

Transcript Prepared By the Clerk of the Legislature
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Agriculture Committee
March 12, 2013

[LB339]

The Committee on Agriculture met at 1:30 p.m. on Tuesday, March 12, 2013, in Room 2102 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB339. Senators present: Ken Schilz, Chairperson; Norm Wallman, Vice Chairperson; Dave Bloomfield; Ernie Chambers; Tom Hansen; Jerry Johnson; and Steve Lathrop. Senators absent: Burke Harr.

SENATOR SCHILZ: Good afternoon, everyone. Welcome to the Agriculture Committee. Go ahead and make introductions. I'm Ken Schilz, the Chair of the committee. We don't have all of the senators here, but the ones we do have here I'll introduce. Here to my left is Norm Wallman from Cortland. Next to him is Senator Hansen from North Platte. To my immediate left is Jamaica Erwin, she's the committee clerk. To my right is Rick Leonard, he is the research analyst for the committee. Over then to my far right is Senator Bloomfield from Hoskins; and next to him is Senator Johnson from Wahoo. Cicely Batie is our page today. And we have one bill, LB339. And if there's any testimony today, we'll follow...of course, I'll introduce the bill, followed by proponent, opponent, and neutral. If you'll fill out a testifier sheet prior to testimony, they're available by the doors and to get the organization you're representing or if you're representing yourself. Just place the testifier sheet down on the table and Cicely will pick that up. State your name, spell it, and then you can go on with your testimony. We won't use time limits today. I don't think that will be an issue. If you do not plan to testify but wish to indicate your position on the bill, there is a gold-colored or some colored sheet by the door where you may do so. These will be made part of the hearing record. However, only persons who verbally testify will be indicated on the committee statement. We have Senator Lathrop from Omaha that just joined us. Welcome, Senator. And then no displays or any verbalizing among the audience of approval or disapproval of the witness testimony. And at this point, I would ask everybody to shut off their cell phones or place in a nonaudible mode any pagers or any other device that make noise. And then if you have any calls or questions or conversations that you need to have, please take those to the hallway as well. And with that, I will go ahead and open up on LB339. I'll give it over to Senator Wallman.

SENATOR WALLMAN: Thank you, Senator Schilz. [LB339]

SENATOR SCHILZ: Good afternoon. For the record, my name is Ken Schilz, K-e-n S-c-h-i-l-z, and I have introduced LB339 to signal my interest in examining means to reinsert fence viewing in Nebraska's fence law as a means to assist landowners in resolving division fence disputes. This bill is not the result of any interim project or consultation with agriculture groups or rural landowner interests. Rather, as I assume the chairmanship I asked staff for suggestions and the bill before you today is basically a dusting off of a concept that had been briefly looked at by my predecessors as chairman. I do not intend to pursue enactment of LB339 this session and have

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purposely scheduled LB339 for the last day of committee public hearings scheduled this session. I would ask the committee to hold the bill over in the interim as we work to refine this approach of examining alternative approaches. LB339 is modeled after Section 272.060.1 and 272.280 of the Missouri fence law which similarly provides for a party to a fence dispute to apply to a judge for the appointment of fence viewers to determine and allocate responsibilities adjoining landowners for the construction and upkeep of division fences. The bill also mimics the procedure for judicial appointment of appraisers in condemnation proceedings under the eminent domain provisions of Chapter 76, Article VII by which upon petition the court assigns three disinterested freeholders to determine the value of condemned property if the parties cannot reach agreement. Previous versions of the Nebraska fence law have mandated appointment of fence viewers as essentially arbitration panels to allocate fencing responsibilities and to reach conclusions as to the functional suitability of the fence with respect to its construction and condition. Landowners only had resort to the courts to ask that for enforcement of fence viewers' orders. This was replaced by the current system which provides for a fencing claim to be initiated similar to a Small Claims Court filing. The parties are then encouraged to submit to mediation, and the case proceeds to litigation if the parties refuse mediation or if mediation fails. While this bill does not reimpose arbitration per se, it is intended that the fence viewers assigned under the bill would serve a valuable fact-finding role. The resolution of fencing disputes often require the determination of the adequacy of a fence's construction and its condition. This is a determination that typically requires actual observation of the fence at its location. In fact, in a case decided in Pawnee County in 2011, the court actually convened a session of the court at the fence line in dispute as the parties disagreed as to the adequacy of the fence for containing livestock. The ability of a court to assign fence viewers as fact finders to report back to the judge with findings and recommendations would have saved time and expense for the court and the parties. It would be my goal that the report of the fence viewers would in most cases result in settlement of the issue, although the bill preserves direct access to the courts in the event either party were to dispute the fence viewer report or if they felt they were clearly wrong. We did receive a communication from the Court Administrator's Office suggesting that the bill be amended to provide some guidance to the court as to the qualifications of persons the court would select as fence viewers. I think this could easily be done by replicating qualifications that existed in previous fence viewer statutes. Also even if this concept were advanced, I would like to retain mediation through the Farm Mediation Service as a service available to landowners who might like to avoid litigation altogether. Under present law, a number of fencing disputes have been accepted and resolved by the Farm Mediation program. My introduction of this bill is in no manner a criticism of that program. And with that, I would invite any questions and that's my opening. [LB339]

SENATOR WALLMAN: Are there any questions for Senator Schilz? Senator Hansen. [LB339]

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SENATOR HANSEN: I have one. It says in here in two different places where the fence viewer would be paid \$35 a day plus mileage. So that's three times three... [LB339]

SENATOR SCHILZ: Right. [LB339]

SENATOR HANSEN: ...for three fence viewers. [LB339]

SENATOR SCHILZ: I would guess, yes. [LB339]

SENATOR HANSEN: Are the fence viewers...you said something about in your opening about they were going to be qualified in a different section than what you had here. Is that correct? [LB339]

SENATOR SCHILZ: I believe so, yes. [LB339]

SENATOR HANSEN: They're qualified fence viewers. [LB339]

SENATOR SCHILZ: Right, yes. [LB339]

SENATOR HANSEN: Professional...does Missouri have professional fence viewers? [LB339]

SENATOR SCHILZ: You know, I don't know. I don't know if Missouri has professional fence viewers. I was just wondering, are you thinking about applying for this, Senator, or just (laugh)...but I don't know (laugh). [LB339]

SENATOR HANSEN: After this deal. [LB339]

SENATOR SCHILZ: I don't know if they're professional or not, but I just know that there, you know, there should be some compensation for those folks. [LB339]

SENATOR HANSEN: Yeah, okay, thank you. [LB339]

SENATOR WALLMAN: Any... [LB339]

SENATOR JOHNSON: Maybe kind of follow up with that, will a bunch of them be preselected? Because if...I mean somebody might have a conflict because of where the location of the dispute is and be disqualified, but you can't train them or prep them in a short period of time. [LB339]

SENATOR SCHILZ: And I would guess that we would try to stay away from a bunch of training. And I would say that the qualifications would be set out so that local people within any jurisdiction would be able to be called upon to be fence viewers, depending

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on where that was at and what they were doing. [LB339]

SENATOR JOHNSON: So not a bureaucratic process. [LB339]

SENATOR SCHILZ: I would...as little as possible, yeah. [LB339]

SENATOR JOHNSON: Okay. [LB339]

SENATOR LATHROP: I do have a question. Can you tell me what the role of a fence viewer is? [LB339]

SENATOR SCHILZ: Basically what... [LB339]

SENATOR LATHROP: Because there's adverse possession which I fully understand and I've been involved in before, and there is apparently fence viewing which seems to be a dispute over how big or how tough or how many strands of wire the fence needs to be and who's going to pay for it. [LB339]

SENATOR SCHILZ: Right. And I think that included in that you would want to make sure that anybody that was looking at or that would become a fence viewer would understand something about fences and be able to go out there and take a look at what it's supposed to do, how it's set up, what it's supposed to handle, and then be able to say whether or not the fence is in good enough shape, needs repair, or needs rebuilding completely. But I still think that as you look at that there's only so much that somebody would have to be required to do anyway in the fence law as it is. [LB339]

SENATOR LATHROP: There's a difference between being a fence viewer, which is checking the fence itself, and trying to decide what the proper boundary line is though. [LB339]

SENATOR SCHILZ: Oh, absolutely, yeah. [LB339]

SENATOR LATHROP: Okay, okay. [LB339]

SENATOR SCHILZ: That's a whole different... [LB339]

SENATOR LATHROP: I just want to make sure that these guys aren't taking the place of a trial in a district court on adverse possession. [LB339]

SENATOR SCHILZ: I wouldn't...I would hope not. [LB339]

SENATOR LATHROP: Okay. [LB339]

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SENATOR WALLMAN: Thank you, Senator Lathrop. Anybody else? Thank you, Senator Schilz. [LB339]

SENATOR SCHILZ: Thanks. [LB339]

SENATOR WALLMAN: First proponent. [LB339]

PETE McClymont: Good afternoon, Senators. For the record, my name is Pete McClymont, P-e-t-e M-c-C-l-y-m-o-n-t. I'm vice president of legislative affairs for the Nebraska Cattlemen. Our board of directors voted to support this. And as much as that, I just want to get up and thank research analyst, Mr. Leonard, for all the work he's done. He can probably give you a history of fencing, fence viewing for over a decade for all the things that he's done to help all the groups get together and try to come up with good answers and solutions to problems. So I...in hearing Senator Schilz's opening, I did appreciate what the court shared with him on maybe possibly having some qualifications for those that are selected to go out and review it. But at any rate, as this bill will be looked at and possibly have more input over the interim, I'd be happy to work with the committee and Mr. Leonard. With that, I'd end my testimony. [LB339]

SENATOR WALLMAN: Thank you. Any questions? [LB339]

SENATOR JOHNSON: Thank, you, Chairman. Thank you, Pete, for coming in. How often has this happened in the past that this process has to be handled? Is it...any...I don't know. How often do we have disputes that have to be resolved like this? [LB339]

PETE McClymont: I couldn't quantify that, but I think the one benefit that I really like about this that the industry would appreciate is that if two parties don't want to go to court and this is an opportunity to resolve that without, you know, more fees involved, it's a good process. So...but I'd be happy to get with Mr. Leonard (inaudible). [LB339]

SENATOR JOHNSON: No, I was just curious. [LB339]

PETE McClymont: I don't know off the top of my head. [LB339]

SENATOR WALLMAN: Thank you, Senator. Anybody else? Seeing none, thank you, Pete. [LB339]

PETE McClymont: Thanks, yeah. [LB339]

SENATOR WALLMAN: Next proponent. Seeing none, opponent? Seeing none, neutral? That ends the hearing I guess for...oh, somebody neutral? [LB339]

SENATOR HANSEN: World-Herald (inaudible). [LB339]

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_____: He'd probably be neutral. (Laughter) [LB339]

_____: Some days better than others. [LB339]

SENATOR LATHROP: Depends on what side of the fence you're on. [LB339]

SENATOR WALLMAN: Would you like to close, Senator Schilz? Would you like to close? [LB339]

SENATOR SCHILZ: Does anybody have any questions? I'll just sit and try to answer some questions. [LB339]

SENATOR LATHROP: You get Paul Hammel up here, we can (inaudible) (laughter). [LB339]

SENATOR SCHILZ: Yes, sir. [LB339]

SENATOR CHAMBERS: While I was gone, did anybody sing a bar or two of "Don't Fence Me In"? (Laughter) [LB339]

SENATOR SCHILZ: Not yet, but the hearing is still open. [LB339]

SENATOR CHAMBERS: Well, we have a literary scholar. Did anybody quote good fences, strong fences make good neighbors? [LB339]

SENATOR SCHILZ: No, we've had none of those. [LB339]

SENATOR CHAMBERS: And the hearing is over now? You did a good job, Senator Schilz. (Laughter). [LB339]

SENATOR LATHROP: I would have thought the Cattlemen would have sung the "Don't Fence Me In." [LB339]

SENATOR SCHILZ: Thank you, and I waive other closing. Thank you very much. That's it. Thanks, everybody, for coming today. [LB339]