. We're presently enjoined in a district court battle which is entirely centered around division fences and trees. LB108 specifically states that although we have the right to fix the fence, we can't move any trees on the adjoining property. And again, I would ask you, what is a tree? If it's a planted tree, I can see some value there, but if it's a volunteer tree and it's the size of your little finger because it just came up two years ago, I cannot remove that or damage that in my attempt to fix the division fence. If it's a 75-year-old tree, and there's some big cottonwoods that are hundreds of years old, you know, I guess, no, I can't remove that tree. And at the same time, would I want to. Would I want to. That's a big project. There's a certain cost involved with installing legal fences. Those costs are typically recognized by right of way purchasers to be \$6 a lineal foot. If they come to your property and say, you've got a fence line there, it's a legal fence, we want to buy your legal fence, \$6 a lineal foot. So that's not an inexpensive proposition. The cost to remove trees is a cost in and above the cost of installing the fence. So you don't really want to waste a lot of time or money to putting up a division fence. Again, it's the path of least resistance. The banker is going to suggest you're going beyond your means. Back to the lawsuit, it was about a tree issue. He was called and asked if he would like to participate. In fact we sent letters to the landowner requesting his participation in helping us develop a division fence that had been unmaintained. That division...that resulted in a very quick and snappy response from the landowner to have me contacted by his attorneys, say, don't you dare. The landowner on the other side of the fence from me, the plaintiff in this instance, is also a livestock producer, is, and has been a farmer for many, many years. Don't really understand why that happened. However, the fact remains that because of the present statutory laws, and we cannot enjoin trees in our work to build fences, he has an avenue now to stop me from constructing a division fence. His primary concern is that I might ask that he pay for half of it. Well, that's not really nearly as expensive as getting involved in a lawsuit. The end result is that we went to district court...we're presently in district court, not county court, as LB108 provides. We're in district court being accused of trespassing and causing damages to his property because some of the trees that I pushed over on our property fell on his and the loader operator went onto his property as allowed for and pulled the fallen trees back onto our property. Not...LB108 was never entertained as a defense in my position. However, now that we can bring it back from...we're attempting to bring it back from district court back to county court so that we can involve LB108 and have those statutes apply. As you can imagine, it's a frustrating situation and not unique to our particular situation. Prucha v. Kahlandt, which is in Burt County, one of my home counties, involved two landowners, one of which liked trees and one of which did not like trees, one of which wanted a fence and one of which did not want a fence. So it's a very similar thing and that was in the S. And I understand there's another lawsuit involving a

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millar that has very similar circumstances. Each, in the past, each and every one of these has come up against a failure or a lack of the statute to clearly define what we can and what we cannot do. And those vague definitions create arguments and arguments are how lawyers make a living. No offense to anybody that might be a lawyer but that is how they make a living. And I would suggest and I would challenge...that brings me to my proposal which is almost to the end of this thing. I propose that I, as a landowner, and I, as a person responsible for the safety of my livestock and responsible for the safety of the people in my community, I would propose that I not be driven to the courthouse steps every time I wish to make something safer. I propose that as a group you might encourage the type of legislation that encourages not only myself but those producers like me that wish to do this without the fear of litigation. And that's going to take a bold step. It's not an easy thing to legislate, abrogate, or correct, something that has been discarded over the course of, lo, these many years. This isn't a small issue. This is a very large issue and it's one that until it's confronted and dealt with, it's not going to go away. It will only continue to get worse. It needs to have action now. Along with the lines of the proposal which I would ask for a distance of eight feet from each side of a division fence to be a delitigation zone. I'm not asking for anything other than the fact that if it's necessary to do, don't sue me for attempting to make it right. I understand there are some significant challenges that come along with eight feet. However, that happens to be the distance necessary for a pickup, tractor with loader, heavy equipment with front-end loader to remove trees from an area or to prevent these large branches from falling down on my fences. To operate, eight feet wide is about right. It might be eight foot, six inches. I would also like to suggest that along with the law that there be a disclaimer placed on all the real estate transactions involving AG or AG-R zoning to notify future landowners that there is a setback distance allowing either party to work on trees on either side of the fence. So any future landowners would not be blindsided by the fact that, you know, this is a division fence and I can lose some of the trees on my newly purchased property. The real estate community is capable of doing that. I further would like to encourage industry...or insurance industry involvement more from a promotional perspective as well as a livestock association involvement, again from a promotional perspective. And I'd like to suggest that we continue to define a legal fences and I would like to encourage or engage all relevant parties, these would be the owners on either side of the division fence, tenants, government and public agencies, as well as this new group of landowners we're finding which are civic agencies, such as Ducks Unlimited, or Pheasants Forever, or Kiwanis Club or someone that just purchases a piece of property for the protection of wildlife or for whatever they want to have it. I continue to...I would like to have farm mediation encouragement continue but as maybe an interim or an adjunct, we could allow the farm mediators to become documenters of existing conditions, recognized by court systems as professionals in their own right so that we don't have to go through a lengthy court process to determine what is...what should or should not be done. Nebraska has taken a bold step with LB667 and in heading for the type of state that I'm proud to be a livestock producer in. We have a responsibility to all of the citizens of the state to

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produce animals as safely and efficiently as possible and I believe that division fences, if encouraged, and if not frowned upon by one party or the other or stifled by the threat of lawsuits, can become an important part of our state's economy. Thank you. Any questions? [LB909]

SENATOR CARLSON: Okay. Any questions of Mr. Roemer? Okay. Thank you for your testimony. Anyone else as a proponent? Anyone as an opponent? Anyone from a neutral position? Okay, hearing none, this concludes the hearing on LB909. Thank you for coming, and in a minute or two we'll go into Executive Session. Moved and seconded that we go into Executive Session. [LB909]