

# FENCE LAW

## 35-46-101. Definitions

As used in this article, unless the context otherwise requires:

(1) "Lawful fence" is a well-constructed three barbed wire fence with substantial posts set at a distance of approximately twenty feet apart, and sufficient to turn ordinary horses and cattle, with all gates equally as good as the fence, or any other fence of like efficiency. Railroad right-of-way fences constructed in compliance with the statute in force on the date of construction and maintained in good condition shall be considered legal fences.

(2) "Livestock" includes horses, cattle, mules, asses, goats, sheep, swine, buffalo, and cattalo, but does not include "alternative livestock" as defined in section 35-41.5-102 (1).

## 35-46-102. Owner may recover for trespass

(1) Any person maintaining in good repair a lawful fence, as described in section 35-46-101, may recover damages for trespass and injury to grass, garden or vegetable products, or other crops of such person from the owner of any livestock which break through such fence. No person shall recover damages for such a trespass or injury unless at the time thereof such grass, garden or vegetable products, or crops were protected by such a lawful fence. Even though such land, grass, garden or vegetable products, or other crops were not at such time protected on all sides by a lawful fence, if it is proved by clear and convincing evidence that livestock have broken through a lawful fence on one side of such land to reach such land, grass, products, or crops, recovery and the remedies under this section may be had the same as if such land, grass, products, or crops had been at such time protected on all sides by a lawful fence.

(2) Whenever any person stocks land, not enclosed by a lawful fence, on which such person has a lawful right to pasture or forage livestock, with a greater number of livestock than such land can properly support or water and any of such livestock pasture, forage, or water on the lands of another person, in order to obtain the proper amount of pasture, forage, or water or whenever any person stocks with livestock land on which such person has no lawful right to pasture or forage livestock and such livestock pasture, forage, or water on such land or on other land on which such person has no right to pasture or forage livestock, he shall be deemed a trespasser and shall be liable in damages and subject to injunction.

(3) All damages sustained on account of the foregoing trespasses may be recovered, together with costs of court and arbitration, and the livestock so trespassing may be taken up by the person damaged and held as security for the payment of such damages and costs. A court of competent jurisdiction in any proper case may issue an injunction to prevent further trespasses. In any action for trespass where the injury complained of has been aggravated and attended by a willful or reckless disregard of the injured person's rights, the board of arbitration, court, or jury may in addition to awarding actual damages include reasonable exemplary damages. Recovery may be had under this section either in a court of law or by arbitration as provided in section 35-46-103.

If no fence exists, animal owner not responsible for nonwillful trespass. One who turns his cattle out to graze, unrestrained upon lands where he has a right to so release them, is under no obligation to prevent them entering upon the unenclosed premises of another, and if they do so enter through following their natural instincts, he is not responsible for the damage occasioned thereby, but the absence of a lawful fence does not justify a willful trespass. *Bolten v. Gates*, 105 Colo. 571, 100 P.2d 145 (1940).

IF YOU WANT THEM OUT, YOU MUST FENCE THEM OUT

#### 35-46-106. Care of stock taken into custody

It is the duty of any person who takes any animals into custody under the provisions of this article to feed and care for such animals in a reasonable, careful, and prudent manner and keep the same in as good order and condition as when so taken into custody by the said party, and he shall be liable for any damage occasioned by his failure to do so. For such feed and care such party shall be entitled to recover from the owner of such animals a reasonable compensation, to be recovered as provided for the recovery of damages sustained.

#### 35-46-107. Unlawful to break fence or open gate

It is unlawful for any person to willfully break down or cause to be broken down any fence or gate or to leave open any gate in such fence. This section shall not apply to the owner or occupant unless such owner or occupant causes such fence or gate to be broken down or left open with malicious intent.

### 35-46-111. Right-of-way fences

(1) (a) Except as otherwise provided in paragraph (b) of this subsection (1) and subsection (4) of this section, it is the duty of the department of transportation to maintain right-of-way fences constructed as of June 1, 1994, by the department at or near the boundary of the department's highway property in agriculturally zoned areas along and adjacent to all federal aid highways where such highways are maintained by the department. The department shall make repairs to such right-of-way fences when necessary only upon actual notice to the department. Neither the department nor the landowner is liable for any damages caused by the failure to adequately construct, maintain, or repair the right-of-way fence unless actual notice is given to the department.

(b) If the department removes a right-of-way fence in an agriculturally zoned area during a construction project, the department shall replace and maintain said fence unless the landowner and the department agree that said fence shall not be replaced.

(2) In nonagriculturally zoned areas, the department may erect a right-of-way fence where the highway has been declared a freeway pursuant to section 43-3-101, C.R.S., or in areas that the landowner and the department agree that said fence be erected. If the department erects a right-of-way fence or has previously erected a right-of-way fence where the highway has been declared a freeway, the department shall maintain and repair said fence when necessary upon actual notice to the department. Neither the department nor the landowner is liable for any damages caused by the failure to adequately construct, maintain, or repair the right-of-way fence unless actual notice is given to the department.

(3) Upon actual notice, the department shall maintain right-of-way fences constructed by the department, where highways are maintained by the department, at or near the boundary of the department's highway property adjacent to properties owned by municipalities unless otherwise agreed to in writing by the department and the municipality.

(4) If, in both agriculturally and nonagriculturally zoned areas, the landowner adjacent to an existing right-of-way fence and the department agree that said fence shall be removed, the right-of-way fence shall be removed by the department at its expense. If the landowner removes or causes the removal of the right-of-way fence without agreement by the department, the department shall not be required to reimburse the landowner for such removal, and the landowner shall be liable for any and all damages caused by the unauthorized removal of the fence.

(5) If a right-of-way fence is either removed or not replaced pursuant to subsection (1) or (4) of this section and the landowner who agreed that the fence be removed or not replaced or any subsequent landowner of property adjacent to the right-of-way later desires to erect a right-of-way fence, said fence may be erected by the landowner at the landowner's expense, but only upon prior agreement by the department. Such right-of-way fence shall be constructed in accordance with the standards applicable to the department at the time such fence is erected, and the department is required to make repairs to such right-of-way

fence upon actual notice to the department. Liability for any damages caused by failure to adequately construct the right-of-way fence shall be borne by the landowner at the time the damages are incurred.

(6) All agreements required pursuant to subsections (1) to (5) of this section shall be in writing, be recorded by the department in the office of the county clerk and recorder of each county where the real property adjacent to the right-of-way is located, and be binding upon and notice to all persons or classes of persons claiming any interest in said property.

(7) If a landowner and the department agree to either remove or not replace a right-of-way fence pursuant to subsections (1) to (5) of this section and the landowner at the time of the agreement or any subsequent landowner does not maintain livestock, as defined in section 35-46-101 (2), on the land adjacent to a highway right-of-way, any livestock that enters the highway right-of-way through that land shall not be a dangerous condition pursuant to section 24-10-106 (1) (d), C.R.S. Neither the landowner nor the department shall be liable for any damages caused by such livestock because of the absence of such right-of-way fence.

(8) If a person herds livestock along a highway adjacent to property from which a fence has been removed pursuant to this section and any of the livestock strays onto that property, the landowner may not recover damages for trespass and injury to grass, garden or vegetable products, or other crops from the owner of the livestock unless the landowner can prove the person herding the livestock allowed the livestock to enter the property without making an effort to remove the livestock. Nothing in this section is intended to change the status of open range law and statutes relating to fences in Colorado.

(9) Notwithstanding any other provision of this section, the department may erect and maintain a right-of-way fence in any area at the department's expense, in its sole discretion, but the department has no duty to erect and maintain any fence at its expense.

**HISTORY:** Source: L. 35: p. 488, § 1. CSA: C. 160, § 71. CRS 53: § 8-13-12. C.R.S. 1963: § 8-13-12.L. 89: Entire section amended, p. 1408, § 1, effective July 1, 1990.L. 91: Entire section amended, p. 1074, § 58, effective July 1.L. 94: Entire section amended, p. 1113, § 1, effective May 19.

#### 35-46-112. Partition fences

Where the agriculture or grazing lands of two or more persons adjoin, whether or not such lands are farmed or grazed, it is the duty of the owner of each tract to build one-half of the line fence, such fence to be a lawful fence as described in section 35-46-101. When the owner or tenant of any agricultural or grazing lands owns a previously erected lawful fence upon any line between such land and the agricultural or grazing lands of any other person,

and such other person or anyone holding under such person, occupies the adjoining land, it is the duty of such owner to pay the person owning such fence one-half of its cash value.

Fence erected 10 feet inside line cannot be regarded as built in compliance with this section. *Maudlin v. Hanscombe*, 12 Colo. 204, 20 P. 619 (1888).

Party who builds fence cannot charge neighbor for contribution. Where both adjoining pasture premises are in occupancy and no partition fence exists, no provision of this section gives to one of the parties, who may elect to build the entire line fence, any right to recover involuntary contributions from his neighbor who has deferred the performance of his inchoate statutory duty: Section 35-46-113 alone provides machinery for the imposition of a statutory liability upon a noncooperating party. *Mosher v. Schumm*, 114 Colo. 441, 166 P.2d 559 (1946).

#### 35-46-113. Cost and repair - how recovered

Partition fences between agricultural and grazing land shall be erected and also kept in repair at the joint cost of the owners of the respective adjoining tracts, except as otherwise agreed by such owners. If after thirty days written notice, served personally or by registered mail by either the owner or tenant of one tract upon the owner or tenant of the other tract, such other owner neglects or refuses to erect or repair one-half of the partition fence, the person giving notice may proceed to erect or repair the entire partition fence and collect by a civil action at law one-half the entire cost thereof from the other owner. Any judgment obtained against the owner of any land for the value of his share of any such partition fence or the repair thereof shall be a lien upon such owner's land to which such fence is appurtenant, and a special execution may issue and be levied upon the land to which such fence is appurtenant as in the manner now prescribed for the levying of an execution under the foreclosure of a mortgage upon real property. Such land may be sold under sheriff's sale for the purpose of satisfying such special execution in the same manner as is now provided for the foreclosure of mortgages on real property.