



From Cradle to Grave: The Life Cycles of Farm and Ranch Ownership: From Acquisition through Operation to Disposition

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From Cradle To Grave: The Life Cycles of Farm and Ranch Ownership

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- What are the future prospects for agriculture investments, individually and institutionally?
- Why is “farm and ranch” land important?
- Where are the future investors coming from?

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How quickly is the population growing?

Hourly “net gain”:	9,463	
Daily “net gain”:	227,104	
Monthly “net gain”:	6,813,133	(Houston)
Annual “net gain”:	81,757,598	(by 7/1/19)
	1.07%/year	(down from 2% in 1960s)

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Population:	Currently: 7.7 billion
July 1, 1970:	3.7 billion (108%)
20 th century:	1.65 billion to 6.1 billion (370%)
By 2037:	9.0 billion (20 years)
By 2055:	10.0 billion (18.6%)
By 2088:	11.0 billion (30%)

Next 40 years – we must produce more food than in the previous 10,000 years combined!!!

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Land Use in the United States

Total Land Area:	1.94 billion acres	
Rangeland:	409,000,000 acres	21.0%
Forestland:	409,000,000 acres	21.0%
Cropland:	361,000,000 acres	18.5%
Pastureland:	120,000,000 acres	6.2%
Other rural land:	51,000,000 acres	2.6%
Conservation Reserve Program:	<u>27,000,000 acres</u>	<u>1.4%</u>
Rural:	1.377 billion	71.0%
Federal:	402,000,000 acres	20.6%
Developed (58% incr. since 1982):	113,000,000 acres	5.8%
Water:	51,000,000 acres	2.6%

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Land Use in Texas

Total Land Area:	171,051,900 acres	(8.82% of US)	
			<u>Comp to US</u>
Rangeland:	97,428,100 acres	57.0%	21.0%
Forestland:	10,879,900 acres	6.4%	21.0%
Cropland (33.4% decl. 1982-2010):	24,302,900 acres	14.2%	18.5%
Pastureland:	16,939,200 acres	9.9%	6.2%
Other rural land:	2,440,400 acres	1.4%	2.6%
Conservation Reserve Program:	<u>3,247,200 acres</u>	<u>1.9%</u>	<u>1.4%</u>
Total Rural:	155,237,700 acres	90.8%	71.0%
Federal:	2,909,900 acres	1.7%	20.6%
Developed (69.1% incr. 1982-2010):	8,756,100 acres	5.1%	5.8%
Water:	4,148,200 acres	2.4%	2.6%

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Who owns land?

1.35 billion acres is privately owned: 58.7% of total
(Top 100: 30 million acres – 2% of America's land mass)

Largest owners (as of 8/2017):

John Malone (media/cattle):	2,200,000 ac
Ted Turner (media/wildlife conservation):	2,000,000 ac
Emmerson family (lumber):	1,956,100 ac
Reed family (lumber)	1,729,232 ac
Stan Kroenke (LA Rams, Den. Nuggets, Walmart):	1,380,000 ac
Irving family (lumber): (Plus 2,00,000 acres in Canada)	1,247,880 ac
8 of top 25 own Texas land -- (#9) King Ranch:	911,215 ac

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Three Large Groups Investing (examples):

TIAA-CREF:	125,000 acres of US farmland total of \$5B invested
Westchester Ag Asset Management:	\$8.0B managed, 350 farms
Hancock Agriculture Investment Group: (12/31/18)	335,000 acres of US farmland total of \$3.0B managed
UBS Agrivest (UBS Global Real Estate):	183,000 acres of US farmland 15 states, 113 farms, 25 crops

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Who are buying farms?

36 Ag-Focused funds:	\$15 billion currently invested
Institutional investors:	\$10 billion estimated looking
Summit Ag Opportunities, LLC (2018):	\$300 mil
Equilibrium Capital (2015):	\$250 mil (oversub)
Global Agriculture (TIAA) (2012):	\$2B
Illinois Municipal Retirement (2014):	\$100 mil
Alaska State Pension Fund (2014):	\$485 mil

Less than 1.75% of privately owned farmland or forestland is foreign owned.

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Why are investors buying farms?

Stable returns over longer periods of time

Global demand for food – emerging economies

Demand for natural gas/water/wind/sustainability

Cash flow from a stable asset

Funds available at low cost

Declining global supply of “arable” land

Comparative US advantages in agriculture

“IMPACT INVESTING”

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What are the potential returns?

2016 avg. return on farmland investments:	7.09%
2015 avg. return on farmland investments:	10.35%
2014 avg. return on farmland investments:	12.63%
Texas – (2018) – values increased (over 2017): (all farm land – strongest since 2014)	9.1%
Since 1990 - avg. annual increase (nationally):	4.7%
Avg. return on farmland investment over 25 years:	8.85%
Avg. return on farmland investment over 40 years:	10.253%
(outperforming both domestic stocks and bonds on annualized basis over the last 40 years)	

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Trends in Agriculture

Technology, Technology, Technology

Demand for High Quality, Healthy Food

Traceability

Population Shifts

Fed. Regulation

Biologic/Biology

Robotics

Functional Foods

Food Demand

Information

Labor

Molecular

Organic

Nutrition

Globalization

Water Shortage

Immigration

Drones

Crop Changes

Synthetics



Starting a Farm or Ranch

Acquisition of the First Farm Scenario

John and Jim Beeman, late 20's, currently "shares" basis farmers seeking Hemp farming opportunity to own and operate

Opportunity: 750 acre Iowa corn farm, \$4500/acre (\$3,375,000) purchase price

John and Jim advise you that they seek advice on the following topics:

- How do they acquire the Zellan farm? Between them and a small trust left by their parents, they have approximately \$300,000 in cash, but it is only useable for purchase of real property.
- What other due diligence items should they consider in looking at the Zellan farm for a future hemp operation?
- Should they form some kind of entity or purchase in their individual names?
- Aside from the hemp considerations of the farm, what other issues should they consider as to living on the farm, acquiring this piece of rural property, and cash flowing their first year of operations until the first harvest?

Appendices

Starting or Purchasing a Farm

Tab 1, Colton McClanahan: Management Assessment Checklist

Tab 2, Matthew McClanahan: Business Formation Checklist

Tab 3, James Eggleston:

3.1 Comparison of Entities

3.2 LLC Overview Letter Sample Form

3.3 A Buyer's Checklist for Due Diligence

3.4 Checklists for Farm and Ranch Acquisitions and Purchase Contracts

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3.9 Limited Partnership Formation Checklist



Growing and Operating a Farm or Ranch

Legacy Farm Succession Scenario

Don and Donna McDonald in their mid 80's operate a third generation inherited 160 Acre farm with mineral production plus additional 4000 acres they acquired.

They have 4 children, only one, Ken (age 50), is interested and experienced in farming.

There is one grandchild (age 20), Ken's nephew, who is interested to take over the farm.

Legacy Farm Succession Scenario

(Cont'd)

Don and Donna McDonald in their mid 80's operate a third generation inherited 160 Acre farm (Old McDonald Farm) with mineral production plus additional 4000 acres (Rocking M Ranch) they acquired and expected to appreciate 250% in 10 years.

They have 4 children, only one, Ken (age 50), is interested and experienced in farming. There is one grandchild (age 20), Ken's nephew, who is interested to take over the farm.

Don has some signs of dementia.

They wish to make sizable charitable gifts upon death

Legacy Farm Succession Scenario

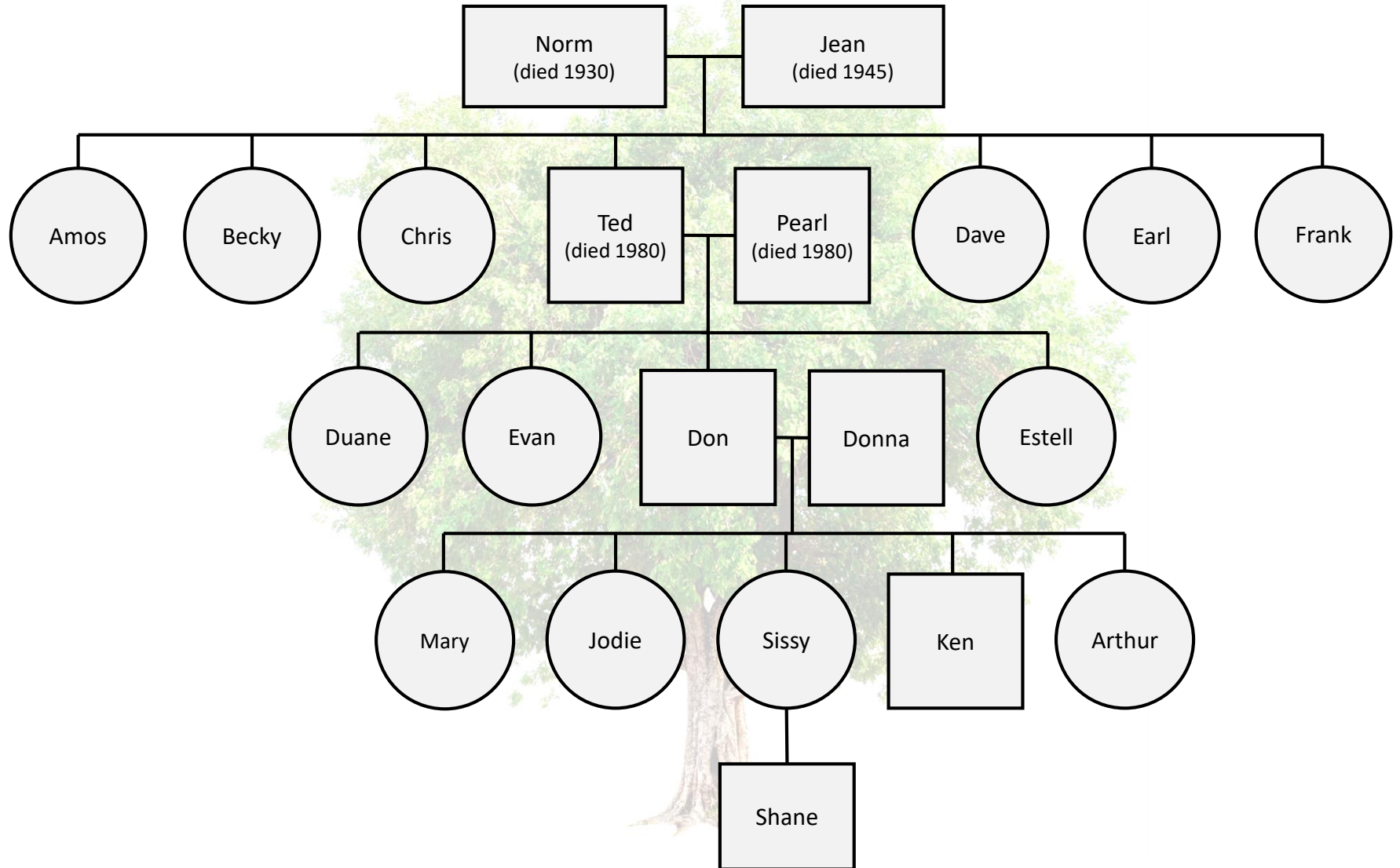
(Cont'd)

The farm and ranch operations and minerals produce net revenues of \$750,000/yr. and they have no debts.

Costs of living and health care for Don and Donna is about \$100,000/yr. and want to travel the remaining years.

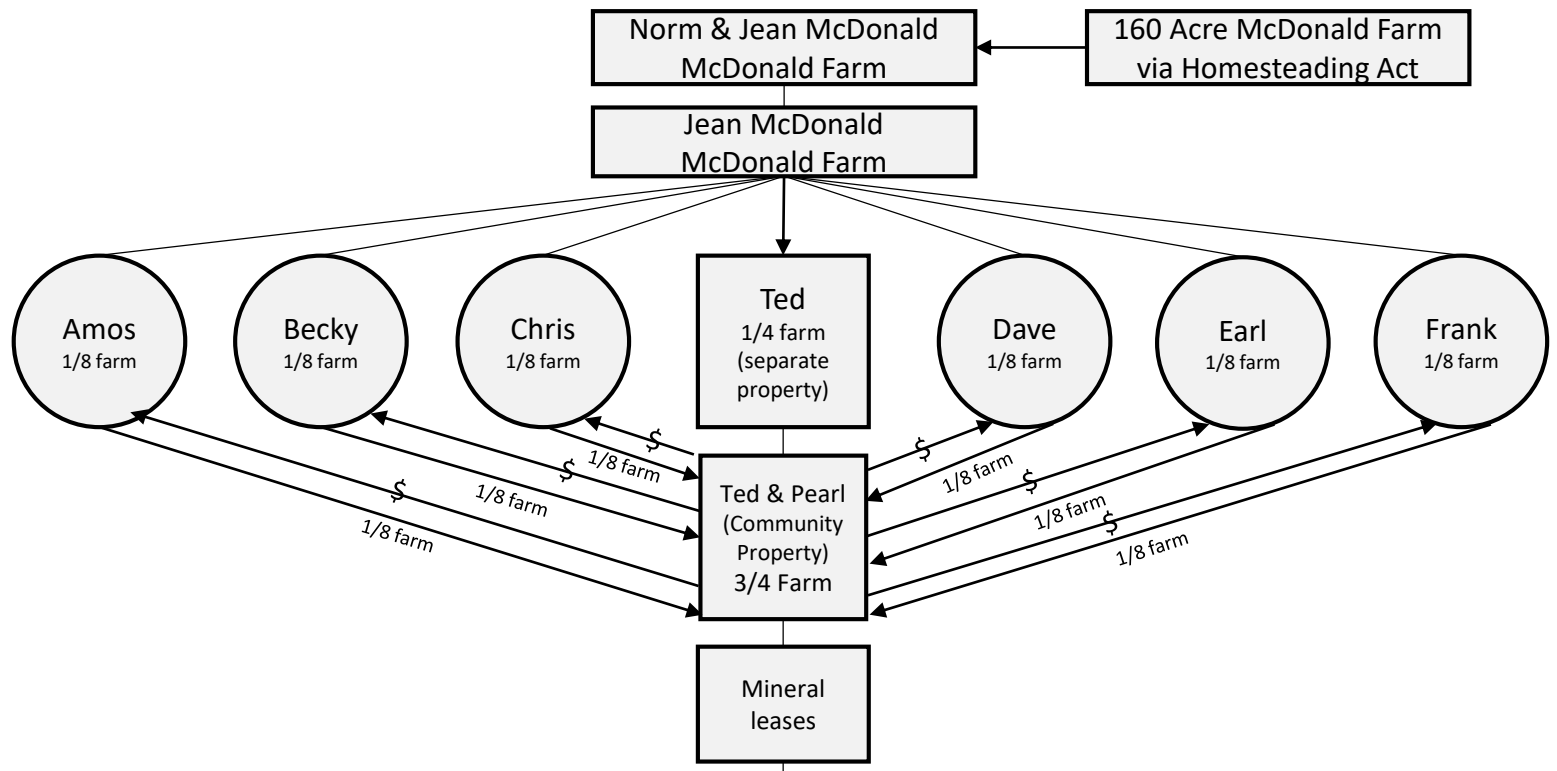
They ask you to help them keep the farm and ranch in the family and preserve continuity and management while transferring all their wealth fairly among their children and their descendants

McDonald Family Tree



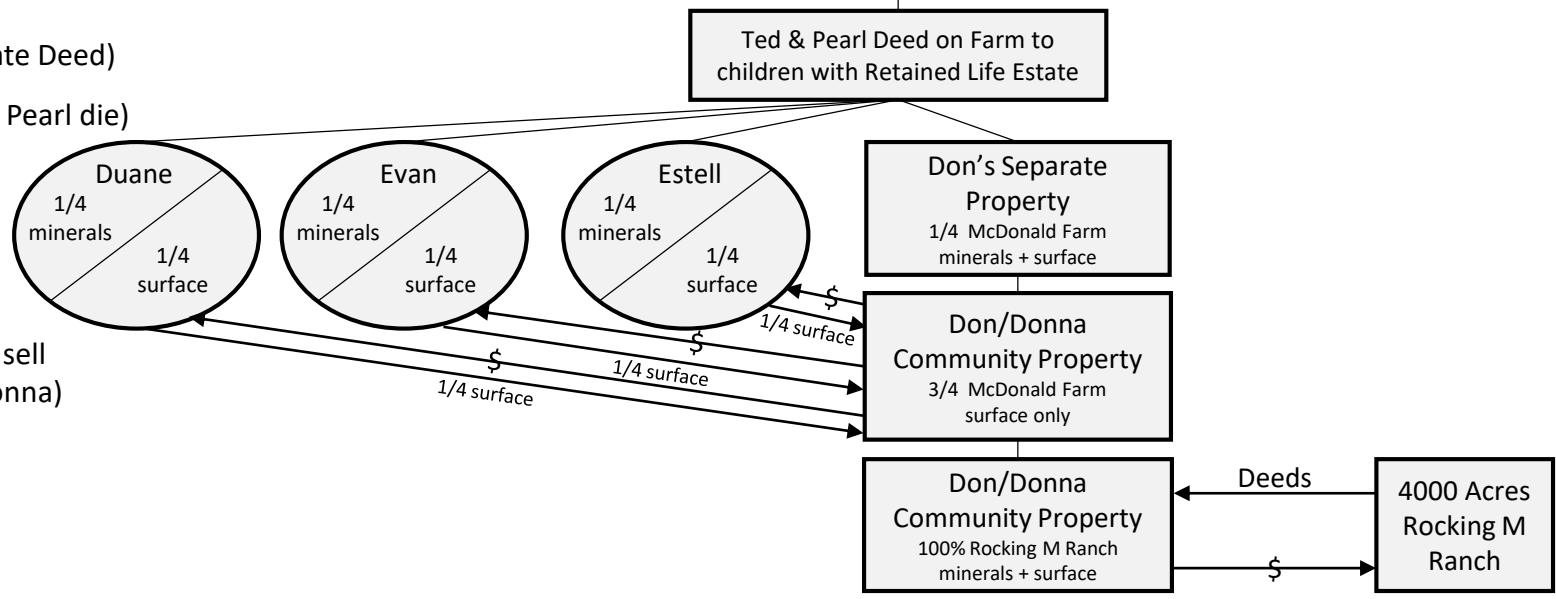
1930 (Norm dies)

1945 (Jean dies)



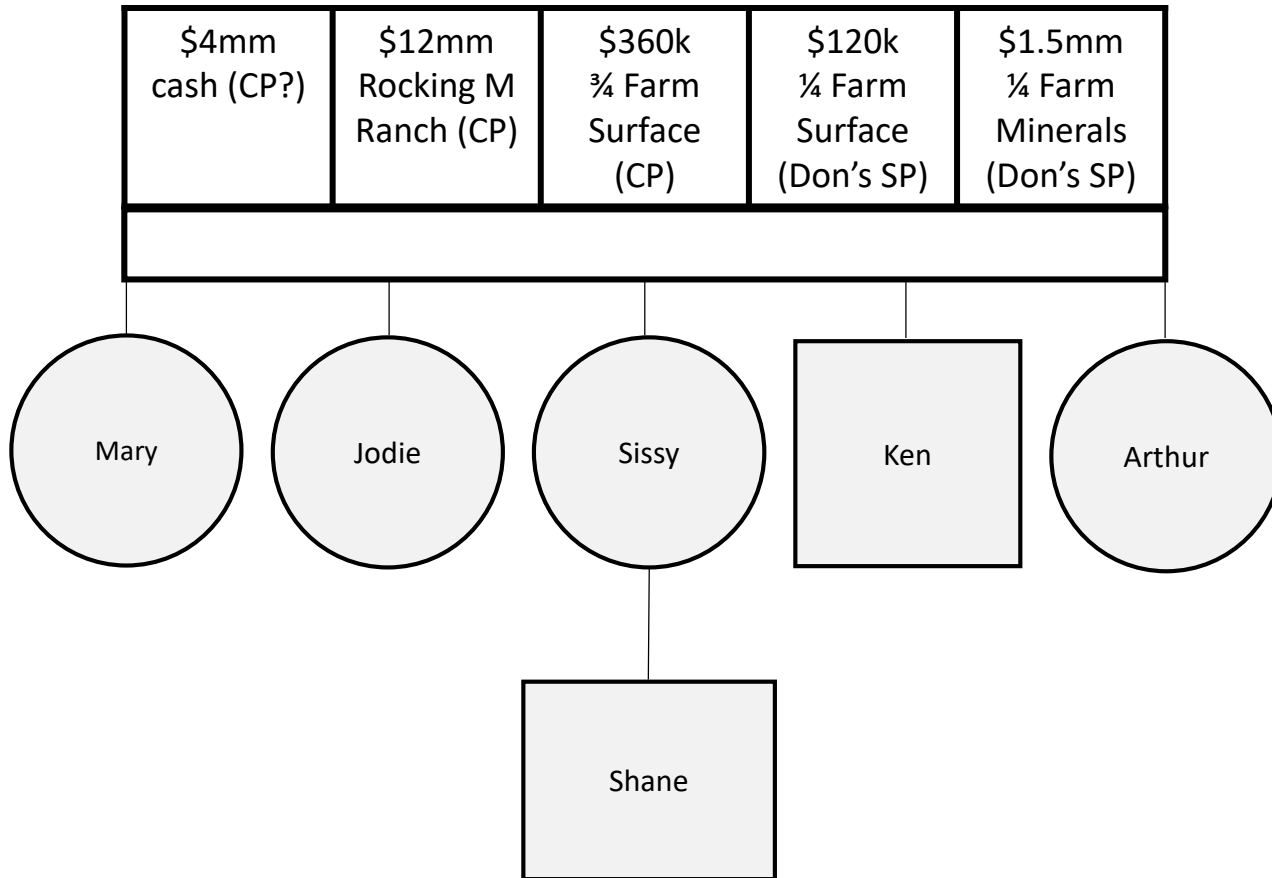
1970 (Life Estate Deed)

1980 (Ted and Pearl die)



1985 (Siblings sell to Don and Donna)

Don & Donna McDonald Estate, 2019



Appendices

Operating and Growing your Farm

Tab 3, James Eggleston:

- 3.10 Risk Management – Practice Guide
- 3.11 Ownership of Farms and Ranches – Practice Guide
- 3.12 Ranch Management Agreements – Practice Guide
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- 3.13 Livestock Operations – Practice Guide
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- 3.15 Checklist for Agriculture Leases
- 3.16 Hunting Leases – Practice Guide
 - 3.16.1 Hunting Lease Sample Form

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Operating and Growing your Farm (Cont'd)

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- 3.17 Grazing Lease Agreements – Practice Guide
 - 3.17.1 Grazing Lease Agreement Sample Form
- 3.18 Crop Lease Agreements- Practice Guide
 - 3.18.1 Crop Lease Agreement Sample Form
- 3.19 Custom Farming Agreements – Practice Guide
 - 3.19.1 Custom Farming Agreement – Sample Form
- 3.20 Surface Use Agreements – Practice Guide
- 3.21 Mineral Deeds – Practice Guide
- 3.22 Water Product Leases – Practice Guide
- 3.23 Wind Energy Easements and Lease Agreements - Practice Guide



Succession and Estate Planning

Primary Estate/Succession Planning Goals

- Identify the legacy plan:
 - To whom will the business and property pass?
 - How it will pass?
 - What is most important to you to pass along?
- Identify any asset protection concerns and how best to address them.
- Identify and minimize any taxes that might apply upon transfer or later disposition.
 - Consider engaging in low or tax free gift transfers
 - Engage in valuation discount planning.
 - Consider the impact of capital gains taxes on appreciating property.
- Assemble the professional advisor team for all plan aspects.
- Share your plans with affected family and others.

Appendices

Estate and Succession Planning

Tab 4, Greg Sampson: Farm & Ranch Family
Estate and Succession Planning Checklist

[*See also Tab 3*, James Eggleston: 3.11 Ownership
of Farms and Ranches – Practice Guide]

Farm and Ranch Family Scenarios

Detailed Version

Scenario 1 – Acquisition of the First Farm:

**Jim and John Beeman and their
new Hemp Farm Venture**

Scenario 2 - Legacy Farm Succession:

Old McDonald Farm Story

Scenario 1 - Acquisition of the First Farm:
Jim and John Beeman and their new Hemp Farm Venture

John and Jim Beeman have farmed for years on a “shares” basis, that is, farming as employees for a large hedge fund out of Chicago for a salary plus a percentage of the profit from their 2,000-acre corn farm based in Iowa. Given the shrinking government subsidies for corn in the ethanol market, John and Jim believe that the corn farm and their jobs make be at risk. Word has actually circulated that the farm maybe sold to a local developer who may create a corporate park for technology and logistics companies supporting the ag industry. Both are married and in their late 20's. John has no children; Jim has two preschoolers.

John and Jim have watched several of their neighbors try planting hemp (not cannabis) on acreage that was previously planted in corn. They have seen the same conversion take place on a few cotton farms when they have visited cousins in Amarillo, Texas.

The average hemp farm in Iowa has consisted of 50 to 100 acres and first year net profits were approximately \$50,000 per acre (more than 120 times what an average acre of corn produces). Those profit margins were not expected to continue as more land was converted to hemp production, as weather conditions in the future may not be as perfect as they were this year, and labor shortages will only increase the cost of labor. Labor for hemp production is a large issue as much of the acreage maintenance requires physical labor and approximately 25 laborers for three weeks at two different times during the production season. The latest planter with special technology and add-ons costs \$120,000, but this equipment allows for earlier planting, quicker germination and earlier harvests. The growing season is four months, but the THC level of a field must be watched carefully. If it exceeds .3% THC, the fields are considered “hot” and the hemp must be destroyed. Most hemp farms in the area (which are small) import labor for the harvesting, which is by hand. If harvested hemp is not quickly hung to dry, its quality and viability rapidly diminishes. Thus, even mechanical harvesting of hemp offers no real advantage if the plant cannot be picked up and stored quickly. Processing of the cut hemp product is also presently difficult (but not impossible) to the shortage of processing facilities, but mobile process labs are in development.

A property may be coming for sale in their community that is not yet listed for sale. It is 750 acres near Independence, Iowa in Buchanan County. The asking price is \$4,500 per acre, primarily due to its past productivity as a corn operation with a small dairy on one end. The farm produced about \$70,000 per year for its former owners, Jeff and Amy Zellan. Jeff passed away last year, and Amy was unable to afford to put in this year's corn crop and the dairy ceased operating during Jeff's last year.

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2. What other due diligence items should they consider in looking at the Zellan farm for a future hemp operation?
3. Should they form some kind of entity or purchase in their individual names?
4. Aside from the hemp considerations of the farm, what other issues should they consider as to living on the farm, acquiring this piece of rural property, and cash flowing their first year of operations until the first harvest?

Scenario 2 - Legacy Farm Succession:
Old McDonald Farm Story

The McDonald 160-acre family farm was acquired by Norm McDonald's by making a homestead of the property in 1885. He cleared the land, cultivated it and gained title under the Homesteading Act seven years later. Over the years, Norm raised peanuts, cotton, tobacco, and silage. Norm died in 1930 and left the farm and a meager amount of cash to his wife, Jean. No oil and gas activity had yet occurred on the farm at the time of his death. At the time of his death, he and Jean had raised seven children on the farm, the youngest being Ted, who remained on the farm and continued to operate it.

Jean soon moved to town and, upon her death in 1945, the farm was left in eight equal shares to Norm and Jean's seven children, with Ted getting one extra share for managing and operating the farm. Ted soon took a job working for the Santa Fe Railroad and began a small dairy operation in order to make ends meet. Ted married Pearl in 1920 and they operated the farm for the remainder of their lives.

Ted and Pearl passed away within a few months of each other in 1980. Ted and Pearl had four children, Don, Duane, Evan and Estell. During the last few years of their life, Don assumed management of the farm inasmuch as he owned several thousand acres in the vicinity, but never took title to any part of the farm to prevent family friction. The other three-fourths of the ranch (held by Ted's siblings) was slowly acquired over time (in the name of Ted and Pearl) by Don's wise use of his parents' income and borrowing against the farm.

Upon their death, it was discovered that Ted and Pearl had deeded the farm (now owned by them in its entirety) in equal shares to their four boys in 1970, reserving for themselves a life estate. They had also signed a number of mineral leases over the years to Chevron, the last of which continued in effect due to the modest production on the farm of two vertical oil wells. They lived off the modest royalties, farming income and the cash Don secretly put in their bank account from time to time to make sure their bills were paid.

In discovering the status of the title in all four sons, Don proposed to buy out the other three brothers, however, as amicable as the proposal and discussions were, a price could not be agreed upon. Thus, Don, as the executor of Ted and Pearl's estate opted, wisely, to hold a public auction on behalf of the estate. With all formalities, notices and conduct of the auction being appropriate and above board, the McDonald farm was auctioned off. Don was the highest (and only) bidder, buying at the same price he had offered to the other three brothers. All were satisfied with the result and Don took title to the entire property. The minerals were not auctioned off, however, and they were divided among the sons in their individual names.

Don is now in his mid-80's, now possibly beginning to show some small signs of dementia, is only active about 10 hours of the week, primarily overseeing a cattle operation which utilizes the original McDonald farm and the "Rocking M" (which includes the now 4,000 acres he assembled during his lifetime). It is all operated today under the Rocking M name. Don's responsibilities on the Rocking M have primarily be taken over by his son, Ken, who is in this mid-50's, and his grandson, Shane, who is in his early 30's. Title to the entire Ranching M Ranch is still in the name of Don and Donna, his wife. The minerals to the Rocking M are also held in their joint name (other than the minerals held in the names of his three brothers or their estate as to the original McDonald farm). The minerals have produced a great deal of wealth (between \$3million and \$4million), of which Don has spent very little and currently holds as liquid assets. He doesn't trust the stock market. The Rocking M is currently worth about \$3,000 per acre (approx.. \$12 million), much of which is attributable to the mineral production. There is no debt on the Rocking M and only about \$400,000 of debt on various pieces of farm equipment and barns.

Don and Donna have the following desires:

1. Their son Ken has been adequate help, has been married several times, currently not married, but is the only one of their five children that have any interest in the Rocking M. His health is so-so (lots of exposure to the sun).
2. None of the other four children have interest in the Rocking M, only the money.
3. A grandson, Shane, is the child of one of Ken's sisters and loves the Rocking M, loves his grandparents, but has always only made a modest salary from and lives the cowboy lifestyle, but he is fine with that. He is capable of managing the cattle operations, but a little more questionable about handling high-tech farming or complicated financial matters.
4. They want the Rocking M to stay in the family as they believe its greatest value is still 10 years away (perhaps 250% more valuable). What happens to the money from its sale after that is a little unclear, but generally it will be spread out among children and grandchildren.
5. The mineral production doesn't show any signs of slowing down. They have given away modest amounts of cash to their kids each year, but nothing significant. Several kids have done well, several not so well, and then there was Ken. Annual net revenues from ranch and minerals is approximately \$750,000 (prior to payments to Ken and Shane).
6. Don and Donna desire to give about 10% of their collective estate to local churches and community non-profits. (10% of liquid assets would be about \$500,000; 10% of the rest is not a certain amount.)
7. Don and Donna desire to create an endowment at the state agriculture university. (\$1,000,000 approx. cost)
8. Don and Donna desire to relocate his and her grandparents and parents to a family cemetery to be built on the Rocking M along a county road adjacent to the ranch. They want to prepare for its perpetual care. (\$100,000 approx. cost)
9. Don and Donna wants to create and endow a park in their local town and Don will name it after Donna and create a small fund to pay for its perpetual care. (\$100,000 approx. cost)
10. Don and Donna want to travel the last five or so years of their expected lives.
11. Don is showing some signs of dementia, and Donna will outlive Don. Their anticipated living costs and health care will average \$100,000/year. They have no debt.
12. When they come in to meet, Donna carries the conversation and spells out most of the above facts and needs. She is very sharp about Rocking M operations and finances; however, she is unable to contribute to any active management activities outside of the ranch office.

Without detailing or solving every legal issue or objective, how can Don and Donna generally accomplish their desires about ranch transfer, wealth transfer and continuity of ranch operations and management?

What planning could have taken place in prior generations that might have made the current issues easier to handle? Or was Don simply smart and lucky to clean them up as he went along?

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Estate and Succession Planning

Tab 4, Greg Sampson: Farm & Ranch Family Estate and Succession Planning Checklist

Appendix - Tab 1, Colton McClanahan
Management Assessment Checklist

YES	NO	N/A	FINANCIAL AWARENESS	
			1.	Does the customer fully understand the reasoning & benefits of the current entity structure?
			2.	Are the financials prepared by an accountant, compiled, reviewed, audited, consolidated? If not does the customer play an active role in the preparation of the financial statements? Are these accurate and timely? Cash or accrual and does the customer understand the difference?
			3.	Are records computerized and are P/L statements and balance sheets readily available and reviewed more than once per year? Are break-even commodity prices known?
			4.	Is there a plan for financial growth? Does the customer understand their current financial position? Do they understand their core ratios and whether each represents a strength or weakness? What do they focus on or how do they benchmark themselves?
			5.	Are measures in place to prevent fraud/embezzlement?
FCMA RATING (1 - 5)				

YES	NO	N/A	RISK MANAGEMENT - PRODUCTION & PRICE	
			1.	Can the customer identify their primary risks/threats to the operation?
			2.	Who makes the marketing decisions? Are consultants or advisors used? How are decisions made? Is the plan written and shared with all interested parties?
			3.	Does the customer use futures & options strategies? If so, can they (1) explain their positions concisely and why they've entered into them, and (2) do they understand the risks involved?
			3.	Is revenue-based insurance used? How does it fit into their marketing plan? Are the purchase of inputs and the marketing of products linked?
			4.	Within the past 3 years, have there been material investments in infrastructure to improve production/reduce risk (tile, irrigation, contracted specialty crops)?
FCMA RATING (1 - 5)				

YES	NO	N/A	WILLINGNESS TO ADAPT	
			1.	Does the customer incorporate their financial ratios in their decision making? Is profit the primary motivator of management decisions? (Rather than pride, growth, etc.)
			2.	Is the customer receptive to FCMA feedback? Is this a partnership or a customer demand driven relationship? Does the customer seek and value input from others prior to making major decisions?
			3.	Are operational and management weaknesses recognized by the customer? Can they tell you their past mistakes?
			4.	Has the customer willingly self-identified and self-corrected in the past?
FCMA RATING (1 - 5)				

YES	NO	N/A	ABILITY TO ADAPT	
			1.	Can the operation survive the loss of a key manager? Is a succession plan in place?
			2.	Does the customer have the ability to self-correct?
			2a.	Eliminate unproductive assets: equipment, low quality ground.
			2b.	Cutting expenses: rental rates, labor, inputs.
			2c.	Reduce family living: vacations, non-income producing assets, etc.
			3.	Is the customer at their management capacity? Can they make the transition from production manager to business manager? Can they give up some level of control?
FCMA RATING (1 - 5)				

YES	NO	N/A	ASSET ACQUISITION	
			1.	Is the customer proactive or reactive in purchasing and financing decisions? Are steps taken in advance or only when necessary?
			2.	What drives purchase decisions? Data, habit, emotion, personal preference, research?
			3.	Does the client shop various suppliers (vs. being loyal to a fault)?
			FCMA RATING (1 - 5)	

STRENGTH	ACCEPTABLE	WEAKNESS	HR MANAGEMENT	
			1.	Is there a formal application, interview and selection process in place?
			2.	Do any employees fill a role that offsets a weakness of management?
			3.	Are employees trained formally (vs. from passed-down information)?
			4.	Is employee compensation performance-based?
			FCMA RATING (Strength, Acceptable, or Weakness)	

Additional Comments by FCMA:

Tabulate all of the scores for each competency:

Score: 20 – 25 = Strength in Management.

13 – 19 = Adequate Management.

0 – 12 = Weakness in Management.

Total: _____

***** Not every question has to be asked of every customer. Rather, these questions should be used throughout the customer interview process to provide a better gauge of the customer's management ability in these core areas. Not all operations will be as in depth in respect to the various categories – a straight cash grain operation may not be very detailed in their HR Management program as a large swine or poultry operation. User discretion is encouraged. There may be other areas of strength or weakness for a given operation, please make note of the specific issues and whether they are increasing or decreasing the management capacity of the farm.

Appendix - Tab 2, Matthew McClanahan

Business Formation Checklist

Initial Considerations

- Is this a **single-member** or multi-member limited liability company (LLC)? A Tennessee LLC may have one or more members (T.C.A. § 48-249-501(c)). A member is a person that has been admitted as a member of the LLC, and may be an individual or entity (T.C.A. §§ 48-249-501 and 48-249-102(20), (25)).
- Will the LLC have a written **operating agreement**? If so, will the LLC use a long- or short-form operating agreement? Under the Tennessee Revised Limited Liability Company Act (RLLCA) (T.C.A. §§ 48-249-101 et seq.), an LLC is not required to have an operating agreement regardless of how many members it has (T.C.A. § 48-249-203). However, a written operating agreement (whether as one long form agreement or several short form agreements) is advisable to help minimize disputes among the members and ensure consistent governance of the LLC. For an example of an operating agreement for a Tennessee single-member LLC, see Standard Document, Operating Agreement (Single Member) (TN).
- Are there majority and minority interests or are the interests divided evenly? Minority and majority parties often have different concerns than a membership with evenly divided interests.
- Is this a **joint venture** company? Operating agreements for joint venture companies often include provisions not usually found in operating agreements for other companies (such as provisions regarding the ownership and use of intellectual property created by the LLC). See Practice Note, Joint Ventures: Overview for a discussion of joint venture companies and joint venture agreements. For an example of an operating agreement for a Delaware joint venture company, see Standard Document, LLC Agreement (Operating Company).
- Who are the company's investors? For example, **private equity** firms typically want more control over management than passive investors. For an example of an operating agreement for a Delaware LLC in a private equity transaction, see Standard Document, LLC Agreement (Multi-Member, Manager-Managed).
- Are any of the members key employees? If so, there are often special considerations for those members, such as employment agreements and **non-competition provisions** (see Restrictive Provisions).
- Are tax advisors reviewing the operating agreement? Tax advisors (such as tax counsel) should review the operating agreement, especially the sections on tax matters, allocations, and distributions, to ensure that matters such as the timing and computation of members' distributions are stated properly.
- What is the default, if any, provided by the RLLCA in the absence of a provision in the operating agreement governing any particular matter? This checklist identifies default provisions that may be particularly relevant when preparing an operating agreement.
- Does the operating agreement comply with the RLLCA? By statute, the operating agreement and articles of organization cannot modify, alter, or waive certain provisions (T.C.A. § 48-249-205(b)).

and see Non-Modifiable Provisions of the RLLCA). If the articles of organization are inconsistent with any provision of an operating agreement, the articles control (T.C.A. § 48-249-202(d)).

Parties and Background

- Are all of the parties identified in the operating agreement? Under the RLLCA, non-members (including holders of financial rights) may enter into the operating agreement (T.C.A. § 48-249-203(a)).
- Will the LLC be a party to the operating agreement? Under the RLLCA, an LLC is bound by the provisions of an operating agreement, even if the LLC is not a signatory to the agreement (T.C.A. § 48-249-203(d)). However, naming the LLC as a party to the operating agreement and requiring its signature clarifies the parties' intent that the LLC be bound by the operating agreement.
- Is the operating agreement effective when signed or on a different date? If the LLC is not yet formed, the agreement will be effective on company formation unless the operating agreement provides for a later effective time or date (T.C.A. § 48-249-203(a)).
- Is there any important or relevant background information (for example, the reasons for forming the LLC) to include in the operating agreement's recitals?

Organizational Matters

- What is the LLC's name and does it comply with Tennessee statutory requirements (T.C.A. § 48-249-106)? Specifically:
 - does the name contain the words "limited liability company", the abbreviation "L.L.C." or "LLC", or similar words or abbreviations in another language?
 - is the name distinguishable on the records of the Tennessee Secretary of State (SOS) from any other true, assumed, reserved, or registered name used by another entity?
 - will the LLC adopt an assumed name?
- For more information, see Practice Note, Forming and Organizing an LLC (TN): Name of the LLC.
- Has each member given its contact information (mailing address, telephone and fax numbers, email address, and principal contact)?
- When was the LLC formed? If not yet formed, when will it be formed? An LLC's existence begins on the date and at the time that the articles of organization are filed with the SOS, unless the articles specify a later effective date (not more than 90 days after the filing date) or a future event on which the LLC is formed (T.C.A. § 48-249-201(a), (c)).
- If the articles of organization specify a future date or event for the LLC's formation, will the LLC file a certificate of formation (T.C.A. § 48-249-201(c))? For more information, see Standard Document, Certificate of Formation (TN).

- Has the LLC designated a registered office and registered agent within the state? If so, what is the name of the agent and the address of the LLC's registered office for service of process? The address of the registered agent must be the same as the registered office (T.C.A. § 48-249-109).
- Where is the LLC's principal executive office, as required in the articles of organization (T.C.A. § 48-249-202(a)(3))? Where is its principal place of business? Will it operate branch offices or locations?
- Will the LLC conduct business in other states besides Tennessee? If so, does the LLC need to file for **foreign qualification** in those other states?
- How long will the LLC exist? Is there a known or anticipated date or event that will cause the LLC to end? By default, a LLC has a perpetual existence, unless it specifies a date certain for dissolution or an event requiring dissolution in its articles of organization or operating agreement (T.C.A. § 48-249-601(a)(1)).
- What is the LLC's business purpose? Will it be narrow in scope (for example, to buy a piece of real estate or to perform obligations under a government contract) or broad (for example, to permit the LLC to conduct any business allowed by law)? Under the RLLCA, a Tennessee LLC may be formed for any lawful business unless a more limited purpose is set out in its articles of organization or operating agreement (T.C.A. § 48-249-104(a)).
- Will the LLC render professional services that require the individuals engaged in the profession to be licensed in Tennessee? If so, do all applicable members, managerial officials, employees, or agents have the proper license (T.C.A. § 48-249-1106)?
- Will the LLC's business require a license to operate? Depending on the type of business and where it is located, the LLC may need to obtain other state or local business licenses.

Members and Meetings

- How will new members be admitted? Unless the operating agreement or articles of organization provide otherwise, the admission of new members requires unanimous consent (T.C.A. § 48-249-501(b)). For more information on admitting additional members, see Standard Document, Operating Agreement (Single Member) (TN): Drafting Note: Admission of Additional Members.
- Will the operating agreement provide that the managers or directors (as applicable) can update the operating agreement to reflect new members?
- Will the members have voting rights? If so, consider the following:
 - what matters the members can they vote on. Certain actions require member consent (see Standard Document, Operating Agreement (Single Member) (TN): Drafting Notes: Matters Requiring Unanimous Member Approval and Matters Requiring Majority Member Approval). Members are often also given the right to vote on certain significant matters (such as a sale of all or substantially all of the LLC's assets);
 - what vote is required to approve each matter (majority, supermajority, or unanimous);

- whether the required level of consent specified in the operating agreement complies with the RLLCA; and
- if there are any actions that require a higher threshold vote than others.
- Will the operating agreement modify any of the RLLCA's following statutory assumptions:
 - each member has one vote regardless of the relative percentage of its contribution (T.C.A. § 48-249-405(a)); and
 - in a member-managed LLC, any matter relating to the LLC's business (except for delegated matters and matters requiring unanimous member consent) is decided by a majority vote of the members (T.C.A. § 48-249-401(a)(2)).
- Will the operating agreement provide for more than one class or group of membership interests (T.C.A. § 48-249-303)? If so, consider the following for each class:
 - voting rights;
 - common or preferred membership interests;
 - **allocation, distribution, and liquidation preferences** (priorities among classes of membership interests are usually contained in provisions of the operating agreement known as **waterfall provisions**);
 - management rights;
 - additional **capital contributions**; and
 - **preemptive rights** to avoid **dilution**.
- Will the operating agreement provide for meetings and actions by the members? If so, consider including provisions relating to:
 - annual and special meetings;
 - notice of meetings;
 - setting a **record date**;
 - **quorum** requirements;
 - acting by written consent;
 - acting by **proxy**; and

- majority, unanimous, or other voting counts needed to act.
- Will membership interests need to be registered under any state **blue sky law**, and will the LLC need to file appropriate documents under the **Securities Act of 1933** (Securities Act), such as **Form D**?
- Does the LLC intend to issue capital interests to some members and **profits interests** to other members? For more information on capital interests and profits interests, see Practice Note, Profits Interest.
- Will the membership interests be evidenced by certificates? The RLLCA does not address whether an LLC is required or permitted to issue certificates to evidence a membership interest in the LLC.
- What are the limitations of liability and indemnification provisions? Operating agreements often provide that:
 - members are not liable for more than their capital contribution (T.C.A. § 48-249-114); and
 - the LLC will indemnify persons or entities who are made a party to a proceeding because they are a member, manager, or director of the LLC (T.C.A. § 48-249-115).
- For a discussion of liability and indemnification, see Standard Document, Operating Agreement (Single Member) (TN): Drafting Note: Liability of Member; Indemnification.
- Can members enter into transactions with the LLC? For example, can the members make loans to the LLC? Transactions in which members have an interest are subject to provisions in the RLLCA regarding conflicting interest transactions unless the operating agreement states otherwise (T.C.A. § 48-249-404).

Management

- What is the management structure? The RLLCA requires organizers to state in the articles of organization whether the LLC will be member-managed, manager-managed, or director-managed (T.C.A. § 48-249-202(a)(4)). A manager is a person vested with the authority of a manager of a manager-managed LLC, and may be an individual or entity (T.C.A. §§ 48-249-401(b) and 48-249-102(18), (25)). A director is a person vested with the authority of a director of a director-managed LLC, and must be an individual (T.C.A. §§ 48-249-401(c) and 48-249-102(6)).
- In a member-managed LLC, what are the members' powers? Every member of a member-managed LLC is an agent of the LLC and can bind the LLC, unless the member had no authority to act in the particular matter and the third party knew of this lack of authority (T.C.A. § 48-249-402(a)(1)).
- If the LLC is manager-managed or director-managed, will there be more than one manager or director? If so, how will they settle any disputes between or among them? Will the LLC have an odd number of managers or directors to avoid **deadlock**? In the absence of direction in the operating agreement, the RLLCA requires a simple majority of managers or directors to authorize action of the LLC (T.C.A. §§ 48-249-401(b)(2) and 48-249-401(c)(2)).

- Will the operating agreement, members, managers, or directors delegate management authority to one or more officers, agents, or employees (T.C.A. §§ 48-249-401(e) and 48-249-402(d))? An officer must be an individual (T.C.A. § 48-249-102(23)).
- If the LLC is manager-managed or director-managed, who will be the initial managers or directors? The operating agreement usually identifies the initial managers or directors or provides for the process to elect managers or directors. Will members elect managers periodically or will the operating agreement provide for managers to act indefinitely or for a specified term?
- In a manager-managed or director-managed LLC, how can a manager or director be removed? Unless stated otherwise in the articles of organization or operating agreement, members can remove managers with or without cause by a majority vote (T.C.A. § 48-249-401(b)(3)(A), (c)(3)(A)).
- In a manager-managed or director-managed LLC, how can manager or director vacancies be filled (for example, if a manager or director resigns or is removed)? Unless stated otherwise in the articles of organization or operating agreement, manager or director vacancies are filled by the majority vote of the members (T.C.A. § 48-249-401(b)(3)(A), (c)(3)(A)).
- In a manager- or director-managed LLC, what are the managers' or directors' powers? The manager of a manager-managed LLC is an agent of the LLC and can bind the LLC, unless the manager had no authority to act in the particular matter and the third party knew of this lack of authority (T.C.A. § 48-249-402(b)(1)). The president and other authorized officers of a director-managed LLC are the only agents of the LLC (T.C.A. § 48-249-402(c), (d)). Regardless of the LLC's management structure, there are certain actions that must be approved by the members (see Standard Document, Operating Agreement (Single Member) (TN): Drafting Notes: Matters Requiring Unanimous Member Approval and Matters Requiring Majority Member Approval).
- Will the managers or directors be compensated for acting in that capacity? If so, what will be the form of compensation?
- Will the LLC have officers? The RLLCA does not require an LLC to appoint officers, unless the LLC is director-managed. Operating agreements often include provisions related to the appointment, powers, and removal of officers. If the LLC is director-managed, it must have a president who is appointed or elected by a majority vote of the directors and authorized to act as an agent of the LLC (T.C.A. § 48-249-401(d)).
- Can the managers or directors appoint officers and delegate authority? If the LLC will have officers, the operating agreement should include related provisions (for example, those addressing officer powers, responsibilities, and authority).
- Does the operating agreement include specific indemnification procedures for managers or directors? Managers or directors are typically indemnified to the maximum extent allowed by law. Under the RLLCA, however, the LLC cannot indemnify a responsible person in connection with a proceeding either:
 - by, or in the right of the LLC, in which the person seeking indemnification was adjudged liable to the LLC; or
 - in which the person improperly received a personal benefit.

- (T.C.A. § 48-249-115(b)(4).)

Capital Contributions

- The RLLCA does not specify whether a person may be admitted as a member without making or being obligated to make a contribution. The operating agreement should address this matter. Any purported contribution or offer of consideration to make a contribution is not treated as a contribution to the LLC until:
 - the members (in a member-managed LLC), members and managers (in a manager-managed LLC), or members and directors (in a director-managed LLC) accept the contribution; and
 - the amount and value of the contribution are recorded in the articles of organization, operating agreement, or the LLC's records.
- (T.C.A. § 48-249-301(c).)
- Assuming a capital contribution is required, what will be the form and amount of the members' initial contributions? Contributions can consist of any combination of:
 - money;
 - tangible or intangible property;
 - a promissory note;
 - services performed; or
 - an obligation or agreement to contribute money or property or perform services.
- (T.C.A. § 48-249-301(a).)
- When are capital contributions due? Capital contributions (if required) can be due at or before formation, according to a schedule, or on the occurrence of specified events.
- Are additional contributions allowed? If so, what is the procedure for additional contributions?
- Will additional capital contributions (**capital calls**) be required? If so, consider the following:
 - who determines when to request an additional capital contribution, which is often up to the manager's or director's discretion or the members' approval;
 - how members are notified of capital calls;

- how much each member will be responsible to contribute; and
- how the can company raise any additional funds not provided by the members.
- What are the liabilities and responsibilities of the members if one member does not make a required capital contribution?
- Will there be penalties or consequences for a member who fails to make a required capital contribution? The operating agreement or articles of organization may impose the following penalties or consequences:
 - the reduction or elimination of the defaulting member's interest;
 - subordination of the defaulting member's interest to that of members or other persons who are not in default;
 - a forced sale of the defaulting member's interest;
 - forfeiture of the defaulting member's interest;
 - borrowing from other members to cover the commitment and requiring that interest and repayments be made from distributions that would otherwise be paid to the defaulting member;
 - selling the interest of the defaulting member or other person at a pre-set, fixed value determined by appraisal or by formula and redemption; or
 - any other penalty or consequence.
- (T.C.A. § 48-249-302(d).)
- Are members entitled to interest on their capital contributions? Usually they are not.

Capital Accounts

- Will the operating agreement provide for the establishment and maintenance of **capital accounts**?
- Will the members be responsible for restoring a deficit balance in their capital accounts? If so, this should be addressed in the operating agreement.
- Will the operating agreement provide for the transfer of a capital account from a transferring member to a transferee on transferring part or all of a membership interest?
- Will withdrawals of amounts from a member's capital account be permissible or required?
- Did tax counsel or other tax advisor review the section regarding capital accounts to ensure compliance with the applicable state and federal tax law?

Allocations and Distributions

- Do certain members or classes of membership interests have a priority with respect to distributions or allocations? See Practice Note, LLC Agreement Commentary: Allocations and Distributions for a more detailed discussion of allocations and distributions between or among members of an LLC.
- If the operating agreement contains a waterfall provision, will it be included in the allocations section or the distributions section?
- How will net profits and net losses be allocated? Net profits and net losses may be allocated according to the agreed value of each member's respective unreturned contributions to the LLC or according to a more complicated waterfall provision. If the operating agreement does not specify how the distributions will be made, the profits and losses must be allocated equally among the members and financial rights holders (T.C.A. § 48-249-304(a), (b)).
- Does the operating agreement include a provision addressing tax allocations?
- If the LLC is manager-managed or director-managed, will distributions of company funds be at the manager's or director's discretion or made at established times? If the latter, how will those times be established. For example, will the operating agreement require distributions at specified dates or intervals or on the occurrence of specified events?
- How will distributions be made? Similar to allocations of profits and losses, distributions are often made according to percentage ownership or a waterfall provision. If the operating agreement does not specify how the distributions will be made, distributions are allocated equally among the members and financial rights holders (T.C.A. § 48-249-305(b)).
- Besides cash, will the distribution of securities and other LLC property be permitted? Unless the operating agreement states otherwise, a member does not have a right to demand or receive a distribution in kind (regardless of the contribution of the member), nor can a member be compelled to accept a distribution of any asset in kind if the percentage of the asset distributed to that member is greater than the percentage in which the member shares in the company's distributions (T.C.A. § 48-249-305(d)).
- Will the operating agreement include a provision providing for at least minimal tax distributions (to cover members' tax obligations attributable to their membership in the LLC)?
- Are there restrictions on distributions? Under the RLLCA, the LLC cannot distribute funds if:
 - doing so would leave the LLC unable to pay its debts as they come due in the usual course of business; or
 - the LLC's total assets would be less than the sum of its total liabilities (subject to certain exceptions) plus the amount that would be needed on dissolution to satisfy its obligation to pay members or holders of financial rights whose entitlement to distributions are superior to those who would be received the proposed distribution.
- (T.C.A. § 48-249-306(a).)
- Will a member be entitled to a full distribution or payment of the value of the member's interest on

dissociation or will the member be penalized?

- Did tax counsel or other tax advisor review the section regarding allocations and distributions to ensure that intended provisions concerning distributions and allocations will not have unintended consequences for the LLC or its members?

Taxes, Books, and Records

- How will the LLC be treated for US federal income tax purposes? LLCs are generally treated as pass-through entities (that is, the LLCs themselves are not themselves subject to tax) for US federal income tax purposes (unless they specifically elect to be treated as a corporation), avoiding the entity-level tax imposed on corporations (see Practice Note, Choice of Entity: Tax Issues).

Typically:

- a single-member LLC is a disregarded entity and treated as a sole proprietorship, branch, or division of the owner; and
 - a multi-member LLC is treated as a partnership.
- How will the LLC be treated for Tennessee state income tax purposes? Tennessee generally classifies LLCs as partnerships for tax purposes, unless the LLC is classified otherwise for federal tax purposes. If the LLC is classified differently for federal tax purposes, the LLC will be treated the same for state tax purposes (T.C.A. § 48-249-1003).
 - Will the operating agreement include provisions for preparing and filing the LLC's tax returns?
 - What is the LLC's fiscal year? The LLC's annual report to the SOS is due on the first day of the fourth month after the end of the fiscal year (T.C.A. § 48-249-1017(c)).
 - Must the LLC prepare and distribute monthly, quarterly, or annual financial statements or reports? If so, do any or all of them have to be prepared in accordance with **generally accepted accounting principles** or other accounting conventions?
 - Who will be the partnership representative for taxable years beginning on or after January 1, 2018 (IRC § 6223)? Who will be the **tax matters member** for prior taxable years? The operating agreement generally specifies the duties and any supplemental powers of the designated person or persons, such as:
 - making any tax elections on behalf of the LLC; and
 - representing the LLC in audits and judicial tax proceedings.
 - (See Standard Clause, LLC Agreement: Tax Matters Representative Provision.)
 - Is there a provision addressing tax withholding?
 - Will the LLC need an **employer identification number** (EIN)? If the LLC has more than one member, it must obtain its own EIN regardless of whether it has employees. A single-member LLC also must have an EIN if it elects to be taxed as a corporation rather than a sole proprietorship. In

addition, an EIN is required for:

- opening a bank account for the company;
- federal and state tax purposes; and
- hiring employees.
- What are the policies for preparing and maintaining the LLC's books and records? The RLLCA requires an LLC to maintain the following records at its principal executive office (or at another place or places within the US determined by LLC's governing persons):
 - a current list of the full name and last known business, residence, or mailing address of each member, manager or director (if applicable), officer (if applicable), and holder of financial rights of the LLC;
 - a copy of the LLC's articles of organization and all amendments to the articles;
 - a copy of any currently effective written operating agreement of the LLC;
 - copies of the LLC's federal, state, and local income tax returns and reports, if any, for the three most recent years;
 - financial information sufficient to provide true and full information regarding the status of the business and financial condition of the LLC for the three most recent fiscal years;
 - records of all proceedings of the members and of the holders, if any, of the LLC;
 - any written consents obtained from the members or from the holders, if any, of the LLC;
 - records of all proceedings of the managers or directors, as applicable, of the LLC for the last three years;
 - a statement of all contributions accepted by the LLC, the identity of the contributor, and the agreed value of each contribution;
 - a copy of all contribution agreements to which the LLC is bound; and
 - a copy of the LLC's most recent annual report filed with the SOS.
- (T.C.A. § 48-249-406.)
- What provisions will be made for inspection of the LLC's books and records? Under the RLLCA:
 - members have a right to LLC information without demand to comply with tax laws and to

properly exercise the member's rights and duties, and on demand for any other information regarding the LLC's business or affairs that is not unreasonable or improper under the circumstances; and

- holders of financial rights have a limited right of access to obtain information comply with tax laws.
- (T.C.A. § 48-249-308.)

Dissociation and Termination of Members

- A member's membership interest terminates if the member:
 - withdraws from membership after serving written notice of withdrawal on the LLC;
 - ceases to be a member on the occurrence of an event specified in the articles of organization or operating agreement;
 - all of the member's financial rights (other than a transfer for security purposes or an unperfected charging order) are transferred;
 - is expelled by law or under the articles of organization or operating agreement;
 - is expelled on unanimous vote of the other members entitled to vote under specific circumstances;
 - is expelled by judicial determination;
 - files a voluntary petition as a debtor in bankruptcy;
 - executes an assignment for the benefit of creditors;
 - consents to or acquiesces in the appointment of a trustee, receiver, or liquidator for the member, or for the member's property;
 - fails to have a petition for involuntary bankruptcy filed against the member dismissed within 90 days after it was filed;
 - fails to have the appointment of a trustee, receiver, or liquidator of the member vacated or stayed;
 - has its entire interest in the LLC purchased or redeemed by the LLC; or
 - is adjudicated incapable of performing the member's duties under the articles of organization

or operating agreement.

- (T.C.A. § 48-249-503(a).)
- If the termination of the member's membership interest does not dissolve the LLC, will there be a distribution to the dissociating member?
- Will a member be allowed to resign, assign its membership interest, or otherwise voluntarily withdraw from the LLC (T.C.A. §§ 48-249-503, 48-249-504, and 48-249-505)?
- How will the LLC handle the retirement of a member? Will the remaining members have the right to buy out the retiring member to ensure the continuation of the LLC? Will there be a mandatory retirement age at which a member must cash out? Will there be a reduction in the amount of the buy-out depending on how early the member retires?
- Will there be a mandatory retirement age at which a member must cash out? Will there be a reduction in the amount of the buy-out depending on how early the member retires?
- What will happen if a member becomes disabled? If the disability is temporary, will the member receive full or partial salary or other compensation? If the member is permanently disabled or the disability continues for a specified time, will the member's interest be bought out by the LLC or the members? Will the buy-out be mandatory? Will the LLC purchase insurance to cover these types of contingencies?
- Can a member be expelled from the LLC? If the operating agreement will allow for the expulsion of a member, what process must be followed to expel the member? When will the expulsion become effective?
- Will the LLC buy the expelled member's interest (**redemption**) or will members be required to purchase the expelled member's interests (cross-purchase)? If so, consider:
 - how will the parties will determine the purchase price; and
 - what the terms of payment will be (for example, timing of payments and interest and security for payment of the purchase price).
- The LLC should consult an accountant or tax professional to take advantage of any tax benefits associated with either buyout provision.
- Counsel should make sure any provisions in the operating agreement that address dissociation and termination are consistent with any buy-sell provisions or transfer restrictions in the operating agreement or standalone buy-sell agreement (see Transfers of Interests).

Dissolution and Winding Up

- Will the operating agreement specify events that will cause the LLC's dissolution (T.C.A. § 48-249-601)? Will the operating agreement include a deadlock sale provision to avoid dissolution in the event of deadlock (see T.C.A. § 48-245-902(a))? For more information on dissolutions, see Practice Note, Dissolving an LLC (TN).

- Will the LLC have a perpetual term or will it have a designated date for dissolution? If the LLC will have a specific date on which it will dissolve, it must include that date in its articles of organization (T.C.A. § 48-249-202(a)(9)).
- Will the members be able to:
 - revoke the decision to end the LLC;
 - change the expiration date of the LLC; or
 - cancel or extend the time for the event on which the LLC expires?
- The articles of organization and operating agreement can be amended to modify these dates or events (T.C.A. § 48-249-204).
- Who will manage the winding up and liquidation process? This is usually handled by the members, managers, or directors, as applicable, but a court can appoint a trustee or custodian on the application of a member or creditor for good cause (T.C.A. §§ 48-249-610 and 48-249-615).
- Will the operating agreement set out notice requirements for known creditors on dissolution? What about unknown or missing creditors? A dissolving Tennessee LLC may (but is not required to) provide notice to creditors and claimants during the wind up phase of the dissolution (T.C.A. §§ 48-249-611(b)(3) and 48-245-502(b)(3)). However, this is often a prudent measure. Placing creditors on notice may alleviate future claims or issues, particularly if there is a dispute on the amount owed.
- How are assets distributed when liquidation occurs? After the LLC settles its debts and pays its creditors, any remaining LLC assets (or proceeds from their disposition) are often distributed to the members based on the members' positive capital account balances or are sometimes based on more complicated formulas. These formulas are usually intended to be the same as those provided in the allocations or distributions sections, subject to certain enumerated exceptions (T.C.A. § 48-249-620). For more information on asset distributions during the winding up process, see Practice Note, Dissolving an LLC (TN): Distribution of Assets.

Transfers of Interests

- Can membership interests be assigned, purchased, or sold? Unless the articles of organization or operating agreement provide otherwise, a member of a multi-member LLC may not transfer its full membership interest and governance rights in an LLC to a non-member without the unanimous consent of the other members (T.C.A. § 48-249-508(b)(3)).
- Will the LLC allow assignees of membership interests to become members (T.C.A. §§ 48-249-507 and 48-249-508(b))?
- What transfer restrictions will the operating agreement impose? Operating agreements often contain detailed transfer restrictions. If the LLC is treated as a partnership for US federal income tax purposes, any transfer (or withdrawal) that causes the LLC to be treated as a corporation for US federal income tax purposes is generally prohibited notwithstanding any other provisions of the

operating agreement.

- Will the operating agreement impose restrictions on the members from encumbering their interests, such as using them for collateral for a personal business loan? The RLLCA allows a member to pledge a membership interest as collateral, so any restriction on that right must be set out in the articles of organization or operating agreement (T.C.A. § 48-249-508(d)).
- Who will be approved as permitted transferees (for example, family trusts, affiliates, immediate family members, other members)? Operating agreements typically allow transfers of membership interests to a defined group of transferees without prior consent even though the transferees have no right to be part of the management of the LLC's affairs.
- What types of transfer and buy-sell provisions will the operating agreement include? Common examples include:
 - **tag-along** and **drag-along rights**;
 - **rights of first offer**;
 - **rights of first refusal**;
 - **put options**; and
 - **call options**.
- Will the operating agreement include buy-sell provisions in the main agreement or in a separate buy-sell agreement? These are often found in the operating agreement.
- If there are buy-sell provisions, do they address valuation and payment methods?
- Will the operating agreement include deadlock provisions? If so, the following are common ways to deal with deadlocks:
 - mediation or arbitration;
 - buy-sell provisions; and
 - a third-party referee outside of legal process.
- What are the procedures for admitting additional members? A transferee usually has to pass certain hurdles before becoming a member for purposes of the operating agreement (such as agreeing to be bound by the agreement and certifying that the transferee is an "**accredited investor**" under the Securities Act).
- If a transferee is not admitted as a member under the operating agreement, what will the transferee be entitled to? A transferee not admitted as a member is typically only permitted to receive the financial rights of the membership interests (T.C.A. § 48-249-507(b)).
- Counsel should make sure that any buy-sell provisions or transfer restrictions in the operating

agreement or standalone buy-sell agreement are consistent with provisions in the operating agreement that address dissociation and termination of members (see Dissociation and Termination of Membership).

- For more information on transfers, see Practice Note, LLC Agreement Commentary, Transfer of LLC Interests.

Restrictive Provisions

- Is there a need for confidentiality provisions? For example, if the company has trade secrets to protect it usually wants the members, managers, and directors to agree to maintain them as confidential.
- Is there a need for non-competition provisions? Members, managers (especially officers who are managers), directors, and other employees are often restricted from competing with the company.
- If the operating agreement includes non-competition provisions, will they apply to all members, managers, and directors? Restricting competitive activities of members, managers, and directors who are also key employees of the LLC is usually more important than restricting minority investors with no involvement in the LLC's operations.
- Are there any other restrictive provisions or agreements to consider, such as restricting a member's ability to dispose of its LLC interests without the other members' consent?

Miscellaneous

- What state's laws will govern the operating agreement? It is common to pick the laws of the state in which the LLC is formed unless there would be a disadvantage to do so (for example, if the LLC wants to impose non-compete provisions and the law of the state of formation is unfavorable relating to their enforceability).
- How will the operating agreement provide for the resolution of disputes among the members or among the members and the LLC? Will the operating agreement provide for a specific venue and jurisdiction for disputes?
- How can the operating agreement be amended? Unless the operating agreement or articles of organization provide the method for amendment, any amendment to the operating agreement must be approved by the consent of all of the members (T.C.A. §§ 48-249-401(f)(1) and 48-249-204(c)). Members should consider whether to:
 - allow amendment of the operating agreement with less than unanimous consent, or with the consent of the members who have contributed (or are required to contribute) a specified percentage of LLC contributions;
 - allow managers or directors to make administrative changes to the operating agreement without member approval; or
 - require the managers or directors to submit proposed amendments to the members.

- How can notices under the operating agreement be given? For example, can notices be given by email? Can required notices to members, managers, or directors be waived in writing or otherwise?
- Are any third parties entitled to any rights under the operating agreement? If not, will the operating agreement include a “no third-party beneficiaries” provision to make it clear that third parties do not have any rights under the operating agreement?

Schedules and Exhibits

- Does the operating agreement call for any schedules or exhibits? If so, what is the necessary information to complete the schedules or exhibits?

Authority and Conflicts

- Is this a new operating agreement or is the LLC amending or restating an existing operating agreement? If this is an amended and restated operating agreement, does it comply with the existing operating agreement’s amendment provisions?
- Is the operating agreement consistent with the RLLCA and the company’s articles of organization?
- Are the member approvals consistent with the RLLCA? For example, unless the articles of organization or operating agreement provide otherwise, unanimous member approval is required to admit a new member (T.C.A. § 48-249-401(f)(5)).

Non-Modifiable Provisions of the RLLCA

Although the RLLCA gives wide latitude to an LLC to modify, alter, or waive most default statutory provisions, the operating agreement and articles of organization cannot do any of the following:

- Vary the requirement that any director or officer of the LLC be an individual.
- Vary the RLLCA’s notice requirements in a manifestly unreasonable manner.
- Vary the statutory requirements for the LLC’s name.
- Vary the requirements for service of process for workers’ compensation claims (T.C.A. § 48-249-112(c)).
- Eliminate or vary the potential for members’ personal liability for:
 - their own acts or omissions; or
 - sales tax.
- Eliminate or vary the restrictions on indemnification for:
 - breach of duty of loyalty to the LLC or its members;
 - acts or omissions not in good faith;

- acts or omissions that involve intentional misconduct or knowing violation of law; or
- unlawful distributions.
- Eliminate or vary:
 - the restrictions on distributions; or
 - a member's liability for unlawful distributions.
- Authorize a director to appoint a proxy.
- Unreasonably restrict the members' right to information or access to records.
- Eliminate the duty of loyalty, other than:
 - identifying specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and
 - specifying the number or percentage of members, disinterested managers, or disinterested directors that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.
- Unreasonably reduce the duty of care applicable to:
 - the requirement that a member refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law (with respect to a member-managed LLC, the LLC's other members, and holders of financial rights when winding up of the LLC's business);
 - a manager; and
 - a director or officer to discharge his or her duties with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the best interests of the LLC.
- Eliminate the obligation of:
 - good faith and fair dealing, applicable to members; and
 - good faith, applicable to directors and officers.
- In both cases, however, the LLC may determine standards by which performance of the obligation will be measured, if not manifestly unreasonable.
- Vary the right to expel a member by judicial determination.
- Vary the requirement to wind up the LLC's business by an order of a court.

- Eliminate or vary the law set out in:
 - part 10 of the RLLCA (T.C.A. §§ 48-249-1001 et seq.) (miscellaneous provisions); and
 - part 11 of the RLLCA (T.C.A. §§ 48-249-1101 et seq.) (professional LLCs).
- Vary any requirements relating to documents required to be filed with the SOS or a register of deeds.
- Otherwise vary or restrict any rights of third parties.

(T.C.A. § 48-249-205.)

Appendix - Tab 3, James Eggleston: 3.1

Comparison of Entities Which One is Best for Farm and Ranch Ownership

<u>Feature/Issue</u>	<u>Limited Liability Company</u>	<u>Limited Partnership</u>	<u>C Corporation</u>	<u>S Corporation</u>	<u>General Partnership</u>	<u>Sole Proprietorship</u>
Charging order protection	Yes TBOC §101.112	Yes TBOC §153.256(b)	No	No	Yes TBOC §152.308(b)	No
Ease of formation	Easy (file Cert of Form)	Moderate (file Cert of Form)	Easy (file Cert of Form)	Moderate (file Cert of Form)	No filing required (except to become LLP)	No filing required
Ownership instrument	Membership interests	Partnership interests	Shares of stock	Shares of stock	Partnership or joint venture interests	Not applicable
Management document	Operating agreement	Limited Partnership Agreement	Bylaws	Bylaws	Partnership Agreement	Not applicable
Filing fees	\$300	\$750	\$300	\$300	None	None
Liability of owners	Very limited	Very limited (except GP is unlimited)	Very limited	Very limited	Unlimited	Unlimited
Duration of Existence	Perpetual	Can be perpetual	Perpetual	Perpetual	Dissolves upon partner death/withdrawal	Dependent on sole proprietor survival
"Pass-Through" Entity	Yes	Yes	No	Yes	Yes	Yes
Tax flexibility	Special allocations ok	Special allocations ok	Not flexible	Not flexible IRC §2553	Special allocations ok (requires written agreement)	Not a taxable entity
"Series"	Yes	No	No	No	No	No
Annual meetings	Not required (but recommended)	Not required	Recommended but no foreclosure without	Recommended but no forfeiture without	Not required	Not applicable
Management	Managers or members	General Partner (Adv: LP's not involved)	Directors (delegate to officers)	Directors (delegate to officers)	All partners	Ultimate flexibility (by sole proprietor)
Piercing the "veil"	Not easy	Not easy except for LP's who manage	Not easy if respect formalities	Not easy if respect formalities	No "veil"	No "veil"
Combinations	LLCs are good as general partners of LP and owners of other entities	Good to use LLC as GPs or LPs	Can be used as GP of LPs	Can be used as GP of LPs	LLCs can be good partner entities, but not vice versa	Good only to hold ownership interests in other entities

Comparison of Entities
Which One is Best for Farm and Ranch Ownership

Other strengths	Special allocation of profits/losses possible	Control can be disproportionate to ownership	Ultimate in protection of owners (shareholders)	Same as C Corp.	No writing required to form	
	All advantages of Ltd. Pshp plus more	Estate planning flexibility	Historical familiarity		No filing required with Sec. of State	
	Broad protection of managers and members	Can borrow money in name of limited partnership				
Weaknesses	Still some open issues re "series"	Higher maintenance costs	Requires more record keeping	Limited generally to individual shareholders	Unlimited liability of owners	Owner has direct exposure for all liabilities
	If members are selected to manage LLC, some inactive members may involve themselves in control	Limited transferability Some limitations on valuation issues for estate planning purposes	Corporate meetings and formalities	Corporate meetings and formalities Limited as to number of shareholders (but high limit: 75)		

Notes:

"Charging Order" means: Limited liability companies and partnerships are "charging order protected" entities (COPE's) meaning creditors of owners of those entities cannot seize the ownership interests of such owners, but may only get a charging order against the distributions allocable to such interests. They do have a lien on the interests, but not "foreclosable." Assets of business untouchable.

"Cert of Form" means: Certificate of Formation, a rather simple document that is filed with the Secretary of State of Texas.

Appendix - Tab 3, James Eggleston: 3.2

LLC Overview Letter Sample Form

[* _____ Letterhead of Attorney _____*]

[* _____ Date _____*]

[* _____*]

Attn: [* _____*]

[* _____*]

[* _____*]

Re: [* _____*] (the “Company”)

Dear [* _____*]:

This purpose of this letter is to provide you with an overview of the organization of the Company and to explain the basics of operating a limited liability company (“LLC”) under the current [Texas] law as governed by [Texas] Business Organizations Code] (the “Code”).

As you know, one of the primary advantages of structuring a new entity as an LLC in [Texas] is the limited liability afforded to the LLC owners, or “Members.” More specifically, Members of an LLC in most situations are not liable for the debts and obligations of the LLC beyond the amount they paid for their membership interests or their “ownership investment.”

In order to maintain this “liability shield” you must be sure to observe certain LLC formalities, such as (i) maintaining separate and distinct accounting books and records, (ii) maintaining separate bank accounts, (iii) avoiding the commingling of LLC and personal funds, (iv) adequately capitalizing the LLC for the type of business in which you are involved, and (v) conducting the LLC’s business, when necessary, with official Member and Manager approval. We cannot overemphasize the importance of maintaining the formal integrity of your new LLC entity. The LLC is a separate legal entity from yourself, and must be treated as such in order for you to maintain the liability protection it generally affords.

The following list contains important items for you to address to ensure the proper maintenance of the Company.

- 1. Minute Book.** The minute book currently includes the following items:
 - the Certificate of Formation (the “Certificate”) which is on file with the [Texas] Secretary of State as the formal organization notification to the public;
 - the Company Agreement, which reflects the Company’s structural framework;
 - the Company’s organizational minutes, which establishes the beginning of the Company’s legal existence;
 - a list of the Members and their addresses; and
 - a record of all initial and subsequent capital contributions.

The Company minute book will be maintained at our office unless you prefer otherwise. We will provide you with a copy of everything that is kept in the Company minute book.

2. Certificate of Formation. The Certificate provides for a perpetual duration and for the Company to conduct any lawful business under [Texas] law. The Company may issue certificates of membership interest to reflect each Member's ownership interest. The Certificate contains the following information regarding the registered agent for the Company:

Registered Agent:	[* _____*]
Registered Agent Address:	[* _____*]
	[* _____*]

You must file a notice with the Secretary of State if any change is made in the Company's registered agent or registered address.

3. Company Agreement. The Company Agreement is too lengthy to summarize in this letter, but in short it is the basic operating rules and structural framework for the Company. You need to consult the Company Agreement at any time the Company intends to take action or in any other situation involving official Company business. The topics covered by the Company Agreement include the following:

- Membership, Disposition of Membership Interests, Information to Members
- Liability of Members
- Capital Contributions
- Allocations and Distributions
- Managers, Election, Number, Authority, Removal, Meetings, Officers
- Meetings of Members, Quorum, Location
- Tax Matters, Dissolution, Liquidation, Termination

4. Organizational Minutes. The organizational minutes of the Company evidences the organizational meeting of members to establish the existence of the Company. The organizational minutes of the Members are effective as of [* _____*] and have the following effect:

- The Certificate names the following person(s) as initial manager(s):
[* _____*] [* _____*]
- The Certificate has been reviewed and accepted by the Company.
- The Company Agreement has been reviewed and accepted by the Company.
- The following person(s) has/have been elected as officers:
[* _____*] President
[* _____*] Secretary
- The Company's minute book has been reviewed and accepted by the Company.
- The form of certificates of membership interest in the minute book have been reviewed and accepted by the Company.

- Membership interest certificates are issued to the following person(s) for the number of Membership Units and the initial capital contribution stated next to their names:

<u>Member's Name</u>	<u>Initial Sharing Ratio</u>	<u>Initial Capital Contribution</u>
[* _____*]	50%	\$100.00
[* _____*]	50%	\$100.00

The same terms, conditions, rights, privileges and benefits (the "Rights") shall belong to each of the classes of Units except as follows:

- As required by the Code, the receipt of consideration, consisting of money, labor done, a promissory note, or property of value, is confirmed.
- Any organizational expenses incurred are authorized to be paid.
- Authorization is given to open a bank account for the Company.
- The Company's office location is established.
- The authorization for necessary licenses, permits, etc. is given.
- Authorization is given for necessary documents needed to operate outside of the State of [Texas].
- A fiscal year ending December 31 is selected.

All the Managers and Members need to sign the organizational minutes as appropriate.

5. Instructions for Future Business Operations.

- a. The legal formalities involved in forming your LLC have been completed. Your minute book and membership interest records are current and complete as of the establishment of the Company. Your Certificate has been executed and your Company Agreement has been adopted. Records of your issued certificates of membership interest are completed. Minutes of your Managers reflect appropriate authorization for these initial steps.
- b. As a continuing matter of sound practice, we advise you to meet with your accounting professional and legal counsel at least annually to make certain that all statutory requirements are met to ensure compliance with the Code and to provide the greatest liability protection for the Members and Managers.

6. Lawful Business Activity.

- a. **Activities in Which the Company May and May Not Engage.** The purpose clause stated in the Certificate is a general purpose clause and permits the Company to engage in "all lawful activities." You are restricted, however, from engaging in any of the following activities or operating as one of the following entities:
 - the banking business or as a financial institution;
 - trust company business;
 - building and loan associations;

- insurance business or as an insurance provider;
 - railroad activities;
 - cemetery business;
 - abstract of title business without a proper license; and
 - other business requiring either a special license or organization under an act other than the [Texas] Business Organizations Code.
- b. Assumed Name Certificate.** We have not yet filed any assumed name certificates for the Company. We would encourage you to modify your business cards, stationery, promotional materials, contracts and other information given to third parties to reflect the complete name of the Company. Making these changes will go far in ensuring that no party with whom you do business can hold you individually responsible for business activities of the Company.
- c. Doing Business Outside [Texas].** If you decide to open an office for the Company or acquire property in the name of the Company in another state, you may be required to register the Company as a “foreign limited liability company” to be authorized to do business in that state. This entails filing your Certificate and paying initial and annual fees with that state. Failure to qualify may result in legal consequences in the future, such as the Company being prohibited from filing suit in that state (i.e. to enforce a contract) or from receiving actual notice of a lawsuit if the Company is sued in that state.

7. Company Accounting.

- a.** Under [Texas] law, an LLC is traditionally not taxed as a separate legal entity. In other words, the Company will be treated as a “disregarded entity” for federal income tax purposes. As such, please make sure your accounting professional has all the necessary financial records and information to appropriately prepare and file your tax returns.
- b.** The Company’s officers and Managers must make certain that accounting practices and auditing procedures customarily followed by similar business are observed in a proper and timely fashion by the Company. Accordingly, you must keep your accounting professional current and consistently informed regarding all Company’s business activities.
- c.** Initially, your accounting professional must resolve questions regarding transfers of accounts receivable, and payment of your accounts payable, if any. All assets transferred by you to the Company must be appropriately entered into the Company’s books by your accountant. Any assets transferred become the Company’s property. All your business insurance (public liability, disability, general insurance, etc.) must be acquired by the Company, either by assignment or binder. Accordingly, you must instruct your insurance agent to transfer or purchase new coverage as soon as conveniently possible after the Company commences business.

8. Administrative Steps to be Taken. With your accounting professional's assistance (and where necessary, with our assistance), you must take the following steps immediately before, contemporaneously with, or as soon as reasonably possible after commencing Company business:

- a. Again, in order to be certain that the Company will act as a "liability shield," you should order new or modify your existing letterhead, invoices, promotional materials, and other business stationery to reflect the Company's full legal name, [*_____], including the expression denoting the limited liability existence, OR, if using the Company's assumed name, only use it as it appears in the assumed name certificates filed for the Company.
- b. Any bank account containing funds of the Company needs to reflect the Company's full and correct name. A new bank account to be opened in the Company's name has already been authorized in the organizational minutes. If you have not already done so, call your bank and ask for several copies of their new limited liability company account signature cards and other required authorizations. Fill one of them out and return it to the bank after first inserting a copy of the bank signature card in the Company's minute book immediately following the organizational minutes.
- c. When and if your accountant determines that no adverse tax consequences will result, any loans you have made in your business need to be transferred to and assumed by the Company. New loans made after you commence business through the Company must be made in the Company's name, even though you may be required to endorse or guarantee the loan personally. When a loan is being made to the Company, it must be officially approved by the Company's Managers, and an appropriate resolution must be adopted and inserted in the Company's minute book.
- d. The following must be modified, assigned, or rewritten in order to reflect that the Company is the contracting party:
 - all leases or rental agreements;
 - contracts;
 - other arrangements you have regarding your present equipment, office premises, and furniture; and
 - any other contracts or arrangements you have previously entered into in connection with your business.

9. Limited Liability Company Formalities.

- a. In order to ensure your adherence to proper LLC formalities, as required by the Code, it is critical that all important Company transactions be reflected in resolutions or minutes of meetings of your Members and Managers.

b. Without limited the significance of the foregoing, it is important to realize you are going to be required formally to consider, review, and act upon the following:

i. All contracts must be made in the Company's name and on its behalf and with the required approval. "Contracts" include employment contracts, buy-sell agreements, profit sharing plans, pension plans, insurance plans, trust agreements, loans, leases, purchase contracts, limited liability brokerage investments accounts, and consulting agreements. From this point forward, when the Company is a party to a contract, please sign as follows:

[* _____ *],
a [Texas] limited liability company

By: _____
[* _____ *], Manager

OR

By: _____
[* _____ *], Manager

ii. Establishing and adjusting all salaries and bonuses of the Company's officers and employees.

iii. Any change in membership interest should:

- be reported to your accounting professional and this firm prior to its occurrence;
- be entered on the certificate of membership interest and the membership transfer ledger in the Company's minute book.

iv. Placing restrictions on transferring membership interests.

v. Issuing additional membership interests and purchasing or selling other Company membership interests.

vi. Accepting resignations of, terminating, and appointing officers and Managers.

vii. Changing the Company's name, registered office, or registered agent.

- viii. Changing bank accounts.
 - ix. Any other significant Company activities.
- c. According to the Code, actions of the Managers or Members of an LLC may be taken either:
- at an actual meeting, special or annual, in which case there will be need to be written minutes of the meeting; or
 - in the form of a unanimous written consent action embodying the desired resolutions.

Note: for additional specifics on holding a “special meeting,” please refer to the Company Agreement.

Unanimous written consent actions must be executed by all the Managers or Members entitled to vote on the matters contained in the consent. For a company like yours, which has relatively few Managers and Members, we have found that it is generally simpler and more convenient to take company actions through a unanimous written consent rather than through actual meetings.

- d. If the Company proposes to engage in a transaction affecting its basic structure or existence, we strongly recommend that you consult with this firm to insure that all necessary documents and consents are prepared, executed, and, where necessary, filed with the appropriate governmental authorities. Failure to execute the proper documents and make the filings required by law may result in the transaction being void and ineffective, and/or possibly expose you and other Members to various liabilities. Transactions that might affect the Company’s basic structure or existence include:
- a merger or consolidation with or an acquisition of another limited liability company or another business entity;
 - a reorganization in another state;
 - a dissolution of the Company;
 - transfer of all or substantially all of the Company’s assets; or
 - transfer of all or substantially all of the membership interests.

10. Additional Matters. The following issues may arise as you complete the Company’s organization:

- a. **Application for [Texas] Sale and Use Tax Permit.** If the Company plans to engage in retail or rental business or perform taxable services, it must obtain a limited sales tax permit from the [Texas] Comptroller of Public Accounts for each place of business it operates within the state. No limited sales tax permit will be issued by the Comptroller until the applicant provides the Comptroller with a

bond or security in an amount to be determined by the Comptroller. Please consult your accounting professional if you are unsure whether the business of the Company would be considered “engaging in retail or rental business or performing taxable services.”

- b. Acquisition of Business of Occupational Licenses and Taxes.** Numerous business activities and occupations are subject to licensing requirements or require paying occupational taxes and/or fees. If the Company is subject to occupational taxes or fees, they must be paid before the Company commences business. Please consult your accounting professional if you are unsure whether the Company is required to pay occupational taxes and/or fees.
- c. [Texas] Margin Tax.** [Texas] has historically imposed a “franchise” tax on all corporate entities, including limited liability companies, for the privilege of doing business in [Texas]. As revised by the [Texas] Legislature, the business franchise tax is known as the “margin” tax. While taxable entities with relatively smaller revenues may not be subject to the margin tax, it is important for you to consult with our firm or your accounting professional regarding this potential tax liability based on the unique circumstances of the Company. Regardless of whether the Company will owe any margin tax though, all taxable entities are required to file an initial margin tax report and subsequent reports with the [Texas] Comptroller, as required by law. If the Company fails to pay its annual margin tax, it may be subject to penalties and interest on the amount unpaid and may forfeit its right to do business in [Texas].
- d. Liability for Nonpayment of FICA Taxes and Federal Withholding Taxes.** Funds collected by the Company as FICA taxes and payroll withholding taxes must be paid as provided by law, or the persons not doing so will be held personally liable. This liability is separate from that imposed upon the employer-LLC. The statutes imposing the liability are broad in scope and may be enforced against all officers and other personnel whose duties relate to the withholding function.
- e. Commencement of Business.** The Company may not commence business or incur debt in the Company’s name until the Company has received consideration consisting of money, labor done, a promissory note, or property of value for issuing its Membership Units.

11. Company Disagreements. Most difficulties regarding the LLC formalities can be resolved by appropriate reference to the Company Agreement, employment contracts, and other Company documents.

The President, as the Company’s chief administrative officer, is responsible for the Company’s day-to-day decision-making process. The President in turn, must account to the Managers. The majority of the Members in the Company will select the Managers. Unless specifically and expressly authorized otherwise, no Manager or officer of the Company may act

independently or arbitrarily from the decision-making process of the President, the Managers, and the majority of the Members.

Independent or arbitrary action on the part of any Manager or officer of the Company threatens the Company's structure and existence as an LLC, and therefore the "limited liability" protection afforded by the Company. Any disputed action on the part of any Manager or officer of the Company must be brought to the immediate attention of the Company's President and Managers. The President and Managers have the ultimate decision-making responsibility for the Company.

If any serious dispute arises among the Members and the Managers of the Company, feel free to contract us in order to arrive at resolutions designed to settle a dispute and promote Company harmony in the best interests of the Company and its Members.

12. Outline of Members' and Officers' Responsibilities. Principal officers and managers of every LLC must be mindful of the following specific and important duties and responsibilities:

- a. Payments of Salaries to Employees.** Officers responsible for paying salaries must see that those salaries are accurately and timely paid by the Company. Managers establish the officer's salaries.
- b. Payroll Taxes.** All payroll taxes must be paid by the Company. Nonpayment may result in personal, civil or criminal liability to the responsible officers and Managers.
- c. Right to Inspect.** Each Manager has the absolute right to inspect all Company books, records, documents and property at any time.
- d. Distinction between Managers and Officers.** Managers control the Company's policies, and officers put those policies into effect. This difference must be understood to ensure proper Company structure and operation. A Manager may not delegate the Manager's authority. A Manager may not give a proxy to vote at a meeting of the Managers, for example. An officer may delegate the officer's responsibility and authority. The Company's officers serve at the discretion and direction of the Managers. Even though an officer may have an employment contract providing that officer rights to compensation, the officer may be removed from office at any time by the Managers. A Manager, on the other hand, may be removed only by the Members under specific procedures provided in the Company Agreement. A Manager or officer may resign at any time. Accepting the resignation is not necessary to make it effect. It is effective when delivered to the Company. The remaining Managers may appoint a new Manager to fill a vacancy without by the Members. The Members may appoint a Manager to fill a vacancy that has not been previously filled.

- e. **Distributions.** The Managers (not officers) have the power to declare distributions and establish salaries. Before declaring distributions, however, we recommend the Managers consult with your accounting professional and this firm.
- f. **Duties to Company and Members.** A Manager may not engage in business competition with the Company or take business opportunities from the Company for the Manager's own benefit. In any event, all transactions of this type need to be disclosed to the Members of the Company if the officers, Managers and Members are not the same individuals. A Manager ordinarily may not be compensated for serving as a Manager unless provided by contract, by an appropriate regulation or resolution. The Managers have the power to fix each officer's salary.
- g. **Other Liabilities.** The Managers of an LLC must be concerned with other sources of potential liability. These liabilities include, but are not limited to, the following:
- improper declaration of distributions or repurchase of the Company's membership interest;
 - improper pledging of the Company's membership interest;
 - improper guarantees by or on behalf of the Company;
 - fraudulent entries in the Company's books or reports;
 - failure to properly supervise the Company's operations;
 - failure to pay any franchise tax or file required reports; and
 - failure to pay compensation to employees or properly withhold payroll taxes.

13. Company Indemnification. The Company's Managers and Members will be indemnified by the Company for any of their actions so long as the Managers and Members exercise prudence in handling Company business. The Company will also indemnify any persons who serve as Managers, Members, or officers from and against any actions that arise solely because the Managers, Members, or officers are serving on the Company's behalf, except for claims arising from gross negligence or misconduct.

14. Termination and Dissolution of the Company. Do not terminate or dissolve the Company or any employee benefit or compensation plans before consulting with this firm and the Company's accounting professional. Dissolution is only properly accomplished by following specific guidelines of the Code and in the Company Agreement. The Company may be dissolved pursuant to the Company Agreement, unless the remaining Members consent to continue the Company pursuant to the Company Agreement. As noted above, it is the intent of the Company Agreement that the Company be disregarded as a separate legal entity for federal income tax purposes. Your accounting professional and legal counsel must be consulted before altering any dissolution events specified in the Company Agreement.

15. Pension and Profit-Sharing Plan. Do not terminate or alter any pension or profit-sharing plan or other compensation arrangements without careful review and study by your attorney and the Company's accounting professional.

16. Transferability of Membership Interest. An assignee of a membership interest may become a Member if and to the extent all Members consent. Please notify us and the Company's accounting professional before making any change which may affect the transferability of membership interests.

17. Centralization of Management. The Company's management has been reserved to its Managers. Please notify us and the Company's accounting professional before making any change which may affect the Company's management structure.

We hope that the foregoing proves helpful. Please be aware that this is simply an outline and should not be in lieu of your reading and understanding the documents summarized above, nor consulting with your attorney or the Company's accounting professional. It has been our pleasure to assist you in the Company's organization, and we look forward to a continue relationship with you and the Company in the future. Please do not hesitate to call us if you have any questions about any matters discussed in this letter.

Very truly yours,

[* Attorney's Law Firm *]

[* Attorney's Name *]

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Appendix - Tab 3, James Eggleston: 3.3

A Buyer's Checklist for Due Diligence

1. A priority item on any transaction will be the quality of the soils on the acquisition target. Soil samples and analysis are available from County Extension Services and from state agriculture universities (i.e., Texas A&M).
 - a. If soil samples reveal less than desirable soils, what is the annual cost of fertilizing and otherwise improving the soils?
 - b. What will the cost to the operator be if substandard soils are present, e.g., in lower hay quality or lesser quantities produced? Or in lower foraging ability for cattle?
2. Does the property show any observable evidence of flooding? Can livestock access feed and water sources when water is at high levels?
3. Where are feed storage facilities? Convenient to where must feed be put out for livestock?
4. Are livestock water sources susceptible to running dry during drought periods? Are feed sources at risk during periods of little rain (either on-site or off-site)? What is the local market for hay, in good times? In bad times?
5. What are surrounding uses? Any potential uses that would be considered a nuisance or a trespass? Are such uses protected by the state's Right to Farm Act? (Consider air quality, run-off issues from neighbors, proposed highways, potential for commercial development.)
6. Who is the commercial source for electricity? For internet?
 - a. Who do you contact for cut over to new owner?
 - b. Do any proposed operations of the buyer require uninterruptable sources of power?
 - c. Do back-up generators exist? Should they be considered if rural power sources are interrupted?
 - d. What are costs of utilities provided to the property?
 - e. Is owner required to join utility cooperatives or utility districts?
 - f. Any assessments pending? Any prior assessments being paid off over time?
 - g. Will the buyer work at home and need access to "always-on" internet service? What is the speed of what's available?
7. What is the primary water source?
 - a. If on-site wells, when were they last serviced? How deep do they go? If multiple levels of water, is one level better from human use and one better for livestock? When were the wells drilled and/or pumping facilities built?
 - b. Which underground aquifer do the wells access and what is the long term health of that aquifer?
 - c. Are any filtering systems or storage tanks present? If so, what condition are they in? (Metal storage tanks are always in various stages of rust and deterioration.) Strongly recommend professional inspection of water wells and recommend water samples be taken.
9. What is source of natural gas, propane, etc.? Are their on-site tanks, i.e., propane, gasoline, diesel, what is amount of fuel present? Inspected recently? Any visible spills? Condition of storage tanks?
10. What is source for disposal of sewer items? Septic system?
 - a. Type? Age?
 - b. When last serviced?
 - c. Complies with county standards? Inspection is strongly recommended.
 - d. What is the capacity? Adequate to handle expansion of residence?

11. How accessible are the physical transmission means of electric, phone, cable and internet services? Where do they come onto the property and how easily are they serviced?
12. What are the property taxes for the property? Obtain property tax statements. Are different parts of the property treated differently, i.e., open-space valuations? Is there any evidence of prior owner's application for special valuations? Does the property's current use meet the "use intensity" test that may be applied to determine "open-space valuation?"
13. Is there any roll-back exposure for property taxes due to a proposed change of use? Will local appraisal district require reapplication for open-space or ag-use valuation?
14. What is the financial condition of the agricultural operations occurring on the property?
 - a. Successful cattle operation or only "hobby farming?"
 - b. Profitable recreational leasing for hunting purposes?
 - c. Obtain financial statements.
15. Any existing hunting leases or ongoing recreational uses? Are they in writing? Insurance by users up to date? New certificates issued to buyer?
16. Are profitable operations dependent on government programs, annual grants? Are they transferrable? Has operation been compliant with program requirements?
17. What residential structures are present? What condition are they in? Obtain inspections by qualified inspectors. (Condition of HVAC and other systems, presence of lead paint or asbestos, condition of roof, floors, appliances, etc.) Age of such systems is critical to evaluate.
18. What restrictions or covenants are applicable to the property? Recorded covenants? Reservations or restrictions in prior deeds? Any proposed uses of buyer that may violate any such restrictions?
19. Is the property subject to any liens that may not be released at closing? Any local paving liens? Any mechanic's liens or other agriculture liens due to prior operations or activities on the property?
20. What liens, title issues and recorded instruments apply to the residential structures?
21. What school district(s) does the property reside in?
 - a. Will school bus run to property? Time of day?
 - b. What is "commute" to school for younger children?
22. What is status of roads?
 - a. Who maintains the roads?
 - b. Any pending special assessments for road construction applicable to the property?
 - c. Are roads paved to property boundary?
 - d. What is possible winter condition of roads and accessibility to school and town?
23. Any pending condemnation proceedings regarding pipeline installation? Any awards made but unpaid? Who gets these? Pipelines benefit this property or simple transmitting items across the property?
24. What surveys does the current owner have?
 - a. What is the cost of obtaining updated survey and proper surveyor's certificate?
 - b. Age of survey of seller and possible changes since prepared?
 - c. Examine each and every item noted on the survey.
25. Do any of the following apply to the property? Ingress/egress easements (and where are they located), boundary line agreements, hunting leases, grazing leases, crop/harvesting agreements, oil and gas leases or other instruments, utility easements.

26. Does seller have any prior appraisals? Will buyer obtain a new appraisal? Of land only or also of operations?
27. Any visible or apparent violations of laws or regulations? Has seller received any notices of any violations?
28. Are any permits/licenses required for operating or conducting certain agriculture operations? If the proposed or continued agriculture operation is a commercial operation, what requirements are there to transfer any such permits? (Waste disposal permits and plans are required for certain operations.)
29. Are any applicable government programs, set-aside programs, conservation easements applicable to the program?
30. Is there any oil and gas production ongoing? Where?
 - a. Does it interfere with crop areas?
 - b. Any seismic or drilling activity present?
 - c. What minerals are transferable?
 - d. Who has “executive” rights as to further leasing?
 - e. Who receives bonus payments when new leases are signed?
 - f. Any royalties presently being paid on current production?
 - g. Any shut-in wells or well sites that haven’t been cleaned up and equipment removed?
31. Are any pipelines on property?
 - a. If so, will they interfere with any proposed construction or farming activity?
 - b. Are they located within recorded easements?
 - c. Are there any above-ground valves or compressor equipment?
 - d. Any above-ground pipe that should be buried in easements?
 - e. On the survey is there any evidence of buried pipe that may not be within easement boundaries?
32. Are there any visible roads or other evidence of ingress/egress from adjoining properties?
 - a. Are there any gates in common fences?
 - b. Who has locks?
 - c. Any common driveways?
33. Is there any proposed oil/gas development or salt water disposal facility proposed in area?
 - a. Look several miles around the property.
 - b. What abandoned sites or equipment are located on the property?
 - c. Any evidence of any mining or quarrying?
34. What are conditions of fences?
 - a. Are fences on the property lines?
 - b. Do any fences cross creeks or high-water areas? If water is up, can cattle get out?
 - c. Do any fences catch brush, trash, etc. in high rains?
 - d. If any fences need to be built, will neighbors share in costs and labor?
35. Are there visible landfills, dumpsites, underground tanks or containers?
 - a. Any visible contamination areas?
 - b. What about unusual trees or grass appearance?
 - c. Presence of spills?
 - d. Any possible leaks from “burn pits” or “dumps” into stock tanks or creeks?
36. Obtain a listing of all prior uses as far back as possible. Talk to neighbors and ask their recall about the property.

37. Are there any wetlands or any habitats of endangered animals? Does the property show evidence of deer or other animal feeding? What about presence of feral hogs?
38. Does property show any observable evidence of flooding?
 - a. Can livestock access feed and water sources when water is at high levels?
 - b. Where is feed stored vs. where must it be put out for livestock?
39. Are livestock water sources susceptible to running dry during drought periods? Are feed sources at risk during periods of little rain (either on-site or off-site)? What is local market for hay, in good times? In bad times?
40. What are surrounding uses?
 - a. Any potential uses that would be considered a nuisance or a trespass?
 - b. Are such uses protected by the state's Right to Farm Act? (Consider air quality, run-off issues from neighbors, proposed highways, potential for commercial development.)
41. What is condition of personal property? Cattle working facilities, feed storage facilities, shops, barns, equipment, water tanks and lines? Are such items safe and in good working condition?
42. What is the condition of all tractors and motor vehicles?
 - a. What are costs of replacement?
 - b. When were any of such items last serviced and where?
 - c. Can you look at titles and service records?
43. Are all items of purchased equipment adequate to conduct the operations desired? E.g., do tractors have adequate horsepower? Are the implements adequate for required operations?
44. What is the condition of any livestock being purchased?
 - a. Breeding status of livestock females?
 - b. Fertility testing of bulls?
 - c. Registration status of livestock?
 - d. Vet records available to inspect? Who is vet, call him/her.
 - e. Inspect working pens, cattle facilities, tanks, feeding troughs (are they safe and in good condition?) What are costs of replacement?
45. What is quality of grass?
 - a. Recommend grass evaluation (as mentioned above, county extension service (free).
 - b. If not in good condition, what is time/cost to bring them into good condition?
 - c. Is this a soil problem or a grass problem?
46. How far into environmental matters should you go?
 - a. Phase I survey
 - b. Phase II if necessary
 - c. Governmental notices?
 - d. Seller's records regarding environmental matters?
 - e. Any observable hazardous waste/dumping areas? Any workshops/paint areas?
47. Are there unrepaired damages to any property or equipment?
48. Are there any open insurance claims? Roof damage on residence or barns?
49. What is the current ETJ status?
 - a. How far are you away from city limits? From ETJ limits?
 - b. Which direction is the closest city growing?
 - c. What is condition of surrounding housing? Is the residence on the property to be purchased "overbuilt" for the neighborhood or compatible?

- d. Is there a presence of a number of lower quality properties?
 - e. How do the neighbors keep their properties?
50. Where does fire protection come from?
- a. Is property in an emergency service district (ESD)?
 - b. Property insurance is affected by accessibility to fire protection.
 - c. What is applicable ESD tax rate?
 - d. Get to know local volunteer fire department chief.
 - e. Make sure you have your address listed with them and that they have gate code or combinations for any locked gates.
51. What is availability of property insurance?
- a. Liability insurance?
 - b. Insurance on employees, invitees?
 - c. What about insurance on livestock (at least for those that may get out)?
52. Where does trash pickup come from? (Private contractors? What rates?) Is private burning of trash permitted?
53. Are there any income items to straddle closing? E.g., crops in field, livestock to be sold.
54. Are there any expense items to straddle closing? E.g., fertilizer costs, pending repairs, unpaid labor?
55. Are their crops in the field they seller will want to harvest?
56. Is there adjoining property seller will continue to own and thus want to continue to have access to certain water wells, irrigation sources, equipment? Does buyer want a first right of refusal to buy such property?

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Appendix - Tab 3, James Eggleston: 3.4

Checklists for Farm and Ranch Acquisitions and Purchase Contracts

I like to work off checklists, both to keep track of my daily tasks and for individual client projects or expectations. No checklist is perfect, but by keeping checklists for certain types of transactions, a lawyer can build a good baseline of items and issues to check on each successive deal. Checklists also represent a sort of historical record of what a lawyer has learned from each deal, what to pay attention to, what to ask about, and what to investigate.

The following are offered as thorough, but by no means perfect or exhaustive, checklists for farm and ranch transactions. The first is a checklist for the due diligence phase of a client's acquisition of an agriculture property, the next is the checklist of required items for completing the purchase contract itself, and finally, several checklists are included for the terms of a promissory note, deed of trust and guaranty agreement, to the extent such items are not already covered in the two larger checklists. With many of the items on the lists, they are written in very brief language, almost shorthand, so as to save the length of this paper. Several of the items may require lots more digging than what a one or two line due diligence question may suggest. Also, don't assume a priority in the way items are listed. In fact, some important due diligence items in one acquisition may be of much lesser importance in another transaction.

The Buyer's Due Diligence Checklist

1. A priority item on any transaction will be the quality of the soils on the acquisition target. Soil samples and analysis are available from County Extension Services and from a state agriculture university, i.e., Texas A&M, Oklahoma State University, Iowa State, etc.
 - a. If soil samples reveal less than desirable soils, what is the annual cost of fertilizing and otherwise improving the soils?
 - b. What will the cost to the operator be if substandard soils are present, e.g., in lower hay quality or lesser quantities produced? Or in lower foraging ability for cattle?
2. Does the property show any observable evidence of flooding? Can livestock access feed and water sources when water is at high levels?
3. Where are feed storage facilities? Convenient to where must feed be put out for livestock?
4. Are livestock water sources susceptible to running dry during drought periods? Are feed sources at risk during periods of little rain (either on-site or off-site)? What is the local market for hay, in good times? In bad times?
5. What are surrounding uses? Any potential uses that would be considered a nuisance or a trespass? Are such uses protected by the state's Right to Farm Act? (Consider air quality, run-off issues from neighbors, proposed highways, potential for commercial development.)

6. Who is the commercial source for electricity? For internet?
 - a. Who do you contact for cut over to new owner?
 - b. Do any proposed operations of the buyer require uninterruptable sources of power?
 - c. Do back-up generators exist? Should they be considered if rural power sources are interrupted?
 - d. What are costs of utilities provided to the property?
 - e. Is owner required to join utility cooperatives or utility districts?
 - f. Any assessments pending? Any prior assessments being paid off over time?
 - g. Will the buyer work at home and need access to “always-on” internet service? What is the speed of what’s available?
7. What is the primary water source?
 - a. If on-site wells, when were they last serviced? How deep do they go? If multiple levels of water, is one level better from human use and one better for livestock? When were the wells drilled and/or pumping facilities built?
 - b. Which underground aquifer do the wells access and what is the long term health of that aquifer?
 - c. Are any filtering systems or storage tanks present? If so, what condition are they in? (Metal storage tanks are always in various stages of rust and deterioration.) Strongly recommend professional inspection of water wells and recommend water samples be taken.
9. What is source of natural gas, propane, etc.? Are their on-site tanks, i.e., propane, gasoline, diesel, what is amount of fuel present? Inspected recently? Any visible spills? Condition of storage tanks?
10. What is source for disposal of sewer items? Septic system?
 - a. Type? Age?
 - b. When last serviced?
 - c. Complies with county standards? Inspection is strongly recommended.
 - d. What is the capacity? Adequate to handle expansion of residence?
11. How accessible are the physical transmission means of electric, phone, cable and internet services? Where do they come onto the property and how easily are they serviced?
12. What are the property taxes for the property? Obtain property tax statements. Are different parts of the property treated differently, i.e., open-space valuations? Is there any evidence of prior owner’s application for special valuations? Does the property’s current use meet the “use intensity” test that may be applied to determine “open-space valuation?”
13. Is there any roll-back exposure for property taxes due to a proposed change of use? Will local appraisal district require reapplication for open-space or ag-use valuation?
14. What is the financial condition of the agricultural operations occurring on the property?
 - a. Successful cattle operation or only “hobby farming?”
 - b. Profitable recreational leasing for hunting purposes?
 - c. Obtain financial statements.
15. Any existing hunting leases or ongoing recreational uses? Are they in writing? Insurance by users up to date? New certificates issued to buyer?
16. Are profitable operations dependent on government programs, annual grants? Are they transferrable? Has operation been compliant with program requirements?
17. What residential structures are present? What condition are they in? Obtain inspections by qualified inspectors. (Condition of HVAC and other systems, presence of lead paint or

- asbestos, condition of roof, floors, appliances, etc.) Age of such systems is critical to evaluate.
18. What restrictions or covenants are applicable to the property? Recorded covenants? Reservations or restrictions in prior deeds? Any proposed uses of buyer that may violate any such restrictions?
 19. Is the property subject to any liens that may not be released at closing? Any local paving liens? Any mechanic's liens or other agriculture liens due to prior operations or activities on the property?
 20. What liens, title issues and recorded instruments apply to the residential structures?
 21. What school district(s) does the property reside in?
 - a. Will school bus run to property? Time of day?
 - b. What is "commute" to school for younger children?
 22. What is status of roads?
 - a. Who maintains the roads?
 - b. Any pending special assessments for road construction applicable to the property?
 - c. Are roads paved to property boundary?
 - d. What is possible winter condition of roads and accessibility to school and town?
 23. Any pending condemnation proceedings regarding pipeline installation? Any awards made but unpaid? Who gets these? Pipelines benefit this property or simple transmitting items across the property?
 24. What surveys does the current owner have?
 - a. What is the cost of obtaining updated survey and proper surveyor's certificate?
 - b. Age of survey of seller and possible changes since prepared?
 - c. Examine each and every item noted on the survey.
 25. Do any of the following apply to the property? Ingress/egress easements (and where are they located), boundary line agreements, hunting leases, grazing leases, crop/harvesting agreements, oil and gas leases or other instruments, utility easements.
 26. Does seller have any prior appraisals? Will buyer obtain a new appraisal? Of land only or also of operations?
 27. Any visible or apparent violations of laws or regulations? Has seller received any notices of any violations?
 28. Are any permits/licenses required for operating or conducting certain agriculture operations? If the proposed or continued agriculture operation is a commercial operation, what requirements are there to transfer any such permits? (Waste disposal permits and plans are required for certain operations.)
 29. Are any applicable government programs, set-aside programs, conservation easements applicable to the program?
 30. Is there any oil and gas production ongoing? Where?
 - a. Does it interfere with crop areas?
 - b. Any seismic or drilling activity present?
 - c. What minerals are transferable?
 - d. Who has "executive" rights as to further leasing?
 - e. Who receives bonus payments when new leases are signed?
 - f. Any royalties presently being paid on current production?
 - g. Any shut-in wells or well sites that haven't been cleaned up and equipment removed?

31. Are any pipelines on property?
 - a. If so, will they interfere with any proposed construction or farming activity?
 - b. Are they located within recorded easements?
 - c. Are there any above-ground valves or compressor equipment?
 - d. Any above-ground pipe that should be buried in easements?
 - e. On the survey is there any evidence of buried pipe that may not be within easement boundaries?
32. Are there any visible roads or other evidence of ingress/egress from adjoining properties?
 - a. Are there any gates in common fences?
 - b. Who has locks?
 - c. Any common driveways?
33. Is there any proposed oil/gas development or salt water disposal facility proposed in area?
 - a. Look several miles around the property.
 - b. What abandoned sites or equipment are located on the property?
 - c. Any evidence of any mining or quarrying?
34. What are conditions of fences?
 - a. Are fences on the property lines?
 - b. Do any fences cross creeks or high-water areas? If water is up, can cattle get out?
 - c. Do any fences catch brush, trash, etc. in high rains?
 - d. If any fences need to be built, will neighbors share in costs and labor?
35. Are there visible landfills, dumpsites, underground tanks or containers?
 - a. Any visible contamination areas?
 - b. What about unusual trees or grass appearance?
 - c. Presence of spills?
 - d. Any possible leaks from “burn pits” or “dumps” into stock tanks or creeks?
36. Obtain a listing of all prior uses as far back as possible. Talk to neighbors and ask their recall about the property.
37. Are there any wetlands or any habitats of endangered animals? Does the property show evidence of deer or other animal feeding? What about presence of feral hogs?
38. Does property show any observable evidence of flooding?
 - a. Can livestock access feed and water sources when water is at high levels?
 - b. Where is feed stored vs. where must it be put out for livestock?
39. Are livestock water sources susceptible to running dry during drought periods? Are feed sources at risk during periods of little rain (either on-site or off-site)? What is local market for hay, in good times? In bad times?
40. What are surrounding uses?
 - a. Any potential uses that would be considered a nuisance or a trespass?
 - b. Are such uses protected by the state’s Right to Farm Act? (Consider air quality, run-off issues from neighbors, proposed highways, potential for commercial development.)
41. What is condition of personal property? Cattle working facilities, feed storage facilities, shops, barns, equipment, water tanks and lines? Are such items safe and in good working condition?

42. What is the condition of all tractors and motor vehicles?
 - a. What are costs of replacement?
 - b. When were any of such items last serviced and where?
 - c. Can you look at titles and service records?
43. Are all items of purchased equipment adequate to conduct the operations desired? E.g., do tractors have adequate horsepower? Are the implements adequate for required operations?
44. What is the condition of any livestock being purchased?
 - a. Breeding status of livestock females?
 - b. Fertility testing of bulls?
 - c. Registration status of livestock?
 - d. Vet records available to inspect? Who is vet, call him/her.
 - e. Inspect working pens, cattle facilities, tanks, feeding troughs (are they safe and in good condition?) What are costs of replacement?
45. What is quality of grass?
 - a. Recommend grass evaluation (as mentioned above, county extension service (free).
 - b. If not in good condition, what is time/cost to bring them into good condition?
 - c. Is this a soil problem or a grass problem?
46. How far into environmental matters should you go?
 - a. Phase I survey
 - b. Phase II if necessary
 - c. Governmental notices?
 - d. Seller's records regarding environmental matters?
 - e. Any observable hazardous waste/dumping areas? Any workshops/paint areas?
47. Are there unrepaired damages to any property or equipment?
48. Are there any open insurance claims? Roof damage on residence or barns?
49. What is the current ETJ status?
 - a. How far are you away from city limits? From ETJ limits?
 - b. Which direction is the closest city growing?
 - c. What is condition of surrounding housing? Is the residence on the property to be purchased "overbuilt" for the neighborhood or compatible?
 - d. Is there a presence of a number of lower quality properties?
 - e. How do the neighbors keep their properties?
50. Where does fire protection come from?
 - a. Is property in an emergency service district (ESD)?
 - b. Property insurance is affected by accessibility to fire protection.
 - c. What is applicable ESD tax rate?
 - d. Get to know local volunteer fire department chief.
 - e. Make sure you have your address listed with them and that they have gate code or combinations for any locked gates.
51. What is availability of property insurance?
 - a. Liability insurance?
 - b. Insurance on employees, invitees?
 - c. What about insurance on livestock (at least for those that may get out)?
52. Where does trash pickup come from? (Private contractors? What rates?) Is private burning of trash permitted?
53. Are there any income items to straddle closing? E.g., crops in field, livestock to be sold.

54. Are there any expense items to straddle closing? E.g., fertilizer costs, pending repairs, unpaid labor?
55. Are their crops in the field they seller will want to harvest?
56. Is there adjoining property seller will continue to own and thus want to continue to have access to certain water wells, irrigation sources, equipment? Does buyer want a first right of refusal to buy such property?

Checklists for Completing the Purchase Contract

1. Parties

- a. Who is seller?
- b. Is seller an individual? Or, if an entity, what type of entity?
- c. If an entity, who are officers, shareholders, directors? If trusts or estates, who are authorized fiduciary parties?
- d. What is address of seller?
- e. Who is buyer?
- f. Is buyer an individual? Or, if an entity, what type of entity?
- g. What is address of buyer?
- h. Will notice to seller and buyer be permitted by email?
- i. What is seller's broker's name and address? (commission share?)
- j. What is buyer's broker's name and address? (commission share?)
- k. What title company will be used?
- l. Who is title company contact person? What is his/her contact information, address, phone, fax, e-mail?
- m. Who is surveyor? What is his/her contact information, address, phone, fax, e-mail?
- n. What is estimated cost of updating existing survey?
- o. Did this surveyor prepare the existing survey?
- p. What is the date of the survey? Is it current?
- q. What is quality of survey certification?
- r. Who is seller's lawyer? Will an attorney be copied on all correspondence?
- s. What is his/her contact information, address, phone, fax, e-mail?
- t. Who is buyer's lawyer? Will an attorney be copied on all correspondence?
- u. What is his/her contact information, address, phone, fax, e-mail?
- v. Will parties accept notices by email?
- w. If transaction involves a 1031 like-kind exchange, who will serve as intermediary?
- x. Has exchange property been identified?
- y. Is contract assignable by buyer? If assignment is conditioned, what are conditions?
- z. Assignment limited to a related or controlled party?
- aa. Does assignment require seller's consent? Can seller's condition be conditioned to "not unreasonably withheld or delayed?"
- bb. Applicable law? (Presumably the state where the property is located) Required venue? (County of property?)

2. Terms Applicable to Contract Offer and Effectiveness

- a. What is expiration date for the contract offer if not accepted?
- b. Will earnest money accompany contract offer or will it be delivered only after contract is fully signed? How much later? One day up to three days?
- c. What is the “effective date” of the contract? Is it the date that the last party signs, or is it a date certain, or is it when the title company receipts the contract and earnest money?
- d. Will a nominal amount of earnest money (e.g., \$100.00) be identified to support a “free-look” right of termination?

3. Property

- a. What property is to be purchased?
- b. Is there an existing survey available for real property?
- c. Is there an existing legal description available?
- d. Is the deed into seller available? Other closing documents of seller?
- e. What improvements will buyer purchase? Are they included in purchase price?
- f. What fixtures go with real property?
- g. Are there residential structures that go with real property? Mobile homes?
- h. Is a state mandated “Residential Disclosure” required?
- i. What fences, barns, cattle handling and feeding equipment go with real property?
- j. Are there hunting or recreational fixtures, feeders, stands included?
- k. Are their written leases for hunting or other recreational uses? Insurance certificates?
- l. Are wells, irrigation structures and equipment included? Water tanks?
- m. What personal property is included?
- n. Tractors, trailers, other vehicles. Get titles.
- o. Is seller conveying or retaining crops in field?
- p. Is seller conveying or retaining crops in storage?
- q. Is seller conveying any leases on adjoining properties?
- r. Any portion of water rights reserved?
- s. Are any future royalties or revenues being retained from future wind energy development projects?
- t. What is excluded from the transaction? What will seller take with him or her as to personal property?
- u. Are there oil, gas and other minerals available to transfer? If not, who owns the minerals? Even if conveyed, will there be any restrictions on such conveyance?
- v. Is seller reserving minerals or “royalty interests?”
- w. If there is no reservation, then presumption is that seller conveys all minerals and mineral rights.
- x. If conveyed, what, if anything, is specifically reserved? What executive rights are reserved and what are transferred?
- y. “Royalty interest” only includes right to receive royalty payments and not right to develop the property, right to lease the property, right to receive delay rentals, or right to receive bonus payments.

- z. If seller wants to retain all of the mineral estate, then seller should retain “all of seller’s interest in and to the oil, gas and mineral estate,” perhaps even describing the above additional attributes.
- aa. If reserving only a portion of minerals or royalty interest, how much? All that seller owns, all that is available, or only a portion of what it owns?
- bb. Consider “Duhig” problem; See *Duhig v. Peavy-Moore Lumber Co., Inc.*, 135 Tex. 503, 144 S.W.2d 878 (1040). Duhig gives a preference to the “granted interest” rather than the “reserved interest.” Thus, a grantor who makes a mistake in describing what mineral interest he or she reserved in the deed or if they forget to account for a previously reserved interest, may end up with no mineral interests if the court finds that is necessary to make sure the grantee gets all of the mineral rights they were intended to get.
- cc. If some or all minerals reserved, are there restrictions on rights associated with minerals? E.g., access for development and production, drill sites, no surface rights at all?
- dd. When will occupancy of the property be delivered?
- ee. If not at closing, will seller lease the property for a period following closing?
- ff. If occupancy by buyer will be before closing, will buyer execute temporary lease?
- gg. Terms of lease: monthly rental, insurance requirement, personal guarantee of lease?
- hh. Provide for delivery of existing leases to which seller is a party to buyer.
- ii. Any repairs or changes to the property or improvements required to be completed by closing?
- jj. Assignability of any other leases, grazing leases, ground leases for crops, etc.

4. Economic Terms

- a. What is purchase price?
- b. How much of the purchase price is to be paid in cash?
- c. How much of the purchase price is to be financed?
- d. Purchase price allocable to fixtures? Personal property? Any reserved items?
- e. Is financing to be provided by seller? (An “owner-financed” transaction?)
- f. Is financing to be provided by third party?
- g. If so, what is third party’s name, contact information, contact person?
- h. Will any debt of seller be assumed by buyer? What are the terms? Will seller be released from such assumed debt?
- i. Is purchase transaction subject to sale of buyer’s property?
- j. Will purchase price be subject to adjustment if updated survey reveals a variance in acres?
- k. If variance is more than __x__% (e.g., 10%), will either party be able to terminate the contract?
- l. What is price per acre to be used for the adjustment amount?
- m. Is purchase price “fixed” regardless of number of acres shown on updated survey?
- n. If financed by a third party, is approval of financing a condition of closing? Or is actual closing and funding of the loan the real condition?
- o. What terms of third party financing must be offered to buyer in order to close?
- p. What is minimum required appraised value of property?

- q. What is the required interest rate on any financing? (fixed or variable at some point?)
- r. What is the required term of any financing? (how long is the minimum length of note as required by buyer?)
- s. What is frequency of payments on note? (monthly, quarterly, annual?)
- t. Will the financing be personally guaranteed by any individuals?
- u. Are there any limitations on any personal guarantees? Percentage of the note?
- v. If the financing is not personally guaranteed, are there any conditions upon which any individual may be personally liable? (e.g., any “carve-outs” from the non-recourse provisions, such as for property taxes, environmental costs, costs arising due to violation of covenants in deed of trust?)
- w. Is loan assumable? With or without consent of holder (e.g., seller)?
- x. Will lender require escrow of property tax liabilities and insurance payments?
- y. Will lender require mortgagee’s title insurance?
- z. What events will give the financing party the option to call the note?
- aa. Will the note be due on sale of the property by buyer?
- bb. Will the note be callable if buyer allows or places additional liens on property?
- cc. Are any brokerage commissions payable? To whom? How much? Payable only upon closing? Separate written agreement?

5. Earnest Money

- a. What is the required earnest money?
- b. What form must all earnest money take? (i.e., cash, cashier’s check, personal check)
- c. What is deadline for delivering earnest money to title company?
- d. Will buyer require earnest money be deposited in an interest bearing account?
- e. Will there be any requirement for additional earnest money?
- f. What condition or event must occur for additional earnest money to be required?
- g. Will additional earnest money be required at the end of the inspection period? Of part way through inspection period?
- h. Will additional earnest money be required if the buyer is granted an option to extend the inspection period?
- i. Will additional earnest money be required if the buyer is granted an option to extend the closing date?
- j. What is the “option fee” amount? e.g., \$100.00? Kept by seller no matter what in order for buyer to have an inspection period.
- k. Is any portion of the earnest money “non-refundable?”
- l. If no portion of the earnest money is “non-refundable” when the contract is signed, will any portion become non-refundable at a later time? (other than at the end of the inspection period?)

6. Due Diligence, Inspection Terms and Deliverables by Seller

- a. Will buyer be allowed a “free-look” period, i.e., a period of inspection and option during such period to terminate the contract in its sole discretion?
- b. Is the inspection period beginning on a date certain? (e.g., the date of the contract or the date on which a certain list of deliverables has been delivered)

- c. If buyer has a “free-look” period, will buyer receive all of its earnest money back if it chooses to terminate the contract (other than a nominal amount as an “option fee”)?
- d. Will buyer be required to provide an insurance certificate to seller prior to entry onto the property? (if so, will seller be named as additional insured?)
- e. What records of seller must be delivered to buyer for it to conduct its due diligence?
- f. What is deadline for delivery of such items?
- g. Any governmental programs apply to property that will be assumed by buyer?
- h. Any leases on the property that will remain after closing? Are they assignable or do such lessees have a right of termination?
- i. See required statutory notices under applicable state law.
- j. If a property condition disclosure is required by state’s property code (i.e., Texas Property Code §5.08 (covering a transaction involving the sale of a single family residence), but not involving the sale of a newly constructed residence, previously unoccupied residence or a transaction in which the value of the dwelling is less than 5% of the value of the real property) and it is not delivered, buyer may terminate contract within 7 days of receiving the notice.

7. Representation and Warranties

- a. Representations and warranties (list is greatly abbreviated):
 - (1) Formation and status of seller
 - (2) Authority of seller to enter into contract and close the deal
 - (3) Seller is fee simple title holder
 - (4) All due diligence items delivered are correct
 - (5) No other contract obligations
 - (6) No litigation pending or threatened
 - (7) Seller not a foreign person
 - (8) Seller not insolvent or bankrupt
 - (9) No violation of laws
 - (10) No condemnation, zoning or land use proceedings
 - (11) No hazardous materials, no spills, no violation of laws
 - (12) No flooding, dumpsites, landfills, wetlands, threatened species
 - (13) Ad valorem taxes paid
 - (14) No government programs
 - (15) No other obligations to sell or lease
 - (16) No liens on property as of closing
 - (17) No underground tanks, no use on property involving hazardous materials
 - (18) Also an indemnification clause?
 - (19) Disclaimer of other reps and warranties
- b. How long does seller remain liable for representations and warranties?
- c. Will conveyance be “as is, where is?”

8. Preconditions to Closing

- a. Does buyer need financing to close the purchase?
- b. Must the required financing meet certain terms? Rate? Term? Recourse? Due on sale?

- c. How long will buyer need (or be allowed) to obtain financing approval?
- d. Is any financial information or operating information required from seller as part of buyer's loan application?
- e. Does buyer need a minimum appraised value to close? How long will appraiser take to furnish its appraisal report?
- f. Must buyer sell another property?
- g. Must irrigation equipment, well systems or other personal property be operational?
- h. Must seller solve any access issues?
- i. Are there any burial sites or cemeteries on the property that need to be documented or dedicated?

9. Default and Remedies

- a. Will contract provide for any liquidated damages (over and above option fee)?
- b. Any to buyer? (i.e., any amount required from seller if it fails to close, in addition to buyer's getting its earnest money back; to cover buyer's expenses incurred believing a closing would occur?)
- c. Any to seller? (i.e., any amount required from buyer if it fails to close, in addition to earnest money; to cover seller's expenses assisting buyer?)
- d. If seller defaults, what are buyer's remedies? Return of earnest money and/or specific performance? Seller will want to limit buyer's remedies to one or the other, not both, as buyer's sole remedies.)
- e. Avoid exposure for "other damages." (If seller wants to avoid exposure for damages and only allow buyer the above two remedies, then delete "damages" and specify that the above two are buyer's "sole and exclusive remedies.")
- f. If buyer defaults, what are seller's remedies? Seller retains earnest money and/or right to specific performance and/or damages (Buyer will want to negate one or more of these; probably only permit seller to retain earnest money as seller's sole and exclusive remedy).
- g. Parties should be aware of title company's requirements for a release of earnest money in event of demand by one or the other following a default situation. Will require consents? Consequences for not granting consent?
- h. Does contract include mediation or arbitration provisions? Are either mandatory?
- i. Does contract permit a "winning party" to recover attorney's fees in a dispute? Some standard forms also allow brokers, title companies and others to recover attorney's fees even though they are not signatory parties to the contract?

10. Survey

- a. Is an existing survey available?
- b. Will any survey updates be required by buyer?
- c. Will title company require an updated survey?
- d. If an updated survey will be obtained, which surveyor will provide it?
- e. Who will pay for new survey or updates? What if update is solely for buyer's particular requests and not for title purposes?
- f. If paid by buyer, will seller reimburse buyer to closing?

- g. If buyer pays for the survey, will seller receive a copy if transaction does not close?
- h. If seller pays for survey or updates, will buyer pay for any portion? Cost sharing?
- i. Will earnest money be released at any time to cover seller's cost of survey or updates?
- j. Is cost of survey allocable to one party or another to be limited to an amount certain?
- k. What type of survey required?
- l. Is there a specific category of survey required?
- m. If no specific category required, is a survey checklist to be delivered to surveyor?
- n. If environmental inspections are required, who pays? Will that party be reimbursed if contract terminated during inspection period? Any reimbursements to either party when transaction closes?

11. Title Review

- a. When is title commitment to be delivered to buyer?
- b. When is survey to be delivered to buyer?
- c. How long after receipt of the foregoing will buyer have to review the title commitment, exception documents and survey and provide objections?
- d. How long will seller have to respond to buyer's title objections?
- e. How long will buyer have to accept status of title commitment and survey after seller has completed its curative actions, if any?
- f. What if seller refused to cure objections? May buyer cancel? Or will buyer close anyway? Can price adjustment be negotiated if title defect is material?

12. Closing

- a. What is closing date? Time of day?
- b. Where will closing be held?
- c. May closing be held by delivery of documents by parties or attorneys?
- d. Where will closing documents be sent? Via email to title company? Wiring instructions? Original signatures required?
- e. Are there any options by either party to extend the closing date? What are they? How much will an extension cost?
- f. What are allocations of closing costs?

13. Brokers/Agents

- a. Seller agent? Address? Amount or percentage?
- b. Buyer's agent? Address? Amount or percentage?
- c. If only one, are they an intermediary? Requisite notices given?

Owner Financing the Transaction

General Parameters/Issues:

- i. Recreational properties/ranches common terms:
 - (a) 15% to 20% down is common, sometimes less.
 - (b) 10 year terms – 30 year amortization, but shorter balloon maturity – forces buyer to eventually refinance.
 - (c) 5% to 7% interest. (Interest slightly higher since seller is not in business of financing and is thus taking on more risk than a traditional lender).
- ii. Why the large volume of owner financed transaction:
 - (a) Rates higher than bank pays on CD's.
 - (b) Security of collateral (seller who becomes a noteholder is familiar with collateral; they owned it and if they foreclose, can operate again).
 - (c) Get higher price for sale of property if seller offers financing.
 - (d) Buyer pays more to avoid tying up personal credit.
- iii. Downside
 - (a) Seller may stay too involved, too many visits to property.
 - (b) Seller may claim defaults that are just matters of personal preference.
 - (c) Seller may assume a practice of picking up checks.

1. Promissory Note - Unique Terms

- a. Trusts and estate planning entities for elderly sellers (who will hold notes, perhaps after death of sellers).
- b. Amount of payments often dictated by seller's monthly cash needs.
- c. Place where payments are to be made.
- d. Grace periods for monetary defaults?
- e. Non-monetary defaults and grace periods for same?

2. Deed of Trust - Unique Terms

- a. Grace periods – Monetary defaults? Non-monetary defaults? Different periods for each. Put such periods in note and deed of trust, but make sure they are consistent.
- b. Identification (subordination) of other liens – what do they say?
- c. Property description – important to accurately, plainly and completely described collateral for obligation.
- d. Obligation of obligor to maintain property condition/insurance. Can noteholder obtain insurance if obligor does not?
- e. Escrows? For property taxes? For insurance? For required improvements?
- f. Additional collateral? Personal property? Cash collateral? Other property?
- g. Partial releases? When granted? In what order?
- h. Assumability of seller financing?
- i. Accelerating events? Noteholder's death? Obligor's death? Guarantor's death?

3. Guaranty Agreement – Unique Terms

- a. Husband and wife?
- b. Joint and several?
- c. Primary liability – may lender proceed against the guarantors and ignore collateral or the primary named borrower?
- d. Unconditional and irrevocable? Does it survive death of guarantor and applicable to his or her estate?
- e. Full or partial guaranty – a percentage of the entire note or only a portion?
- f. Condition extension of loan upon execution of guaranty or is guaranty automatically extended?
- g. Broad waiver of rights – Notice of default? Notice of acceleration?
- h. Delivery of financial statements – required? Who approves?

Perhaps by starting with one or more of these checklists, the lawyer can build an always useful, but always changing checklist and run less chance of overlooking a major due diligence item or contract provision. Also, having the checklist at hand avoid numerous and costly phone calls to the client.

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Appendix - Tab 3, James Eggleston: 3.5

Letters of Intent – Practice Guide

A letter of intent (LOI) is commonly used to summarize the general terms of a purchase transaction. The parties may want to avoid the cost of preparing a formal contract and associated documents if there is not yet an agreement as to key terms of the transaction.

Deal points or questions commonly addresses in an LOI include:

1. Who are Buyer and Seller?
2. What is the subject matter of transaction?
3. What else is included in the purchase, i.e., personal property, livestock, operations, intangible property?
4. When will the transaction close (i.e., the closing date)?
5. What is the purchase price?
6. How will the purchase price be paid?
 - a. How much cash is required?
 - b. Will the remainder be paid by a note to Seller or a third party (or a combination thereof)?
7. What are Buyer's required terms for financing?
 - a. Is acceptable financing a condition to closing?
 - b. What rates, amortization period, payment terms are needed?
 - c. What personal guarantee requirements will Buyer accept?
8. What will Buyer require as to Seller's warranties and representations? Or will Buyer accept an "AS IS, WHERE IS" transaction or some combination of these two?
9. Will Buyer be required to accept any leases on the property that last past the closing date?
10. What equipment will Buyer acquire?
11. What rights will Buyer acquire as to oil, gas and other mineral interests?
 - a. Are any oil and gas leases currently in effect?
 - b. What rights to the oil, gas, and mineral interests will Seller reserve?
 - c. What rights are to be reserved to Seller?
 - d. What rights/interests have already been reserved in past transactions?
 - e. If Buyer gets any rights, especially "executive rights" (i.e., the right to sign leases and generally control the surface) and/or rights to develop and explore the property, do parties want to designate drill sites or otherwise restrict those rights?
12. Will the purchase price be adjusted if acreage varies upon receipt of an updated survey?
13. How much earnest money will Seller require?
14. Will Seller require any additional earnest money for any reason?
15. What title company will be used? What deadlines will be associated with title matters?
16. Will the final contract be assignable by Buyer?
17. Who will deliver the first survey? Who will pay for the first survey or for updates?
18. What personal property belonging to Seller will be excluded from the transaction?
19. Will Seller occupy the property after the closing or will Buyer occupy the property before closing?
20. How will the parties handle crops in the field, crops or hay in storage? Will proceeds from sale of any of these items be shared?

21. Will Buyer have a due diligence period for reviewing property and its feasibility for Buyer's use? How long will that period last?
22. What books and records of Seller will be delivered to Buyer for its review?
23. Are any approvals or estoppel letters required for Seller to deliver to Buyer?
24. Where will the transaction close?
25. How will transaction costs be allocated?
26. What brokerage commissions are to be paid and to whom?
27. Are the terms of this transaction confidential?

LOI's are generally non-binding: Letters of intent are generally not binding, but they provide a basis for moral obligations among the parties to "hold" the deal long enough for a formal contract to be prepared and signed. An LOI may also contain the agreements of the parties concerning confidentiality and non-disclosure of confidential information the parties may share between them, as well as the salient deal points.

Formatting of LOI's: LOI's don't follow any sort of established format. They may simply be little more than a "term sheet" on which the terms are listed in a very brief format.

On the other hand, an LOI also may be a lengthy recital of the deal points over which negotiations may take weeks or months to complete. It is a good format through which to isolate negotiations on important points, setting the "boiler plate" and more mundane covenants aside to not distract the parties while working on the essence of the transaction.

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Appendix - Tab 3, James Eggleston: 3.5.1

Letter of Intent Sample Form

[*Letterhead*]

[* _____ *], 201[* __ *]

[*Name of individual(s)*]

[*Street address*]

[*City, State, Zip*]

Re: Proposed transaction involving the purchase of all of the real property (the "Ranch Property") associated with the ranch named "[* _____ *]" (the "Ranch") and all improvements, fixtures, equipment, livestock, operations, and related tangible and intangible personal property (the "Ranch Assets").

Dear Mr. and Mrs. [* _____ *]:

Please accept this letter to evidence our desire to purchase the Ranch Property and the Ranch Assets on the terms set forth herein below from the parties to whom this letter is addressed (collectively, whether one or more, the "Seller"). This letter agreement (the "Letter") is prepared to document the proposal for the purchase of the Ranch Property and the Ranch Assets by the undersigned (collectively, whether one or more, the "Buyer").

Good Faith Expression of Parties and Nonbinding Nature

Upon its execution by Seller and Buyer, this Letter will represent a good faith expression of the parties hereto regarding their desire and intention to consummate the purchase transaction described herein (the "Transaction").

Until such time as the parties execute a definitive purchase and sale agreement (the "PSA"), the parties shall not be bound to consummate the Transaction, except that the obligation to proceed in good faith and certain terms and provisions hereof shall remain binding on the parties after any termination of this Letter.

The Transaction

Effective Date: The effective date of the Transaction shall be [* _____ *], 201[* __ *], (herein the "Closing Date"), subject to satisfaction of the "Purchase Conditions" (defined hereinbelow), at which time the Transaction shall be consummated pursuant to the PSA (the "Closing").

Real Property Transaction: At the Closing, Buyer will acquire the Ranch Property from Seller for the sum of \$[* _____ *].

Personal Property Transaction: At the Closing, Buyer will acquire the Ranch Assets from Seller for the sum of \$[* _____ *].

At the Closing, the following contracts, documents, and agreements shall be assigned and transferred to Buyer:

1. The original real property leases whereby Seller also lease any real property (other than the Ranch Property) on which operations of the Ranch are also conducted in addition to the Ranch Property.
2. A Bill of Sale conveying the Ranch Assets to Buyer free and clear of all liens and containing warranties of title acceptable to Buyer.
3. Warranties and Representations: Seller will deliver to Buyer at the Closing a statement of Representations and Warranties (herein so called) prepared by legal counsel for Seller containing representations and warranties concerning the good standing and authority of Seller, the financial condition of the Ranch Property and operations, free and clear title to the Assets. Except as expressly stated therein, Buyer shall purchase the Assets "AS IS and WHERE IS." See list of warranties and representations on Exhibit "A" attached hereto and incorporated herein by reference.
4. Existing real property leases, personal property leases, governmental programs: See list of programs on Exhibit "B" attached hereto and incorporated herein by reference.
5. Oil and gas leases: See list of oil, gas and mineral leases on the Ranch Property listed on Exhibit "C" attached hereto and incorporated herein by reference.

Purchase Price for Ranch Property: \$[* _____ *]

Purchase Price for Ranch Assets: \$[* _____ *]

How Paid: 100% in cash
OR [*Third party financing*]

[*20%*] in cash
[*80%*] by third party financing (approval for which shall be obtained prior to the expiration of the Inspection Period)
Minimum appraised value required: [* _____ *]
Maximum interest rate: [* _____ *]
Maximum monthly payment: [* _____ *]
Minimum term of note: [* _____ *]

OR [*Seller financing*]

[*20%*] in cash
[*80%*] by seller financing on the following terms:
Interest rate: [* _____ *]
Term: [* _____ *]
Monthly installments: [* _____ *]
Personal guarantees: [* _____ *]
Secured by: First lien deed of trust on Ranch Property and UCC-1 (superior lien) on all Ranch Assets
Due-on-sale or assumable: [* _____ *]

Adjustments to Purchase Price: The Purchase Price assumes that the Ranch Property contains [* _____ *] acres within its boundaries (the “Assumed Acreage”). The Purchase Price will be adjusted upon receipt of final survey showing the actual number of acres within the boundaries of the Ranch Property (the “Actual Acreage”). If Actual Acreage shown on the Survey is less than [* _____ *] acres, the Purchase Price shall be reduced by an amount equal to \$[* _____ *] per acre that the Actual Acreage is less than the Assumed Acreage.

Earnest Money: \$[* _____ *], due within one (1) business day of the full execution of the PSA (hereinafter the “PSA Date”).

Additional Earnest Money: \$[* _____ *], to be delivered in the following circumstances:

[*One-time option of Buyer to extend the expiration of the Inspection Period by up to 30 days*]

[*One-time option of Buyer to extend the Closing Date by up to 30 days*]

Option Fee: \$100.00 shall be nonrefundable and payable to Seller as consideration for Buyer's right, in its sole discretion, to terminate the PSA during the Inspection Period.

Title Company: [* _____ Title Company _____, Attn: Contact Person*]
[* _____ *]
[* _____ *]
Phone: [* _____ *] Fax: [* _____ *]

Assignability: The PSA shall [*not*] be assignable by Buyer absent [*without*] the prior written consent of Seller.

Survey: Seller shall immediately deliver any existing survey of the Ranch Property presently in its possession. Any updates or lender-required changes to such survey shall be at the expense of Buyer. If Seller does not have a survey of the Ranch Property, it shall obtain a survey and deliver it to Buyer within 30 days of the PSA Date.

Title Commitment/Review: The Title Company shall deliver the title commitment (and all exception documents referenced therein to Buyer within 30 days of the PSA Date. Buyer shall thereafter have 14 days to review and object to any title matters. Seller shall thereafter have 5 days to cure any of Buyer's objections. Buyer shall then either accept the status of title or may terminate the PSA.

Personal Property Excluded: None of the Ranch Assets (i.e., personal property on the Ranch Property) will be removed prior to the Closing and all Ranch Assets as of the date of this Letter are included in the Transaction, except the items of personal property listed on Exhibit "D" attached hereto and incorporated herein by reference.

Oil, Gas and Minerals: Seller will convey all rights to all oil, gas, and minerals that it owns. [*Alternative clauses*]

[*Seller will retain at the Closing one-half of all of the rights to all oil, gas and minerals that it owns, except that all executive rights will be conveyed to Buyer.]

[*Seller shall retain at the Closing all oil, gas, and other minerals, and rights to reasonable ingress and egress to explore, develop and remove such oil, gas, and other minerals, except that drilling activities shall only be conducted on the sites designated on Exhibit "E" attached hereto and incorporated herein by reference.*]

[*Seller shall retain the right to receive one-half (1/2) of all royalty interests that it currently owns, but shall not bear any costs or expenses of exploration, development, or production, e.g., a one-half (1/2) non-participating royalty.*]

Occupancy:

Buyer will be entitled to occupancy immediately after the Closing.

[*Seller will enter into a lease agreement as of the Closing Date providing for a lease from Buyer of the Ranch Property for a period of six (6) months following the Closing on the following terms and conditions:

- a. Amount of monthly installments: _____
- b. Insurance required: _____
- c. Lessee: _____
- d. Personal guarantee of lease required: _____*]

Treatment of Crops in Field:

Seller shall have the right to fertilize and harvest all hay, crops, vegetables, and similar growing commodities now in the field on the Ranch Property between the date of this Letter and the date which is sixty (60) days following the Closing Date.

Treatment of Crops in Storage:

Seller shall have the right to use and remove all hay, crops, feedstuffs, seed, and other similar commodities from all storage areas on the Ranch Property between the date of this Letter and the date which is sixty (60) days following the Closing Date.

Inspection Period:

From the date of the full execution of this Letter until the expiration of sixty (60) days from the execution of the PSA, Buyer shall have the right to enter on to the Ranch Property to conduct its due diligence and analysis of the Ranch Property and the Ranch Assets, and all operations of the Ranch to determine if the Transaction meets its business objectives and financial parameters.

During the Inspection Period, Buyer, when accompanied by Seller, shall have also the right to interview the Seller's Ranch manager, accounting and bookkeeping personnel, and such other individuals as Buyer may reasonably determine are necessary to evaluate the feasibility of the Transaction.

Buyer shall have the sole and absolute discretion to terminate the Transaction by delivering written notice to the addressee(s) of this Letter on or before [* _____ *] that the proposed Transaction (or the due diligence information collected by it) is unsatisfactory for its purposes or does not meet its investment requirements. Upon the delivery of such notice, Buyer shall have no further rights or responsibilities hereunder, except as such agreements and covenants are expressly made to last beyond the termination of this Letter.

Due Diligence and
Purchase Conditions:

Buyer's consummation of the Transaction is conditioned upon the following (the "Purchase Conditions"), all of which shall be reviewed and approved, or waived, by Buyer prior to the end of the Due Diligence Period:

1. Buyer's review and approval of all books and records, financial statements, operating statements and reports, and related documents and instruments (the "Materials") in the possession of Seller concerning the Ranch Property, the Ranch Assets and the operations of the Ranch.
2. Buyer's review and approval of any legal documents or records of Seller to make sure there are no pending actions, claims, lawsuits or other proceedings which would affect or impair the operations of the Ranch Property or the Ranch operations.
3. Buyer's review of all legal proceedings concerning the Ranch Property, any Ranch Assets or the Ranch operations concerning employee, labor, government programs, environmental matters, health and safety, zoning, property tax matters, eminent domain, zoning, or related issues (collectively, the "Legal Documents").

4. Buyer's review and approval of all other due diligence materials that it shall deem necessary, all of which it shall create or gather at its own expense with the reasonable and good faith cooperation of Seller.
5. Buyer's obtaining financing in an amount and on such terms as it shall, in its sole discretion, deem to be acceptable for its purposes in acquiring the Assets.

Representations and
Warranties:

Seller shall represent and warrant in the PSA and as of the Closing as follows:

1. Seller shall have full power and authority to consummate the Transaction as provided in the PSA.
2. Seller shall have obtained all necessary approvals to authorize them [*or its executive officers*] to consummate the Transaction and execute all documents required pursuant hereto [*(including estoppel and acknowledgement letters from the lessees, lienholders and other parties holding contract rights that will last beyond the Closing.)].
3. To the best of Seller's knowledge, there is no litigation pending or threatened against Seller, the Ranch Property, the Ranch Assets or any operations of the Ranch that might affect (i) their ability continue to profitably operate the business of the Ranch or (ii) their ability to perform their obligations under this Letter and the PSA.
4. To the best of Seller's knowledge, they have not received notice of violation of any law, ordinance, regulation, or requirements affecting any of the Ranch Property, the Ranch Assets or the operations of the Ranch.

Place of Closing and Funding:

The consummation of the Transaction shall take place in the [* _____ *], [Texas] offices of [*Title Company*] or such other location as shall be mutually agreed upon by the parties hereto.

The amount required of Buyer to consummate the Transaction shall be funded by wire transfer to the

designated bank of Seller within twenty-four (24) hours of the full execution of all applicable closing documents.

Costs and Fees:

Seller shall pay for the title policy, one-half of escrow fees, preparation and recoding of deed, any release of lien required of it and other matters normally paid by sellers in the county where the Ranch Property is located.

Buyer shall pay one-half of the escrow fees, its financing costs and recording expenses of security documents, updates to the survey, and other matters normally paid by buyers in the county where the Ranch Property is located.

Except as noted above, each party to this Letter shall bear all of its own costs incurred in connection with the Transaction.

Non-Refundable Deposit against Seller's Costs:

Buyer shall deposit the sum of \$[* _____ *] upon the full execution of this Letter with Seller's legal counsel to apply to the costs and expenses of Seller incurred in furtherance of this the Transaction. This amount shall be deemed to be part of the earnest money specified in the PSA, but shall be nonrefundable unless Seller shall default under the PSA.

Brokerage Commissions:

Payable to:

[* _____ *]

[* _____ *]

Other Terms and Conditions:

Prior to the commencement of any litigation by either party to this Letter concerning this Letter or the transactions described herein, the parties shall participate in non-binding mediation in [* _____ *] County, [Texas] utilizing a local member of the State Bar of [Texas] that is mutually acceptable to both parties.

Confidentiality:

The terms of this Letter and the Transaction shall remain confidential and any dissemination of the consummation of the Transaction shall only occur after the Closing in a format mutually acceptable to Seller and Buyer.

Mr. and Mrs. [* _____ *]
[*or Entity name*]
[* _____ *], 201[* ____ *]
Page 9

The terms and conditions of any confidentiality and non-disclosure agreement which the Buyer has already signed prior to the date of this Letter shall continue to be in full force and effect during the pendency of the Transaction and thereafter in accordance with the terms of such agreements.

Should the foregoing reflect your understanding and agreement to the Transaction, please sign this Letter in the space provided below. Upon execution of this Letter, we will begin the due diligence and cause the preparation of the necessary documents for this transaction.

This offer as contained in this Letter shall expire upon the expiration of five (5) business days from the date hereof (the "LOI Expiration Date") unless it is fully executed and returned to the undersigned prior to 5 p.m. on the LOI Expiration Date. Buyer's legal counsel shall prepare the PSA containing the above terms and conditions in addition to other provisions that it shall deem reasonably necessary for Buyer's purposes which are not inconsistent with this Letter.

Sincerely,

Buyer: [*Company name, if applicable*]

Accepted this [* ____ *] day of [* _____ *], 201[* ____ *]

Seller: [*Company name, if applicable*]

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

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Mr. and Mrs. [_____ *]
[*or Entity name*]
[* _____ *], 201[* _____ *]
Page 10*

Exhibit "A"

Representations and Warranties

Mr. and Mrs. [_____ *]*

*[*or Entity name*]*

[_____ *], 201[* ____ *]*

Page 11

Exhibit "B"

Listing of Real Property Leases, Personal Property Leases, Governmental Programs

Mr. and Mrs. [_____ *]
[*or Entity name*]
[* _____ *], 201[* _____ *]
Page 12*

Exhibit "C"

Oil and Gas Leases

Mr. and Mrs. [_____ *]
[*or Entity name*]
[* _____ *], 201[* _____ *]
Page 13*

Exhibit "D"

Personal Property excluded from listing of Ranch Assets

Mr. and Mrs. [_____ *]
[*or Entity name*]
[* _____ *], 201[* _____ *]
Page 14*

Exhibit “E”

Designation of Permitted Drill Sites

Appendix - Tab 3, James Eggleston: 3.6

Sample List of Seller's Representations and Warranties

Practice Guide:

When it comes to the standard representations and warranties, Purchasers will ask for them (or more) and Sellers will either resist and/or negotiate. Sellers will, of course, want to avoid as many representations and warranties as possible or, if many are given, limit the duty Sellers have to conduct any inquiry on their own prior to making a certain presentation or warranty.

Practice Guide Notes regarding Seller's Knowledge

Seller's Knowledge. As used in this Contract, the terms, “knowledge of Seller,” “Seller's knowledge,” “to the best of Seller's knowledge,” and similar terms shall mean the current, actual knowledge of Seller and shall not imply that Seller or its representatives have conducted any inquiry or investigation with respect to any representation or warranty contained in this Agreement.

Alternative Clause: A useful phrase that may be added to the foregoing: The phrase “Seller has received no notice” shall mean that Seller has no actual knowledge of receiving the notice or information which the specific representation or warranty concerns. Seller has made no inquiry of its books or records or those of any of its representatives to determine if the subject notice or information has actually been received.

Drafting tip: *The foregoing provision should be included if such limiting words are to be used. By inclusion of these words, Seller is relieved from the obligation or duty to engage in expensive research in order to make the representation or warranty involved. Rather, Seller is providing the representation based on what he or she knows or reasonably should know without investigating the matter further. If Purchaser wants absolute assurance of the truth of a particular representation or warranty, then such limiting words should be avoided.*

Representations and Warranties of Seller

Representations and Warranties of Seller. To induce Purchaser to enter into this Agreement, Seller makes each of the following representations and warranties, all of which are true as of the date hereof (unless otherwise specified) and shall also be true as of the Closing Date:

[*Preface certain of the following representations and warranties with the appropriate limiting words regarding Seller's knowledge. Those provisions below without such notations should generally not be limited as Seller should be held to an unconditional representation and warranty regarding the statement.)

1. **Formation and Status.** Seller is a Texas [*corporation / limited liability company / limited partnership*] duly organized, validly existing, and in good standing under the laws of the state of Texas with authority to convey the Property to Purchaser.

Drafting Tip: *This representation assures Purchaser that Seller has all legal authority and requisite standing under state law to convey the real property and conclude the transaction.*

2. Authority. Seller has full power and authority to enter into this Agreement and to perform all of its obligations hereunder. The execution and delivery of this Agreement and the performance by Seller of its obligations hereunder have been duly authorized by all requisite action and no further action or approval is required in order to constitute this Agreement as a binding and enforceable obligation of Seller.

Drafting Tip: *This representation assures Purchaser that Seller has all legal authority under Seller's formation documents and agreements among its members and owners that whoever is selling the real property is authorized to do so. It gives Purchaser assurance that an unknown or silent partner or shareholder in Seller won't later try to undo the deal.*

3. Title. Seller is the legal fee simple titleholder of the Property and has good and indefeasible title to the Property free and clear of all liens and encumbrances of any kind, except (i) those of public record in [**name of county**] County, _____, which will not materially interfere with the contemplated use and operation of the Property, (ii) utility and other easements which will not materially interfere with the contemplated use and operation of the Property, (iii) facts and conditions which would be disclosed by an inspection and/or survey of the Property and which [_____] will not materially interfere with the contemplated use of the Property, (vi) real estate taxes for the current tax year which are liens on the Property and are not yet due and payable; and (v) liens that will be satisfied and removed at or prior to the Closing.

Drafting Tip: *This representation assures Purchaser that Seller has the requisite legal title to transfer full and complete ownership. The only exceptions to such title will be those items, easements and the like that Purchaser can live with. Other exceptions may be revealed in an inspection and, even if not discovered, will not materially impact the Property's usefulness to Purchaser. Any liens securing any notes will be removed at closing since they will be paid and released from the sales proceeds.*

4. Due Diligence Items and Records. [To Seller's actual knowledge,] [A]ll documents, records and reports delivered by Seller to Purchaser for any reason under this Agreement shall be true, correct and complete as of their delivery and Seller has no knowledge that any such items are [not] inaccurate in any material respect.

Drafting Tip: *This representation is Seller's assurance that Purchaser can rely upon any written documents delivered to Purchaser. If any inaccuracies are found in a document, they are not material and wouldn't impact Purchaser's decision to purchase the Property or use the Property.*

5. Contract Obligations. Except as otherwise disclosed in the title commitment or in this Contract, no lease, contract or agreement exists relating to any portion of the Property which is not terminable at will or upon no more than thirty (30) days' prior notice.

Drafting Tip: *Purchaser will want this representation to be assured that there will be no leases, contracts or other written obligations that will last past the Closing. Purchaser will not want to step into a contract of Seller that is either inconsistent with Purchaser's operation/ownership, whose terms may be outdated or whose revenue is not at a market rate.*

6. Litigation. [To Seller's actual knowledge, there is no] or [Seller has not received any notice of any] or [There is no] litigation, action, suit, claim, judicial or administrative proceeding pending or threatened affecting any portion of the Property or affecting Seller and relating to the ownership, operation use or occupancy of the Property or that might affect Seller's ability to perform its obligations under this Contract.

Drafting Tip: *Purchaser wants to be assured that it will not step into any litigation or proceedings that Seller incurred or that affect the Property without knowing the exposure posed by such proceedings. Purchaser will certainly want to avoid any costs or complications to a smooth, straight-forward purchase transaction.*

7. Seller is not a Foreign Person. Seller is not "foreign person or entity" as defined in Section 1445 of the Internal Revenue Code of 1986, as amended, and Purchaser is not obligated to withhold any portion of the Purchase Price for the benefit of the Internal Revenue Service.

Drafting Tip: *Purchasers are obligated to withhold a portion of the proceeds of a sale transaction by a "foreign person" as defined in the Internal Revenue Code and at a rate required in the Code. Generally this withholding would be actually done by the title company; however, the Code imposes the withholding obligation on the Purchaser.*

8. No Insolvency Proceedings. No attachment, execution, assignment for the benefit of creditors, receivership, conservatorship or voluntary or involuntary proceedings in bankruptcy or pursuant to any other debtor relief laws is contemplated or has been filed by or against Seller or the Property, nor [to Seller's actual knowledge] is any such action pending by or against Seller or the Property.

Drafting Tip: *Bankruptcy proceedings will stay any pending closing until it is dismissed or a trustee approves the sale and obtains court approval. A proceeding filed against the Seller after the closing occurs may also put the transaction under scrutiny. Again, like a representation regarding pending litigation, a Purchaser will want to avoid any entanglement with any creditors of Seller who may have claims against or liens on any real property involved.*

9. Violation of Laws. [To Seller's actual knowledge of any] or [Seller has not received any notice] or [No notice has been given by] any governmental department, commission, board, bureau, agency or instrumentality having jurisdiction over the Property of a violation of any law, ordinance, regulation, or requirements affecting the Property or Seller's use of the Property. Furthermore, [to Seller's actual knowledge] [T]here is no claim, action, suit or proceeding is pending or threatened against or affecting Seller or the Property or with respect to Seller's present use and operation of the Property.

Drafting Tip: *This representation will assure Purchaser that the Property complies with applicable state and federal laws and that no legal proceedings affect Seller or the Property. Purchaser will want to step in and begin operating the Property immediately after the closing without worrying about the distraction of legal proceedings which could halt such operations or require Purchaser to begin some corrective or abatement action at an unforeseen expense.*

10. Licenses, Permits and Approvals. [To Seller's actual knowledge] or [There is no] license, permit, or approval necessary to operate the Property in the manner in which it is currently operated that will not be renewed on expiration or that any material condition will be imposed in order to obtain their renewal.

Drafting Tip: *Farms and ranches are faced with ever increasing permitting and licensing requirements at the local, state and federal level. Purchaser will not want to be surprised by any such requirement that may delay the revenue of Purchaser's proposed operation.*

11. Condemnation; Zoning; Land Use. [Seller has received no notice of any] or [There is no] condemnation, zoning, or land-use proceedings affecting any portion of the Property, nor any pending public improvements on or about the Property that will affect access to the Property or result in additional assessments against the Property. Seller shall not initiate or participate in any changes in zoning proposed by any applicable zoning authority.

Drafting Tip: *Farm and ranch land is not often covered by zoning or land-use restrictions unless the Property is within the extra-territorial jurisdiction of a nearby city. The ordinances of such city may restrict the subdivision or development of the Property without an application for annexation, zoning approval or other waivers. With such applications and approvals comes the possibility of development and hook-up fees, higher taxes and assessments for utilities and roads being brought to the Property. From the date of the purchase contract until the Closing, Seller must agree not to change any zoning of the Property.*

12. No Assessments or Dedications. [Seller has received no notice of any] or [There is no] pending or threatened special assessments with respect to the Property and has no knowledge of any pending or being threatened. Seller has received no request, written or otherwise, from any governmental entity with regard to dedication of the Property or any part thereof and has no knowledge of any donations or payments to or for schools, parks, fire departments or any other public entity which are required to be made by the owner of the Property.

Drafting Tip: *This representation assures Purchaser that no part of the Property will be taken or assessed for public improvements or facilities.*

13. No Hazardous Materials. [Seller has received no notice of any] or [There have been no] inquiries, notices, claims or actions by any governmental authority or third party with respect to the presence of Hazardous Materials (defined hereinbelow) on the Property, the migration of hazardous materials from the Property, or that Seller has otherwise violated any environmental law, regulations or ordinance. Seller represents and warrants that (i) [to Seller's actual knowledge] there has been no present or past release of hazardous substances on, over, at, from, into or onto any of the Property, (ii) [to Seller's actual knowledge] there is no environmental condition, situation or incident on, at or concerning the Property that could reasonably be expected

to give rise to an action or liability under any law, rule, ordinance or common law theory governing environmental protection and (iii) all required federal, state and local permits concerning or related to environmental protection or regulation for the Property and Seller's operations thereon are current and Seller is in compliance therewith.

Drafting Tip: *Not only will Purchaser want to know that no hazardous materials have been dumped or spilled on the Property, but Purchaser will also want to know that no governmental agencies have been investigating or threatens any action for the presence of hazardous materials on the Property. Permits which Seller obtains for operations on the Property which may involve hazardous materials should be current and transferrable to Purchaser. Does Purchaser want Seller to provide a Phase I Environmental Report?*

14. Property Condition and Notification regarding Changes. [to Seller's actual knowledge] or [There has been no] (1) any flooding of the Property; (2) any dumpsite, landfill, underground tanks or containers now or previously located on the Property; (3) any wetland, as defined by federal or state law or regulation; and (4) any threatened or endangered species of their habitat affecting the Property. Seller agrees to notify Purchaser prior to the closing of any change affecting the Property and Purchaser's intended use or any representation or warranty made by Seller herein.

Drafting Tip: *Each of the forgoing listed items would, if present, affect the value of the Property and Purchaser's ability to conduct operations or realize revenue. Purchaser will want to have as much of a guarantee as possible that none of such items are present.*

15. Survival of Representations and Warranties. All of Seller's representations and warranties shall survive the Closing. [*Alternative clause: add at the end of the sentence, "for a period of one year from the Closing Date."*]

Drafting Tip: *Purchaser will want the representations and warranties to not only survive the closing date (i.e., the date the deed is delivered and recorded), but also for an indefinite period of time following the closing. A breach of one or more of these representations or warranties may not be discovered until well after the closing. Purchaser will want to hold on to the ability to sue the Seller in the event of such a discovery or if a claim is subsequently made.*

Seller, on the other hand, will want to cut off its liability as of the closing date or within a short period of time thereafter. Seller's argument will be that Purchaser has had a due diligence period within which to satisfy itself as to all of the items covered by the representations and warranties and is almost as likely to know the Property and the issues as is Seller, particularly if Seller is an absentee owner or only an investor who has not conducted active operations on the Property.

[*Alternative clause: Seller's representations and warranties set forth herein shall survive the Closing for a period of one (1) year; provided, however, that any claim that there has been a breach of such representations and warranties shall be deemed waived by Purchaser if (i) such breach is actually known to Purchaser on or before the Closing or (ii) if such breach is not actually known by Purchaser on or before the Closing and a claim is not made in writing by Purchaser

within one (1) year following the Closing. In no event shall Purchaser have any right or claim to rescind the purchase of the Property by reason of any breach of Seller's representations and warranties set forth herein.]*

Drafting Tip: *This language clarifies that Purchaser may not be able to make claims for issues that Purchaser already knew about and closed anyway, or an issue that Purchaser does not timely raise with Seller. In any event, even if there is a breach of a representation or warranty, Purchaser's only remedy will be to recover damages and not to rescind the purchase transaction and force Seller to reacquire the Property.*

16. Ad Valorem Taxes. Except as otherwise expressly stated in the Contract, all ad valorem taxes on the Property for prior years and all special assessments on the Property of any kind have been paid in full in accordance with the terms and there are no deferred ad valorem taxes for prior years or unpaid special assessments pertaining to the Property. All prior years' ad valorem valuation as "open space" as provided in Section 1-d-1 of the Texas Constitution are appropriate and bona fide and if any such valuations are subsequently disallowed, Seller shall reimburse Purchaser for all such ad valorem taxes assessments, penalties and interest resulting therefrom.

Drafting Tip: *For a local tax appraisal district to claim, subsequent to the closing, that a change in use occurred before the closing (which change is not known to Purchaser), the "roll-back" or recapture of the taxes for the previous five years which could have been charged but for the "open space" exemption would impose a significant economic burden on Seller. Purchaser will not want to step into any sort of a risk of a "roll-back" of the tax classification and valuation. If such exemption is subsequently disallowed, Seller should reimburse Purchaser for any such increased tax burden for that period. This representation should also prompt Seller to thoroughly investigate and ensure that no roll-back situation is threatened. If there is any question as to the occurrence of a roll-back, the parties should agree upon an escrow arrangement until there is clarity as to the continuity of the "open space" exemption.*

17. No Government Programs. The Property is not subject to any government programs.

*[*Alternative clause: Seller shall provide Purchaser with copies of all governmental programs, agreements and allocation allotments applicable to the Property. Any allocation or proration of payments under governmental programs is made by separate agreement between the parties which will survive the Closing.*]*

18. No Other Obligations to Sell or Lease the Property; No Restrictions Against Sale. Except for granting a security interest in the Property, Seller has not obligated itself to sell or lease any portion of the Property to any party other than Purchaser. Seller's performance of this Agreement will not cause a breach of any other agreement or obligation to which Seller is a party or to which it is bound.

Drafting Tip: *This representation assures Purchaser that no other party has purchase or lease rights which would conflict with Purchaser or delay the Closing.*

19. *No Liens.* On the Closing Date, the Property will be free and clear of all mechanic's and materialman's liens and other liens and encumbrances of any nature except the Permitted Exceptions, and no work or materials will have been furnished to the Property that might give rise to mechanic's, materialman's, or other liens against the Property other than work or materials to which Purchaser has given its consent.

Drafting Tip: *Purchaser will want Seller to also give assurances of this fact including the assurance that no one is owed for unpaid labor or materials that has not yet matured into a lien under state law for contractors, i.e., mechanic's and materialman's lien.*

20. *Environmental Warranties.* [to Seller's actual knowledge], (1) [N]o underground storage tanks exist on or in the Property and no underground storage tanks have been previously situated on or in the Property, and (2) [N]either Seller nor any previous owner, tenant, occupant or user of the Property, nor any other person, has engaged in or permitted any operations or activities upon, or any use or occupancy of the Property, or any portion thereof, for the purpose of or in any way involving the handling, manufacture, treatment, storage, use, generation, release, discharge, refining, dumping or disposal of any Hazardous Materials (as hereinafter defined) in violation of any applicable laws or regulations on, under, in or about the Property, or transported any Hazardous Materials to, from or across the Property, nor are any Hazardous Materials presently constructed, deposited, stored, or otherwise located on, under, in or about the Property, nor have any Hazardous Materials migrated from the Property upon or beneath other properties, nor have any Hazardous Materials migrated or threatened to migrate from other properties upon, about or beneath the Property, nor are any underground improvements, including but not limited to storage tanks, dumps, or water, gas or oil wells now located or have ever been located on the Property. As used herein, the term "Hazardous Materials" means any substance:

- a. the presence of which requires investigation or remediation under any federal, state or local statute, regulation, ordinance, order, action, policy or common law; or
- b. which is defined as a "hazardous waste," "hazardous substance," pollutant or contaminant under any federal, state or local statute, regulation, rule or ordinance or amendments thereto including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §9601 et seq.) and/or the Resource Conservation and Recovery Act (42 U.S.C. §6901 et seq.); or
- c. which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic, or otherwise hazardous and is or becomes regulated by any governmental authority, agency, department, commission, board, agency or instrumentality of the United States, the State of Texas or any political subdivision thereof; or
- d. the presence of which on the Property causes or threatens to cause a nuisance upon the Property or to adjacent properties or poses or threatens to pose a hazard to the health or safety of persons on or about the Property or to water courses, water wells,

lakes, ponds or other water supplies whether such water is for human consumption or use or consumption by livestock; or

- e. the presence of which on adjacent properties could constitute a trespass by Seller; or
- f. without limitation, which contains gasoline, diesel fuel or other petroleum hydrocarbons; or
- g. without limitation, which contains polychlorinated biphenols (PCBs), asbestos or urea formaldehyde foam insulation; or
- h. without limitation, radon gas.

Drafting Tip: *The parties often prefer to obtain a Phase I environmental report and rely on the disclosures or “all-clear” language of such a report to cover the environmental risks. In a farm and ranch transaction the parties often believe a rural agriculture property could not have any environmental risk. However, rural properties often have fuel tanks, landfills or private dumpsites, livestock operations with significant waste byproducts, etc. Each of such activities can create long-term environmental issues, particularly if any such activities ultimately impact surface water or navigable streams or underground aquifers. Such issues must be much more thoroughly investigated in current transactions than what was done several years ago.*

[*Alternative clause: *AFTER CLOSING, AS BETWEEN PURCHASER AND SELLER, THE RISK OF LIABILITY OR EXPENSE FOR ENVIRONMENTAL PROBLEMS, EVEN IF ARISING FROM EVENTS BEFORE CLOSING, WILL BE THE SOLE RESPONSIBILITY OF PURCHASER, REGARDLESS OF WHETHER THE ENVIRONMENTAL PROBLEMS WERE KNOWN OR UNKNOWN AT CLOSING. ONCE CLOSING HAS OCCURRED, PURCHASER INDEMNIFIES, HOLDS HARMLESS, AND RELEASES SELLER FROM LIABILITY FOR ANY LATENT DEFECTS AND FROM ANY LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY, INCLUDING LIABILITY UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA), THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), THE TEXAS SOLID WASTE DISPOSAL ACT, OR THE TEXAS WATER CODE. **PURCHASER INDEMNIFIES, HOLDS HARMLESS, AND RELEASES SELLER FROM ANY LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY ARISING AS THE RESULT OF SELLER’S OWN NEGLIGENCE OR THE NEGLIGENCE OF SELLER’S REPRESENTATIVES.** PURCHASER INDEMNIFIES, HOLDS HARMLESS, AND RELEASES SELLER FROM ANY LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY ARISING AS THE RESULT OF THEORIES OF PRODUCTS LIABILITY AND STRICT LIABILITY, OR UNDER NEW LAWS OR CHANGES TO EXISTING LAWS ENACTED AFTER THE EFFECTIVE DATE THAT WOULD OTHERWISE IMPOSE ON SELLERS IN THIS TYPE OF TRANSACTION NEW LIABILITIES FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY.*

The applicable provisions of this Exhibit regarding the Property may be included in the deed with appropriate modification of terms as the context requires.]*

21. *Seller's Indemnification for Representations and Warranties.* WITH RESPECT TO THE REPRESENTATIONS AND WARRANTIES CONTAINED IN SECTIONS ____ THROUGH ____ ABOVE, SELLER AGREES TO INDEMNIFY, DEFEND, REIMBURSE AND HOLD HARMLESS PURCHASER, ITS AFFILIATES, SUCCESSORS AND ASSIGNS FROM ANY AND ALL LIABILITIES, COSTS, DAMAGES AND EXPENSES (INCLUDING WITHOUT LIMITATION, ATTORNEYS' FEES) ARISING FROM OR OUT OF ANY LIENS OR CLAIMS BY THIRD PARTIES FOR ANY SUCH ACT OR OMISSION OCCURRING PRIOR TO THE CLOSING DATE WITH RESPECT TO THE PROPERTY OR FOR MATERIALS OR SERVICES FURNISHED ON THE PROPERTY PRIOR TO THE CLOSING, EXCEPT THOSE ACTS OR OMISSIONS OF PURCHASER, OR MATERIALS OR SERVICES CONTRACTED FOR BY PURCHASER. WITH RESPECT TO THE REPRESENTATIONS AND WARRANTIES CONTAINED IN SECTION ____ ABOVE, SELLER AGREES TO INDEMNIFY, DEFEND, REIMBURSE AND HOLD HARMLESS PURCHASER AND ITS SUCCESSORS AND ASSIGNS FROM ANY AND ALL LIABILITIES, COSTS, DAMAGES AND EXPENSES (INCLUDING WITHOUT LIMITATION, ATTORNEYS' FEES) ARISING FROM OR RELATED TO THE BREACH OF ANY REPRESENTATION OR WARRANTY AS TO CONDITIONS EXISTING ON OR PRIOR TO THE CLOSING DATE FOR A PERIOD ENDING UPON THE EXPIRATION OF THE APPLICABLE STATUTE OF LIMITATIONS. The obligations of Seller under this paragraph shall not be affected by any investigation by or on behalf of Purchaser, or by any information which Purchaser may have or obtain with respect thereto. Seller's obligation hereunder shall include, but not be limited to, the burden and expense of defending all claims, suits and administrative proceedings (with counsel reasonably approved by Purchaser), even if such claims, suits or proceedings are groundless, false or fraudulent, and conducting all negotiations of any description, and paying and discharging, when and as the same become due, any and all judgments, penalties or other sums due against such indemnified person. Purchaser, at its sole expense, may employ additional counsel of its choice to associate with counsel representing Seller.

[***Alternative clause:** *No Warranty.* See language of Section 22 below and/or next addendum.*]

Drafting Tip: *Indemnifications are particularly important when a piece of property may have environmental issues as such issues may present liability to a landowner years after the occurrence of the event. If the Seller does not have a continuing indemnity obligation for environmental liabilities, it may be unreachable in subsequent litigation by the Purchaser seeking recovery from the party causing the hazard or damage.*

22. *"As Is, Where Is"* THIS AGREEMENT IS AN ARMS-LENGTH AGREEMENT BETWEEN THE PARTIES. THE PURCHASE PRICE WAS BARGAINED FOR ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES, EXCEPT FOR THE WARRANTY OF TITLE STATED IN THE CLOSING DOCUMENTS AND SELLER'S REPRESENTATIONS TO PURCHASER SET FORTH IN SECTION ____ OF THIS EXHIBIT "____." THE PROPERTY WILL BE CONVEYED TO PURCHASER IN AN "AS IS, WHERE IS" CONDITION, WITH

ALL FAULTS. ALL WARRANTIES, EXCEPT THE WARRANTY OF TITLE IN THE CLOSING DOCUMENTS, ARE DISCLAIMED.

The applicable provisions of this Exhibit regarding the Property may be included in the deed with appropriate modification of terms as the context requires.

Drafting Tip: *While indemnification provisions are often more fiercely negotiated in commercial real estate contracts, the indemnification in a farm and ranch transaction should be carefully worded and/or negotiated. From the Seller's standpoint, a limitation on the length of time the indemnification continues should be negotiated, e.g., one or two years. From the Purchaser's standpoint, the indemnification often signals the Seller's confidence in its representations and warranties. A strenuous objection to any indemnification (or a particular warranty or representation provision) by a Seller may indicate some undisclosed issue or concern that Purchaser should investigate. Indemnifications are particularly important when a piece of property may have environmental issues as such issues may present liability to a landowner years after the occurrence of the event. If the Seller does not have a continuing indemnity obligation for environmental liabilities, it may be unreachable in subsequent litigation by the Purchaser seeking recovery from the party causing the hazard or damage.*

[*Alternative Clauses:

Disclaimer of Reliance on Seller's Representations and Warranties

Option 1:

"As Is, Where Is" THIS CONTRACT IS AN ARMS-LENGTH AGREEMENT BETWEEN THE PARTIES. THE PURCHASE PRICE WAS BARGAINED FOR ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE SPECIFICALLY NEGOTIATED AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES, EXCEPT FOR THE WARRANTY OF TITLE STATED IN THE CLOSING DOCUMENTS AND ANY OTHER REPRESENTATION OF SELLER EXPRESSLY SET FORTH HEREIN. BUT FOR THIS DISCLAIMER, SELLER WOULD NOT HAVE SOLD THE PROEPRTY FOR THE PRICE AND ON THE TERMS AND CONDITIONS OF THIS PROVISION. THE PROPERTY WILL BE CONVEYED TO PURCHASER IN AN "AS IS, WHERE IS" CONDITION, WITH ALL FAULTS. ALL WARRANTIES, EXCEPT THE WARRANTY OF TITLE IN THE CLOSING DOCUMENTS, ARE DISCLAIMED. PURCHASER ACKNOWLEDGES THAT IT (HE/SHE) UNDERSTANDS THE LEGAL SIGNIFICANCE OF THIS WAIVER AND THAT PURCHASER HAS HAD THE OPPORTUNITY OR HAS IN FACT CONSULTED WITH AN ATTORNEY OF PURCHASER'S CHOICE TO BE ADVISED CONCERNING THE EFFECT OF PURCHASER'S AGREEMENT TO THIS WAIVER. THE DISCLAIMER PROVISIONS OF THIS SECTION SHALL SURVIVE THE CLOSING AND SHALL, AT SELLER'S ELECTION, BE INCLUDED IN THE DEED AND OTHER INSTRUMENTS EXECUTED AND DELIVERED BY SELLER AT CLOSING.

Option 2:

AS IS. PURCHASER ACKNOWLEDGES AND AGREES THAT, EXCEPT AS EXPRESSLY SET FORTH IN THIS CONTRACT, SELLER HAS NOT MADE, AND SPECIFICALLY NEGATES AND DISCLAIMS, ANY REPRESENTATIONS, WARRANTIES (OTHER THAN THE SPECIAL WARRANTY OF TITLE AS SET OUT IN THE DEED REQUIRED UNDER SECTION _____ BELOW), COVENANTS OR AGREEMENTS OF ANY KIND OR CHARACTER REGARDING ANY ASPECT OF THE PROPERTY, INCLUDING WITHOUT LIMITATION (A) THE VALUE, NATURE, QUALITY OR PHYSICAL CONDITION OF THE PROPERTY, (B) THE INCOME TO BE DERIVED FROM THE PROPERTY, (C) THE SUITABILITY OF THE PROPERTY FOR ANY ACTIVITY OR USE WHICH PURCHASER OR ANY TENANT MAY CONDUCT THEREON, (D) THE COMPLIANCE OF THE PROPERTY OR ITS OPERATION WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENTAL AUTHORITY OR BODY, (E) THE HABITABILITY, MERCHANTABILITY, MARKETABILITY, PROFITABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY, (F) THE MANNER, QUALITY, STATE OF REPAIR OR LACK OF REPAIR OF THE PROPERTY, OR (G) COMPLIANCE OF THE PROPERTY WITH ANY ENVIRONMENTAL PROTECTION, POLLUTION OR LAND USE LAWS, RULES, REGULATIONS, ORDERS OR REQUIREMENTS, INCLUDING THE EXISTENCE IN OR ON THE PROPERTY OF HAZARDOUS MATERIALS. ADDITIONALLY, EXCEPT AS EXPRESSLY SET FORTH IN THIS CONTRACT, NO PERSON ACTING ON BEHALF OF SELLER IS AUTHORIZED TO MAKE, AND BY EXECUTION HEREOF PURCHASER ACKNOWLEDGES THAT NO PERSON HAS MADE, ANY REPRESENTATION, WARRANTY, COVENANT OR AGREEMENT REGARDING THE PROPERTY OR THE TRANSACTION CONTEMPLATED HEREIN. HAVING BEEN GIVEN THE OPPORTUNITY TO INSPECT THE PROPERTY, PURCHASER IS RELYING SOLELY ON ITS OWN INVESTIGATION OF THE PROPERTY AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER, OTHER THAN INFORMATION EXPRESSLY REQUIRED TO BE PROVIDED BY SELLER HEREUNDER. PURCHASER ACKNOWLEDGES AND AGREES THAT ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER AND/OR SELLER'S REPRESENTATIVES AND AGENTS WITH RESPECT TO THE PROPERTY WAS OBTAINED FROM A VARIETY OF SOURCES AND THAT, EXCEPT AS MAY BE EXPRESSLY SET FORTH IN THIS CONTRACT, SELLER HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION AND MAKES NO REPRESENTATIONS AS TO THE ACCURACY, TRUTHFULNESS OR COMPLETENESS OF SUCH INFORMATION. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT TO THE MAXIMUM EXTENT PERMITTED BY LAW, THE SALE OF THE PROPERTY AS PROVIDED FOR HEREIN IS MADE ON AN "AS IS" BASIS WITH ALL FAULTS. THE PURCHASE PRICE HAS BEEN ADJUSTED BY PRIOR NEGOTIATION TO REFLECT THAT ALL OF THE PROPERTY IS SOLD BY SELLER AND PURCHASED BY PURCHASER SUBJECT TO THE FOREGOING. THE PROVISIONS OF THIS SECTION _____ SHALL SURVIVE THE CLOSING OR ANY TERMINATION OF THIS CONTRACT.

Representations and Warranties of Purchaser

Representations and Warranties of Purchaser. Purchaser represents and warrants to Seller as follows:

- (a) If Purchaser is an entity, Purchaser is a duly formed and validly existing entity in good standing under the laws of the jurisdiction of its formation and is duly qualified to transact business in the jurisdiction in which the Property is located.
- (b) This Agreement is duly authorized, executed and delivered by all necessary action on the part of Purchaser, and constitutes the valid and binding agreement of Purchaser; and
- (c) The execution and delivery of and the performance by Purchaser of its obligations hereunder do not and will not contravene, or constitute a default under any provisions of applicable law or regulation or any agreement, judgment, injunction, order, decree or other instrument binding upon Purchaser or result in the creation of any lien or other encumbrance on any asset of Purchaser.

Drafting Tip: This set of representations assures Seller of Purchaser's legal authority and standing under state law as well as the confirmation that all requisite corporate consents and actions have been taken for Purchaser to close the transaction. Purchaser may be a party to other loan agreements which restrict Purchaser's ability to take on more debt and Seller will want to make sure that Purchaser has reviewed such agreements in order to make sure that this transaction is authorized by any agreements to which Purchaser is a party that are otherwise non-discoverable by Seller or any involved title company.

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Appendix - Tab 3, James Eggleston: 3.7

Confidentiality Agreements – Practice Guide

Generally, Confidentiality Agreements or Non-Disclosure Agreements (“NDA’s”) are used only in ranch transactions that involve operations where the disclosure of proprietary and confidential information concerning the owner and the operations must not occur, certainly not to competitors. The sale of ranches on which animals are being trained or shown, or unique breeding programs are run, or oil and gas development is being proposed, could see prices impacted if the public became aware of a pending sales transaction or certain confidential information concerning its operations.

The NDA principally describes the obligation of an investigating party looking at a ranch purchase to protect the confidentiality of the information it receives during the pre-contract or due diligence period. The requirement of confidentiality does not apply to information the investigating party already possesses or has developed on its own, information that is generally available to the public, information that is received from third parties who obtained such information properly or, most likely, information that is actually delivered by the seller.

The NDA protects the information for a period that should sufficiently protect the ranch owner from its competitors who may come into possession of such confidential information. That period is seldom longer than one (1) year.

Negotiations concerning what information is protected are seldom the focus of Seller and Buyer’s discussion concerning the NDA form. Rather, they more often center on (i) the exceptions for information that Buyer may already have that it came into possession of without respect to what it received from Seller, (ii) the remedies Seller has in the event it believes confidential information has been wrongfully disclosed, and (iii) to whom the restriction applies, e.g., Buyer’s agents, employees, partners, etc. Seller may believe it possesses and has disclosed proprietary information, but Buyer may already possess such information through trade publications, breed registration organizations, reproductive and genetic service providers and the like.

Buyer may also object to having liability if information that Seller releases ends up in the hands of people over whom Buyer may have no control. Seller will want the right to injunctive relief as a remedy but will seldom receive an award of damages by a court inasmuch as it is often difficult to calculate actual loss if the information is wrongfully disseminated.

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Appendix - Tab 3, James Eggleston: 3.7.1

Confidentiality and Non-Disclosure Agreement Sample Form

This Confidentiality and Non-Disclosure Agreement (this “Agreement”) is made as of the date specified below above the signatures of the parties to this Agreement and is by and between [* _____*] (hereinafter “Seller”) and the person(s) or entities signing this Agreement in the space provided below (the “Interested Parties,” whether one or more). As used in this Agreement, the term “Interested Parties” is intended to describe and include both the named parties and their successors in interest, subsidiaries, affiliates and assigns.

Recitals

WHEREAS, Seller owns approximately [* _____*] acres of real property in [* _____*] County, [Texas] more particularly described on Exhibit “A” attached hereto and incorporated herein by reference (the “Real Property”) and operates the [* _____*] ranch located thereon (the “Ranch”);

WHEREAS, Seller desires to share with the Interested Parties and the Interested Parties desire to obtain, review and analyze information relating to and concerning the Real Property, the Ranch and Seller’s operation of the Ranch, including financial statements, cash flow statements, information regarding improvements on the Real Property, livestock, crop production, vendors, customers and other key relationships, information regarding the rental or ownership of the Real Property, and all other information deemed confidential and proprietary which relates or may relate to the Real Property and the Ranch’s products, employees, operations, and ongoing business;

WHEREAS, the purpose of sharing such confidential and proprietary information is for the Interested Parties to determine the feasibility and desirability of entering into a purchase transaction with Seller for the acquisition of the Real Property and the Ranch (the “Transaction”).

Agreement

NOW, THEREFORE, in consideration of the covenants, agreements, and conditions contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Interested Parties agrees to be bound as follows:

1. The Interested Parties agree, promise and warrant for Interested Parties and any affiliate, subsidiary, contractor, officer, director, agent, or employee of Interested Parties (collectively included within the term “Interested Parties”) that the Interested Parties shall not disclose to any other person, party, or entity the Confidential Information (as defined below) or any other similar or related information received from Seller, except as may be specifically authorized in writing by an authorized representative of Seller. Interested Parties shall take and receive all such information they receive from Seller with the understanding that such information is proprietary and confidential to Seller.

2. Any and all individuals employed by the Interested Parties who receives any of the Confidential Information shall be apprised of its confidential nature and that its use is governed by this Agreement. It shall not be necessary for information to be marked “confidential” or in any other way be marked or identified as such.

3. The Interested Parties agree to use at least as high a degree of care to avoid disclosure or unauthorized use of the information they receive as would be necessary or required by law to protect their own confidential and proprietary information. The Interested Parties also agree to do any and all things necessary to prevent any of their employees, representatives, contractors, agents, affiliates, officers, subsidiaries, shareholders, and directors from disclosing any Confidential Information to third persons, including, without limitation, requiring each employee, representative, contractor, agent, affiliate, officer, subsidiary, shareholder and director to sign a copy of this Agreement before being authorized to have access to such Confidential Information.

4. In the event the Interested Parties improperly discloses any Confidential Information, the improperly disclosing party shall be liable to Seller for all resulting damage, loss, cost, and expense, including reasonable attorneys’ fees incurred in pursuing such legal action.

5. The term “Confidential Information” shall include non-public information concerning the business, finances or operations of Seller, including but not limited to financial statements, investment information, business operating strategies and plans, and any other information, the disclosure of which might harm Seller and its operations and/or its relationships with its employees, vendors and other parties who are important to their operations. Information shall not be deemed confidential or proprietary and there shall be no obligation with respect to any information which: (1) is or becomes publicly known through no wrongful, negligent or intentional act of the Interested Parties, its employees, representatives, or agents; (2) is presently information that was rightfully received from a third party without restriction prior to execution of this Agreement; (3) is approved for release by written authorization by Seller; (4) has been disclosed to the government pursuant to the requirement of a governmental agency or as required by operation of law; or (5) is present and existing information that was independently developed before execution of this Agreement.

6. The Interested Parties agree not to use any Confidential Information for any purpose except to evaluate and engage in discussions with Seller concerning the Transaction. In the event that the Transaction does not occur, the Interested Parties shall not merge, adopt, or in any way incorporate any Confidential Information into ongoing or future business endeavors of any of the Interested Parties without the prior written consent of Seller.

7. All Confidential Information disclosed in any form shall be and remain the exclusive property of Seller and all the Confidential Information shall be promptly returned to Seller, or upon written request, destroyed by the Interested Parties.

8. There shall be no public announcement or disclosure of the potential for, or the pendency or consideration of, the Transaction or the existence of this Agreement without the prior written consent of both Interested Parties and Seller. This provision shall survive the termination of this

Agreement in the event the Transaction does not occur. Notwithstanding the foregoing, the provisions of this Agreement insofar as they concern Confidential Information shall also survive the successful completion of the Transaction and shall also be binding upon the legal successors to any party signing this Agreement.

It is expressly understood that Interested Parties shall not contact or interview any employees of Seller or conduct any due diligence or “on-site” inspections of the Real Property without Seller’s prior consent.

9. This Agreement is not assignable or transferable in any manner without the express written consent of Seller, nor may it be assigned or transferred by operation of law or change of control.

10. Nothing in this Agreement shall be deemed to be an exclusive arrangement between Seller and the Interested Parties concerning the Confidential Information and/or the Transaction and the Interested Parties acknowledge that Seller may be disclosing the Confidential Information to others besides the Interested Parties.

11. The validity, interpretation, or performance of the terms of this Agreement and all rights and obligations of the parties hereunder shall be governed and construed in accordance with the laws of the State of [Texas] applicable to contracts made and performed wholly within the United States. The invalidity or unenforceability of any term or provision hereof shall not affect the validity or enforceability of any other term or provision hereof.

12. This Agreement shall not be modified, amended, canceled, or in any way altered, nor may it be modified by custom and usage of trade or course of dealing, except by an instrument in writing. Failure to enforce any provision of this Agreement shall not constitute a waiver of any term hereof.

13. Nothing in this Agreement shall be deemed to constitute a joint venture, or partnership, or any other agreement, business, or financial endeavor between any party named herein.

14. The Interested Parties’ obligations, promises, covenants and agreements under this Agreement shall expire on the earlier of (i) two (2) years from the date of this Agreement or (ii) the date on which the Confidential Information no longer remains a trade secret for any reason (such period is herein referred to as the “Term”). Notwithstanding the foregoing, the provisions of paragraph 8 shall survive for a period of two (2) years following the expiration of the Term.

15. Disclaimer as to Information: Seller is presenting information which has been gathered from a number of sources. Seller has not independently verified all such information and no representation or warranty, express or implied, is made herein as to the accuracy or completeness of such information. Forward looking data, such as projections or financial models, are inherently uncertain, and no representation or warranty, express or implied, is made by any party hereto with respect to such models or the assumptions, hypothetical results, estimates, hypothetical performance analysis or other financial information contained therein. Actual results may vary materially from all such data. All information provided pursuant to this

Agreement is only presented for purposes of allowing an evaluation of an investment or other business relationship, i.e., the Transaction. Such information is not represented to be complete or all-inclusive. Independent investigation and analysis of all information provided by Seller is encouraged. The delivery of any information pursuant to this Agreement is not intended nor be deemed to be an offer to sell or a solicitation of an offer to buy any securities. Independent legal counsel, accountants and other qualified professionals should be consulted when evaluating all information received pursuant to this Agreement.

IN WITNESS WHEREOF, the undersigned have hereby caused this Agreement to be effective as of the [* ____*] day of [* _____*], 20[* ____*].

Interested Parties:

By: _____ By: _____

Name:[* _____*]Name:[* _____*]

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Exhibit "A"

Legal Description of Real Property

Appendix - Tab 3, James Eggleston: 3.8

Checklist for Formation of a Limited Liability Company

Summary: This sample checklist is meant to assist in the formation of a *Texas* limited liability company (“LLC”). It helps identify the information that is required, the decisions that need to be made, and the steps that must be taken to form the LLC. This sample checklist contains a number of questions for counsel to ask the client in order to obtain the information necessary to properly structure the LLC so that it meets the client’s needs. This checklist is not exhaustive, however, and counsel may require additional information.

1. Is the limited liability company going to be a “series” limited liability company or “single purpose” limited liability company? If the LLC is going to have more than one business activity, consideration should be given to the “series” limited liability company. [Check state law to see if “series” LLCs are allowed.]
2. Who will serve as the registered agent?
3. What is the registered agent’s physical address?
4. Who are the owners (members)? Will the owners be interested in using an intermediate entity such as another limited liability company or a trust to hold the membership interests so as to preserve anonymity in the Secretary of State’s records?
5. Who will serve as managers of the entity? Are they capable to serve in such roles? Or, should authority for certain actions be assigned to one person or restricted from certain managers?

Drafting Consideration for No. 5: Pros and cons exist for selecting whether to have either members or managers to serve as the managing persons. While selecting managers may help narrow the management team and separate “management” from “ownership,” selecting members as the managing parties simplifies management by removing an extra layer of governance.

6. Who are the initial managers? What are their addresses? Using a post office box is permissible.
7. What will the LLC’s business address be? A post office box is not permissible as a business address.
8. What is the desired name for the LLC?

Drafting Consideration for No. 8: The owners should think of at least three alternative names as common names are generally taken. Putting the year of formation in front of a common name is one way to get a desired name to be accepted by the Secretary of State’s office. Customization of a company name can often be achieved with assumed name certificates filed with the Secretary of State and the county clerk of the county in which the LLC maintains its principal place of business. It is best to not order minute books,

EIN's or prepare other company documents until the Certificate of Formation with the desired name is officially accepted and filed with the Secretary of State.

9. What are the ownership percentages of the initial members of the LLC?
Will percentages shift as more revenue is realized or as initial capital investors receive back more than their initial investment?
Will ownership percentages be earned by management upon certain goals being achieved? (What is tax consequence of this?)
10. What are the contributions of each member to the LLC?
 - a. Cash?
 - b. Property?
 - c. Services?
 - d. Guarantee of debt?
11. Is there a mandatory return of capital invested before there is a distribution of profits?
 - a. A "preferred return" is frequently offered to an investor. That is, he or she will receive a rate of return on his or her unrepaid capital until it is repaid.
 - b. The unrepaid capital is the first distribution of money that is paid out when the LLC begins to make money. This may be reserved until the LLC has accumulated a sufficient reserve of money for contingencies and cash flow needs.
12. Is anyone making a loan to the LLC for part of the initial capital?
 - a. Is there interest to be paid on this loan?
 - b. What rate or interest will be paid on this?
 - c. Is a note form going to be used (advisable)?
13. What is the LLC going to do?
 - a. What is its function?
 - b. Where is it going to do business?
 - c. Multiple states?
 - d. Will it be required to qualify to do business in each of those states?
14. Will the LLC be active in business or will it just be a holding company?
15. Will the LLC own other business entities?

16. If the LLC is going to be a “series” LLC:
 - a. What assets will go in each series?
 - b. Will the sharing of profits in each series be the same or different among the members?
 - c. Will there be an investment allocated to each series?
 - d. Will management be different for each series?
17. Will the LLC serve as a general partner of any limited partnerships?
18. Is a buy-sell agreement among the members necessary?
 - a. What are the events which give rise to another member having the right to buy the membership interests of another?
 - b. Are there “cause” events which will cause a member to be expelled?
 - c. Will ownership interests of a member who dies, becomes disabled, files bankruptcy or goes through a divorce be subject to “buy-sell” triggers?
 - d. How do these provisions apply if a member owns his or her ownership interests through another entity?
 - e. If a buy-sell event occurs, how will the departing member be paid?
 - i. How will his or her interest be valued?
 - ii. Will there be discounts to this value depending on the reason for their departure?
 - iii. How will this purchase price be paid? All in cash or partly in cash and partly in a note?
19. Will officers be appointed, e.g., President, Secretary, CEO? A person’s title as “manager” is generally sufficient; however, some people prefer the title of an officer as it resonates better in many business environments, on documents, etc.
20. Will the LLC operate under an “assumed name”?
 - a. If so, will it do so only in a limited number of counties or potentially state-wide?
21. What assets will be transferred into the LLC?
 - a. Real estate?
 - b. Other business?
 - c. Other personal property?

22. Will future contributions be required of a member of the LLC?
 - a. Will there be any consequences for a failure to make a future contribution, i.e., dilution of ownership interests?
 - b. Will another member be able to make a loan to the LLC on behalf of the non-contributing member? If so, what are that member's remedies if the non-contributing member fails to repay the "loan" made on his or her behalf?
 - c. What is the required vote of the membership in order to require contributions?
23. What other actions on behalf of the LLC or the managers may require "super-majority" voting, i.e., more than a simple majority?
 - a. Selling assets? What percentage?
 - b. Making loans? Will a limit be set for making loans without consent?
 - c. Borrowing money? Will a limit be set for borrowing without consent?
 - d. Guaranteeing debt of another entity or a member?
 - e. Filing bankruptcy?
 - f. Dissolution of the LLC?
 - g. Pledging of assets?
 - h. Change of name?
 - i. Mergers? Acquisitions?
 - j. Termination of certificate of formation?
 - k. Changing salaries of key employees?
24. Will there be required meeting dates for members or managers?
25. Will there be the possibility of requiring special meetings of members or managers?
26. Will any managing persons be compensated for their services?
27. Will any member of the LLC also be an employee of the LLC? If so, will he or she be compensated for such work as an employee or will the member be receiving some portion of his or her ownership interests in exchange for services?
28. Will "key man insurance" be useful to the LLC for coverage on the life of a key member or manager?
29. Will there be any restrictions on conflicts of interests by managers or members? In other words, can they be involved in competitive businesses?
30. Who will be responsible for maintenance of the books and records of the LLC?
31. Who will be the "tax matters" partner? (Now called the "Partnership Representative" after the Bipartisan Budget Act of 2015.)
32. How will the assets of the LLC be distributed in the event of a liquidation of the LLC?

33. Will there be any distributions from the LLC?
- a. Are any distributions mandatory? On what schedule?
 - b. Will the distributions be sufficient to pay member's share of pass-through tax liabilities?
 - c. Will distributions be allocated according to ownership interest percentages or some form of special allocation?
 - d. Distributions of cash only or property also?

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Appendix - Tab 3, James Eggleston: 3.9

Limited Partnership Formation Checklist (Short List)

1. Name of the Limited Partnership (checking the name availability with the *Texas* Secretary of State is recommended)
2. Names and address of the limited partners of the Limited Partnership
3. Name and address of the general partner? Will general partner be an entity and if so, what type of entity?
4. Name and address of the registered agent
5. The purposes of the Limited Partnership
6. Is permission is granted for the partners to engage in other businesses, included those that may be in conflict with the business of the Limited Partnership?
7. How do the partners share in profits?
8. How will profits and losses of the Limited Partnership be allocated, including any special allocations?
9. What capital contributions will be made and when?
10. Will future capital contributions be mandatory, optional or prohibited?
11. Whose responsibility will accounting and reporting of the Limited Partnership be?
12. Management will be vested in the general partner, but if that partner no longer serves, does the agreement provide a procedure for selecting a new general partner?
13. What will the authority of the general partner (broad or narrow) be, including those items in which the general partner will need consent of others?
14. How will new partners are admitted to the Limited Partnership and what consents are required?
15. What transfers of partnership interests are permitted?
16. When does the Limited Partnership terminate, what happens upon liquidation, and how is that accomplished?
17. What priorities upon liquidation and distribution of assets belong to the Limited Partnership?

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Appendix - Tab 3, James Eggleston: 3.10

Risk Management – Practice Guide

Risk is inherent in any small or large business. The very nature of engaging in business involves risk-taking. The potential reward of engaging in business makes many risks worth taking. However, the potential of such rewards doesn't mean that all or even most risks should be ignored. Risks should be carefully and frequently studied, however, it should not be feared because most risk is manageable, often with ease and at little expense. It involves making good choices, avoiding bad decisions and managing business activity wisely.

Evaluation of Risk

Risk may be evaluated in one of three ways. First, an activity may be described as having high risks if engaging in such activity has a high likelihood of an adverse outcome or potential loss. In other words, some activities involve the potential for frequent injury or accidents. For example, race car driving is an activity in which bad things frequently happen. For the farmer, raising wheat or corn involves a considerable amount of risk to the likelihood of loss due to weather, drought or disease.

Second, risk may also be described by how much loss (financially or otherwise) may be suffered if the bad event were to occur. In other words, something may be "risky" if the economic consequences of a bad event were large, even though the chances of such an event are rare. For example, the risks associated with tight-rope walking may be classified, as to the general public, as being pretty low because it is generally only attempted by experts or those well-trained to do that activity. However, if there is an accident, the likelihood of a significant injury, even death, are pretty great. As to a rancher, this risks may be realized with respect to an expensive bull. The chances of a loss to this bull, depending on his care, may be relatively small, but if a loss were to occur, the economic loss could be disproportionate to the loss that would be realized from the loss of any other individual cow or bull on the ranch.

Finally, risk is frequently measured by combining the foregoing two definitions or factors in order to determine the "expected value" of the loss. That is, the "expected value" definition combines or multiplies the chances or odds of an adverse outcome times the magnitude or size of loss that would from an unfortunate event. Returning to the race car example, the risk as measured from an "expected value" analysis of that sport may reveal a very high risk activity in that wrecks frequently occur in racing and when they do, the damage to expensive race cars and highly trained drivers is significant. Thus, the "expected value" of a loss from a wreck involving a high-performance race car is very high, making the activity very risky both as to probabilities and economics.

Activities Creating Risks on a Farm or Ranch:

Casualty risks describe risks to property, real or personal, due to fire, floods, storms, tornados, theft and vehicular accidents. These risks involve ever increasing costs and greater economic losses due to the increasing capital costs in machinery, structures, and investments in planting and producing crops. Insurance is often the best risk management tool for these types of risks. However, while the losses from these events are being repaired or recouped, the farm or ranch may be not producing any revenue in the meantime for the owner.

Production risks are generally thought to be those applicable to the production of crops and can be caused by weather, pests, disease and drought. Livestock producers suffer from disease and adverse weather conditions. These losses may be localized to an individual ranch or they may be broadly experienced in a large geographic region. The increasingly dry weather conditions are having broad implications across much of Texas and are creating production losses greater than at any time in the recent past.

Financial risks describe those risks attributable to market conditions and, as with many risks of the farmer or rancher, may be uniquely beyond his or her control. If the output of grain or cattle is low over an extended period of time, the price paid for such items will rise across the industry. However, an individual farmer may suffer from such an event if the costs to buy feed or replacement livestock becomes so high as to impact his or her ability to make a profit. Conversely, when such prices are lower, making feed less expensive and replacement livestock more affordable, such prices may occur at the very time when that same farmer is attempting to sell last year's production.

Governmental risks are those associated with the ever increasing regulatory burden on farmers and ranchers. What additional costs will be imposed in the near and long term on farmers or ranchers? Will large political issues such as immigration reform or health care costs impact the farmer in a very practical sense? Activities going on at the state and national level have dramatic effects on the rural landscape. Additionally, the federal government has been heavily involved in the economic activities of farmers with farm bills providing financial support to certain farming activity. Restricting these payments will dramatically increase the financial risks to the independent farmer or rancher. Government policy has significant impact on the farmer's and rancher's ability to sell their goods overseas as the government expands or contracts international trade policies. Greater emphasis on environmental regulation has also significantly moved into the rural environment and virtually every aspect of the farm and ranch enterprise has greater costs due to such regulations.

Capital risks describe those associated with a farmer's cost of capital, i.e., interest rates on loans. If he or she uses private capital or investors to buy land, equipment, livestock or seed, will that capital still be available next year and at what cost? Will the debt already incurred by a farmer still be able to be serviced in a bad year or in a financial environment showing downward trends due to decreased consumption, increased costs of transportation to markets and the like? Capital risks also describes risks that arise from ranchers who lease acreage for grazing and whether increases in those lease rates will impact his or her ability to keep a leased property and thus maintain their level of livestock. Capital risks may also describe the risks evaluated by a farmer

or rancher contemplating expanding his or her operation by buying more land, more equipment and more livestock. Will he or she actually make more money by getting “bigger” or will they move into a competitive environment already occupied by more well-funded operators. As mentioned above concerning the government’s impact on the foreign markets of US products, the foreign currency markets impact the amount of US farm products and animals that can be purchased by foreign consumers.

Technology risks involve new production methods, new crop varieties, feed combinations, makes and models of equipment, and breeding and reproductive endeavors. While each of these may be considered an “advancement” for the farmer or rancher, until its use is implemented and proven on a particular property, the advancement is in theory only. Thus, the capital put at “risk” in acquiring once of these improved methods, feeds or equipment may be significant but ultimately unable to provide an adequate return. Will a small producer be able to access the latest in technology breakthroughs? Or will they be competing with their crops and livestock against corporate entities who plant and sell the latest biotechnologically advanced seeds and products. Will advances in technology result in “safer” food? Will the farmer be able to afford changing technology and regulations involving waste disposal? If a significant capital investment is made in a piece of equipment or technology, will it become obsolete with some further advancement resulting in a piece of equipment that is not sellable for adequate value or perhaps it is simply obsolete and of no value?

How do you manage risks?

1. Avoid risks: Structuring the farm and ranch business so that certain types of risks are simply nonexistent. For example, a “closed herd” for a rancher may eliminate the introduction of disease that comes with cattle purchased from unknown sources or at the local auction barn. The risks of losing calves at calving time may be avoided by the rancher who doesn’t produce his own calves but simply buys weaned calves and feeds them until they are hauled to market.
2. Reduction of risks: While all risks cannot be eliminated or avoided, some can be reduced. For example, utilizing experts to assist with crop and fertilizer decisions reduces risks. Experts are frequently used to advise ranchers as to improving breeding programs, selecting better breeding stock, and helping make tough culling decisions. Diversification is also a reduction strategy. By expanding the farming operations to involve different types of crop or livestock breeds or combinations thereof will spread risks. The downside of such diversification is that specialized and homogeneous farming operations achieve economies of size by only pursuing one specific, focused activity.
3. Assumption of risks: Farmers and ranchers simply accept the fact that risks exist in most agricultural endeavors and that such risks can be assumed provided that they are observed, studied, managed and assessed. For example, crop producers may “pre-sell” crops at a certain price for a delivery on a date in the future. While such producer may lose the opportunity for a higher price that may be in effect on the day he or she harvest the crop which he or she has “pre-sold” or “hedged,” he or she has

assumed the risk of price fluctuations and managed that risk of the markets by accepting a known, fixed sum certain. These are often called “forward contracts.” These risks can also be managed by contractual relationships between a single farmer and rancher as a seller, and a single purchaser of his or her output. For example, a crop producer may sell his or her entire crop of corn to a local feed yard thereby insuring him or her an income stream. The risk of this relationship is, of course, that if that feed yard goes out of business or changes management, that “sole source” contract may be lost.

Strategies for managing risks:

1. Financial reserves – maintain adequate liquidity
2. Timing adjustments as to capital purchases, i.e., delaying purchases or expansion
3. Sale of underused equipment or assets to meet financial obligations in order to avoid further debt.
4. Managing debt and allocations between short-term debt, long-term debt or maintaining different types of debt and collateral. Careful evaluation of cash flows and their timing
5. Hedges, options and forward contracts to protect against price changes.
 - a. Hedges are agreements where a farmer sells products at a price set now (or purchase a product at a set price). They lose the chance to gain from a rise in market prices. They can be lifted at any time as the farmer measures the cost of purchasing the hedge against what he or she may gain by returning to selling their crop at the market price.
 - b. Options protect a farmer from lower prices, but still allow the farmer to share in the gain from increase in prices. Again, the costs of these options must be evaluated and some farmers may not be of a size able to participate in an option contract due to minimum size requirements.
 - c. Forward contracts have less flexibility since only delivery of the contract satisfies the contract. But other disadvantages such as costs, minimum size contracts, margin calls, are eliminated.
6. Diversification
 - a. Geographic dispersion or diversification
 - b. Variety of crop production
 - c. Livestock varieties, crossbreeding, mix of seed stock and commercial stock
 - d. Requires, however, that the diverse enterprises have different risks and not be subject to the same hazards.
7. Insurance
 - a. Health and medical risk insurance
 - b. Casualty risk
 - c. Accident risk
 - d. Liability risk
 - e. Weather risks – crop insurance (wide variety of these today)
 - f. Automobile risk
8. Maintain flexibility
 - a. Personnel – can you expand or contract easily
 - b. Equipment – can equipment be shared so as to spread costs?

- c. Emphasis on variable costs vs. fixed costs – can you rely on leased land?
 - d. Higher levels of liquidity and lower levels of debt always improves flexibility
 - e. Catastrophe planning, planning for business interruptions.
9. Contingency planning
10. Legal protections
- a. Estate planning
 - b. Using proper legal entities
 - c. Contracts

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Appendix - Tab 3, James Eggleston: 3.11

Ownership of Farms and Ranches - Practice Guide

The topics of Asset Protection, Estate Planning, Business Entities and Risk Management all involve considerations that should be addressed in forming and maintaining the ownership structure of farms and ranches. The structure must be flexible, yet effective in accomplishing the following goals: (a) protect the assets of the individual principals and/or families involved in the farm and ranch operations, (b) transfer assets and value to future generations at the least cost and with the optimum tax planning, (c) utilize entity structures and forms that enhance business value while not impeding operations or record keeping to the point where they are ignored or abandoned as too cumbersome or difficult to understand, and (d) minimize the risk of loss from accidents or claims arising during operations.

Certain of the entities formed under the *Texas* Business Organizations Code (“TBOC”) should be utilized to accomplish the above listed goals, but not every entity equally effective and some options should be passed over. (See Comparison of Entities chart attached).

Basic Building Blocks:

The basic “building blocks” of an effective structure are as follows:

- a. A limited liability company (LLC) owned and managed by the farm and ranch owners or “founders.” The LLC offers the maximum in management, operation and tax flexibility. It doesn’t require the formalities of most other entities but offers as much of a “liability” shield as any other entity available. One of its greatest strengths is that it is a “COPE” (discussed in greater detail below). An LLC can be managed by its members or managers. The attached form recommends management by managers inasmuch as the membership interests may be initially held by other entities or may be transferred to trusts or others who are not involved in management of the ranch enterprise.
- b. A limited partnership (LP) formed to directly own real estate and personal property involved in the farm and ranch operations or indirectly own such property and investments through other entities, primarily limited liability companies. A LP provides certain key advantages as the “holding company” for the assets of the farm or ranch. In addition to many of those which an LLC offers, an LP also provides excellent estate planning advantages. The most well-known of these advantages is the ability to transfer limited partnership interests over time to trusts or individuals in tax favorable transactions (as gifts) which can ultimately result in the transfer of a large part of the estate of the ranch owners tax free while such owners remaining in control for as long as they desire by continuing to control the general partner either as individuals as general partners or, preferably, through a limited liability company formed to be the general partner. LPs are also “COPEs.”
- c. Revocable trusts are useful estate planning tools and offer an above-average tool for avoiding probate fights and costs. It provides some degree of privacy and pre-death planning.

They key disadvantages are that they do not provide any material protection from creditors of the “grantors” (those who establish such trusts). They offer little significant tax planning except to the same extent as what would be provided by a well-drawn will. They can be cumbersome as a transaction vehicle, but they can be a good “holding” vehicle for assets that the grantor may still want to utilize or enjoy, while still pre-setting the disposition plan the grantor desires to implement on his or her death, or upon the death of the survivor of the grantors.

- d. Irrevocable trusts are also useful estate planning tools offering many advantages over revocable trusts, but some significant disadvantages for those grantors who may still need to utilize assets they are considering for a trust.

The key advantages are that (a) what is in the irrevocable trust is excluded from the estate of the grantor, (b) if properly formed and funded, they can shield trust assets from creditors of the grantor and trust beneficiaries, and (c) the grantor controls the ultimate distributions of the irrevocable trust by dictating the terms of the irrevocable trust agreement when it is drafted.

The key disadvantages are that (a) what is placed into the irrevocable trust must be left in the trust (i.e., “no touchy” is a good phrase to impress on the client as to the nature of an irrevocable trust), (b) the trustee, as an unaffiliated third party, is generally invested with broad discretion, and thus, the grantor does not have any ongoing, daily control, and (c) the irrevocable trust agreement is difficult to amend and/or terminate.

Irrevocable trusts are often used to purchase and hold term life insurance (e.g., “ILIT” or “Irrevocable Life Insurance Trust”). The ILIT purchases life insurance on the life of the grantor. The ILIT then receives the death benefits from such insurance when the grantor dies and the beneficiaries receive lots of cash, all of which can be tax-free. In an ILIT, the grantor isn’t putting assets into the ILIT that he or she may still need to utilize, sell or borrow against. The grantor can ultimately “amend” or “terminate” the ILIT (and thus have effective control) by simply ceasing to gift to the ILIT the amounts the ILIT needs to pay the insurance premiums for the insurance (required to keep it alive). Certain formalities must be observed and a properly drafted agreement for the ILIT must be used.

Common Structure:

A common structure using each of the above basic tools is shown on the attached “Structure Chart” and is briefly described below.

- a. A family limited partnership (FLP) is an LP formed to hold “assets” of the ranch, whether these are the real property or personal property or other investments of the ranch owners. Often, however, the FLP owns other entities which are formed to hold different assets or operations of the ranch. For example, the FLP may own an LLC that simply holds the ranch’s real property and an LLC that only owns the cattle operations. This structure is recommended to isolate the assets and value of one function or operation of the ranch from the liabilities and risks of another function or operation. The FLP may also simply be an investor in other ventures unrelated to the ranch or perhaps involving the separate endeavors of one of the children of a ranch owner.

Family limited liability companies (FLLC) are similar structures that have similar advantages, except FLPs generally have management limited to a few number of individuals (acting through the GP) whereas the FLLC is generally thought of as having management shared among all or its members. (This can be alleviated if membership interests are held by trusts controlled by the ranch owners.)

A FLP has no practical legal distinction from any other LP except that its limited partnership interests are only held by family members related to the ranch and its owners or trusts established for such family members.

- b. An LLC is used as the general partner of the FLP in order to shield the ranch’s owners from personal liability of the activities and liabilities of the FLP which is imposed on general partners under state law. It allows its owners (members) to continue to control the FLP long after they cease to own a majority of the FLP’s limited partnership interests. The entity formalities and structure should be strictly followed and separate books and records, including keeping consents and minutes of meetings, should be maintained. It is a separate entity from the individuals who own the ranch and the FLP and should be treated as such.
- c. The attached structure reflects a FLP that owns other entities, in this case LLCs, who in turn own real estate, ranch operations and investments in other activities. The FLP, upon formation, is solely owned by the ranch’s owners, either through the general partner LLC they form and own and through their ownership of all the limited partnership interests (subject to whatever limited partners they may give at that time to children). In this case, the general partner owns 1% of the total partnership interests and the limited partners own 99% of the partnership interests.

The attached chart reflects that 9% of the total partnership interests are owned from the beginning by an irrevocable trust benefitting children and the remaining limited partnership interests are owned in equal percentages by each of the individual ranch owners (i.e., 40% of the total partnership interests are held by each). It also contemplates

that over time, the individual limited partners will make transfers to either trusts or other individuals through properly documented gifts thereby reducing the total estate of the ranch owners.

- d. The attached structure (and the agreement of limited partnership for the FLP) uses an irrevocable trust as a limited partner which may receive future gifts of limited partnership interests from the initial individual limited partners. This limited partner may also be a revocable trust, but if the limited partnership is going to be most effectively used as an estate planning tool, the limited partnership interests will either be given outright to individuals in the “next generation” (i.e., children of the ranch owners) or to an irrevocable trust for their benefit.

Charging Order Protected Entities (“COPEs”):

COPE’s are those entities whose owners are protected under *Texas* law from losing their ownership interest in a COPE to a creditor of such owner. Unless the ownership interest is specifically pledged to a lender, the only remedy a creditor of an owner of ownership interests in a COPE is a charging order against the distributions from the COPE to such owner. In other words, an owner in a COPE may not lose his membership interests or limited partnership interests to a creditor; he or she may only be deprived of distributions on such interests.

A corporation under *Texas* law is not a COPE and a creditor of a shareholder may have the right to capture a shareholder’s stock in order to satisfy a judgment. A member of a limited liability company or a limited partnership may not lose their ownership interest for a similar reason.

The most obvious rationale for “charging order protection” is that the expectation of the other members or partners in such interests was that they would not later become co-owners or partners with unknown third parties and thereby be forced to buy-out such parties, especially creditors of former partners, at prices or in a time frame that was unforeseen. Another rationale is that, practically speaking, the true value of membership interests in limited liability companies and partnership interests in limited partners is the potential for cash distributions that they represent. Absent the prospect of distributable cash, the interests don’t mean much. Thus, to a creditor, the ability to obtain charging order on such interests may be nearly as good as holding the interest itself.

The advantage, however, is that the members or partners of a COPE can elect to withhold distributions if a creditor of a member or partner appears. It may also elect to simply hire the member or partner as an employee and perhaps make salary payments to replace distribution payments and such salary may be exempt under *Texas* law from garnishment. It is not prudent to assume that a COPE would protect a member or partner from claims of the Internal Revenue Service, other government loan programs, claims in property settlement disputes or other “nondischargeable” type claims as defined in federal bankruptcy law.

Drafting Tips, Issues to Consider and Information to be Gathered:

Limited liability Company:

- a. Name of the Company (check name availability on the *Texas* Secretary of State's website early to avoid redoing documents if the use of the name is denied)
- b. Names and addresses of owners of the Company – the “members.”
- c. Names of the Company's “officers.” The attached forms contemplate naming managers as “officers” with traditional titles such as President, Vice President, Secretary and Treasurer. The law does not require such officer titles. Simply appointing one or more members as “managers” may suit the members' desires for authority and appearance of management control. Another oft-used “title” is “Principal.”
- d. Name and address of the Company's registered agent. This may be one of the members of the Company. However, a lawyer may recommend that the lawyer serve as the registered agent so that the Company and its members are not bothered by the appearance of a process server bringing a lawsuit into their workplace.
- e. The agent must consent to serve in such capacity. The attached form provides that such agent signs a statement of consent at the bottom of the Ratification and Consent in Lieu of Organizational Meeting. A consent statement may, alternatively, be attached to the Certificate of Formation when it is initially filed.
- f. The percentage of each member's ownership in the Company is set forth and the consideration he or she will pay. In the attached form, it is contemplated that the members will own the membership interests in a 50/50 ratio and that the consideration paid at this point will be nominal.
- g. The Company Agreement will provide whether future capital contributions will be required or whether loans may be made by members to the Company. If such future contributions will be required, the Company Agreement provides for certain remedies if they are not made.
- h. The Ratification and Consent in Lieu of Organizational Meeting provides that the members will appoint managers to manage the affairs of the Company (much as a board of directors manages the affairs of a corporation). If the Company is to be managed by the members, the appointment of the managers will be deleted, and a statement of membership managers will be made instead.
- i. The Company Agreement will also cover the following topics and decisions concerning each should be discussed with the owners and appropriate modifications made:
 - (1) Membership, Disposition of Membership Interests, Information to Members
 - (2) Liability of Members (generally negated to preserve a “shield”)
 - (3) Capital Contributions
 - (4) Allocations and Distributions (generally as per ownership interests unless the hard-capital investors are to receive preferential distributions until they receive a return of all their invested capital).
 - (5) Managers, Election, Number, Authority, Removal, Meetings, Officers
 - (6) Meetings of Members, Quorum, Location
 - (7) Tax Matters, Dissolution, Liquidation, Termination

Limited Partnership:

- a. Name of the Limited Partnership (again, checking the name availability is recommended).
- b. Names and address of the limited partners of the Limited Partnership.
- c. Name and address of the general partner.
- d. Name and address of the registered agent.
- e. The purposes of the Limited Partnership.
- f. Permission is granted for the partners to engage in other businesses, included those that may conflict with the business of the Limited Partnership.
- g. How the partners share in profits
- h. How profits and losses of the Limited Partnership will be allocated, including any special allocations.
- i. What capital contributions will be made and when.
- j. Whether or not future capital contributions may be mandatory, optional or prohibited.
- k. Accounting and reporting by the responsible party of the Limited Partnership.
- l. Management will be vested in the general partner, but if that partner no longer serves, the agreement provides a procedure for selecting new general partners.
- m. The authority of the general partner (broad or narrow), including those items in which the general partner will need consent of others.
- n. How new partners are admitted to the Limited Partnership and what consents are required.
- o. What transfers of partnership interests are permitted?
- p. How and when the Limited Partnership terminates and what happens upon liquidation.
- q. Priorities upon liquidation and distribution of assets belonging to the Limited Partnership.

Irrevocable Trust:

- a. Name of grantor/settlor.
- b. Name and address of trustee and one or two alternate trustees.
- c. Name and address of beneficiaries.
- d. The distribution plan? When will distributions be made? To whom? At what age or upon what events?
- e. What discretion does the trustee have for distributions that differ from the written plan or instructions?

Revocable Trust:

- a. Name of grantor/settlor.
- b. Name and address of trustee and one or two alternate trustees.
- c. Name and address of beneficiaries.
- d. Does the revocable trust first benefit the grantor/settlor?
- e. What is the distribution plan? When will distributions be made? To whom? At what age or upon what events?
- f. What discretion does the trustee have for distributions that differ from the written plan or instructions within the revocable trust agreement?

Irrevocable life insurance trust (ILIT):

- a. Name of grantor/settlor.
- b. Name and address of trustee and one or two alternate trustees.
- c. Name and address of beneficiaries.
- d. What is amount of insurance?
- e. What is type of insurance? (should be term life insurance)

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Appendix - Tab 3, James Eggleston: 3.12

Ranch Management Agreements – Practice Guide

Ranch Management Agreements are useful documents to memorialize compensation agreements with ranch managers and to detail the duties of such persons in managing farms and ranches which constitute large investments for their owners. Such investments also include livestock and cattle including breeding stock, equipment and intellectual property concerning competitive strategies, breeding strategies and marketing ideas.

These are also useful in the cases where long term managers may work for several generations of owners. They either may feel entitled to ownership of property, livestock or operations. Promises of ownership may have been made by prior generations and forgotten by the time the manager retires.

This form addresses the following important concepts:

1. Names of parties
2. Term of the agreement and whether it automatically renews
3. Notice requirement for termination of the agreement.
4. Dues of the manager including care and feeding responsibilities, preparing animals for sale and transportation, oversight of veterinarian care, management of crops.
5. Whether the manager has limits on spending money from ranch operations
6. Whether the owner and manager will establish quarterly budgets and requiring the owner to consent to expenditures that vary from the budget.
7. What “free” services will the manger provide to the owner, i.e., training of a certain number of horses.
8. Whether manager may train horses for others and who gets that revenue, i.e., perhaps the revenue from boarding belongs to the ranch owner and the fees for training are revenues belonging to eh owner.
9. What is the compensation of the owner?
 - a. Salary?
 - b. Equity in the entity owning the ranch
 - c. Share in net revenue (“net” after all expenses)
 - d. Bonuses based on a share of gross revenue
 - e. Premium bonuses if certain revenue goals are achieved.
 - f. Other benefits such as the following:
 - i. The right to keep horses and livestock belonging to the manager
 - ii. The right to use fuel provided by ranch owner and for what purposes.
 - iii. The right to use living quarters and who pays the utilities.
 - iv. The right to keep cattle use in training of Manager’s horses.
 - g. Whether the manager may be entitled to purchase some of the ranch in the event of the ranch owner’s death? The ranch owner may give the manager some “free” acreage upon his or her death.
 - h. Life insurance is often provided to a long-term ranch manager in lieu of any rights the manager may have in the ranch, its operations or the real property.

10. What are manager's termination rights and what payments he receives in certain events causing him or her to terminate the agreement
11. What is the ranch owner's right to terminate the agreement and what obligation does the owner have? Depends on what the termination occurred? Some payments involve a premium, some payments will be only through the day of termination, i.e., if there is a termination for "cause."
12. A manager should keep the business of the owner confidential and should also not disclose any trade secrets of the owner. It allows the owner to maintain certain competitive advantages.
13. Resolution of disputes should first be by mediation and then by binding arbitration.
14. Among the miscellaneous provisions, an important one is contained which insures the relationship is one of an independent contractor and not as an employee. The manager must handle his or her own tax obligations and the ranch owner should not be obligated for payroll tax obligations to the IRS.

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Appendix - Tab 3, James Eggleston: 3.12.1

Ranch Management Agreement

This Ranch Management Agreement (the "Agreement") is made this [* _____*] day of [* month *], [* year *], between [* ranch owner *], a [Texas] limited [* type of entity *] having a principal place of business in [* address, city, state, zip *] (here "Ranch Owner") and [* ranch manager *], an individual residing at [* address, city, state, zip *] (hereinafter referred to as "Manager") as follows:

Term

1. Manager is retained for a term of [* two (2) *] years upon the terms and conditions contained herein. Thereafter, the term of this Agreement shall automatically be renewed for successive [* two (2) *] year periods upon the terms and conditions contained herein, subject to either party's rights of termination as provided elsewhere herein. However, certain provisions contained herein provide for earlier termination and the parties agree, subject to the specific requirements contained hereinbelow, to give each other sixty (60) days' notice of their intent to terminate the Agreement. This is to be a courtesy extended to the non-terminating party and is not intended to create an additional or different specified term of this Agreement.

Duties

2. Manager is initially retained pursuant to this Agreement with the following duties listed below. For purposes of this Agreement, the term "Ranch" shall mean all real property owned by the Partnership.

A. Manager shall provide ranch management and oversight to the operations of the Ranch Owner at the Ranch including the following:

- (1) Care and feeding of all [* horses/cattle *] owned by Ranch Owner in a first class manner demonstrating good animal husbandry and competent and diligent care.
- (2) Preparation of all [* horses/cattle *] for sale, breeding and transport as directed by Ranch Owner. All such transportation shall be done in equipment and vehicles provided by Ranch Owner and for which Manager shall operate in a careful and prudent manner.
- (3) Oversight of all veterinarian care, nutritional needs, safety and boarding needs of all [* horses/cattle *] as directed by Ranch Owner, with such emergency care and transportation occurring in Manager's discretion reasonably exercised.
- (4) Management of all horticultural, planting, cultivation, fertilizing and harvesting needs and operations of the Ranch.
- (5) Other normal and customary tasks reasonably required to maintain the Ranch in a first class condition and all livestock thereon in a fit and healthy condition.

- (6) All expenses incurred in connection with the foregoing activities shall be paid by Ranch Owner and/or the Partnership. Any single expense in excess of [* \$500.00 *] shall be approved in advance via e-mail or fax by Ranch Owner.
- (7) Ranch Owner and Manager shall agree at the beginning of each calendar quarter on a budget for operations for Ranch and Ranch Owner's consent shall be required for any expenditure in excess of such quarterly budget in addition to any expense specified in subparagraph (6) above.

[*Alternative clause:

_____ Manager shall provide, at no charge to Ranch Owner, training and boarding services (at the Ranch) for up to [* four (4) *][* horses *] owned by Ranch Owner. Any additional [* horses *] to be trained and boarded by Manager for Ranch Owner shall be at Manager's normal and customary rates. All [* horses *] trained by Manager for third parties who contract with Ranch Owner for training at the Ranch shall be charged Manager's normal and customary rates and all receipts for boarding of such [* horses *] shall belong solely to Ranch Owner.

C. It is understood and agreed that Manager is subject to the direction and control of Ranch Owner's Chief Executive Officer. Manager further agrees that he or she will not directly or indirectly engage or participate in any activities at any time during the term of this Agreement that are in conflict with the best interests of Ranch Owner. Further, both during and after the term of this Agreement, Manager shall be restricted by the terms of the provisions contained herein.

Compensation

3. As compensation for services rendered under this Agreement, Manager shall be entitled to receive the compensation described as follows: _____

[*Alternative clause:

_____. As compensation for services rendered under this Agreement, Manager shall be also entitled to receive the compensation described on Exhibit "A" attached hereto and incorporated herein by reference.

Termination

4. This Agreement may be terminated as follows:

A. By Manager (1) "at will," that is, upon the providing of the written notice specified above; or (2) upon written notice to Ranch Owner of its failure to comply with the terms of this Agreement and the continuation of such failure for a period of thirty (30) business days from the date of such notice.

B. By Ranch Owner (1) "at will," that is, upon the providing of the written notice

specified above, or (2) upon written notice to Manager of his or her termination for “cause” and the failure of Manager to cure such “cause” within a period of fourteen (14) business days from the date of such notice. “Cause” for purposes of this paragraph shall mean one of the following: (a) Manager’s commission of an act of fraud or dishonesty against or with respect to Ranch Owner as shall be reasonably determined to have occurred by Ranch Owner’s Chief Executive Officer; (b) Manager’s conviction by a court of competent jurisdiction of (1) a felony or any kind or (2) any misdemeanor involving moral turpitude and/or dishonesty; (c) Manager’s failure to perform to the reasonable satisfaction of Ranch Owner’s Chief Executive Officer; or (d) Manager’s breach of any covenant or condition contained in this Agreement.

C. By Ranch Owner upon the giving of written notice to Manager that Ranch Owner has determined that Manager is disabled, that is, unable to perform his or her duties hereunder due to illness, accident or other physical or mental incapacity.

Effect of Termination

5. **A. Termination by Manager.** In the event of the termination of this Agreement for the reasons specified under Paragraph 4.A.(1), Manager shall be entitled to the compensation earned by him or her prior to the date of termination as provided in this Agreement computed pro rata up to and including the date of termination. In the event of the termination of this Agreement for the reasons specified under Paragraph 4.A.(2), Manager shall be entitled to an amount of compensation equal to [* 125% *] of the total compensation which was earned by him or her in the [* ninety (90) *] days prior to the date of termination computed pro rata up to and including the date of termination.

B. Termination by Ranch Owner. In the event of the termination of this Agreement for the reasons specified under Paragraph 4.B.(1), Manager shall be entitled to an amount of compensation equal to [* 125% *] of the total compensation which was earned by him or her in the [* ninety (90) *] days prior to the date of termination computed pro rata up to and including the date of termination. In the event of the termination of this Agreement for the reasons specified under Paragraph 4.B.(2), Manager shall be entitled to the compensation earned by him or her prior to the date of termination as provided in this Agreement computed pro rata up to and including the date of termination.

Non-Compete Agreement and Disclosure of Confidential Information

6. Ranch Owner possesses secret and confidential information, techniques, procedures, technical data and information, and customer and client lists used or intended for utilization in its operations of which Manager has obtained or may obtain knowledge and Ranch Owner would suffer serious harm if this confidential information were disclosed or if Manager used this information to compete against Ranch Owner. Further, Manager, in the performance of services hereunder, may develop or conceive new and additional inventions and improvements with respect to such matters. Accordingly, Manager hereby agrees, during and after the term of this Agreement, that he or she shall abide by the terms of the “Confidentiality and Non-Compete Agreement” attached hereto as Exhibit “B” and incorporated herein by reference.

Mediation and Arbitration

7. Should there be at any time any dispute between the parties to this Agreement or the Confidentiality and Non-Compete Agreement, as to any matter and such dispute is not settled by mutual agreement between the parties involved, then either party may by writing notify the other party of the dispute and the parties are hereby bound to mediate the controversy in good faith according to the American Arbitration Association (“AAA”) rules of mediation in effect at the time. If mediation fails, the parties hereto agree to submit the matter to binding arbitration and an arbitrator shall be appointed and the arbitration shall be governed pursuant to the Commercial Arbitration Rules of the AAA, as they exist from time to time. The decision of such arbitrator as to any matter submitted to arbitration shall be final, conclusive, and binding on all parties to this Agreement. Any mediation or arbitration held under this Agreement shall be administered and conducted by the AAA. Each party shall equally bear the cost and expense of the mediator or arbitrator appointed.

Miscellaneous

8. A. **[Texas] Law to Apply.** This Agreement shall be construed under and in accordance with the laws of the State of [Texas]. The venue of any litigation arising from this Agreement shall be [* _____*] County, [Texas].

B. **Notices.** All notices allowed or required to be given hereunder must be in writing and dispatched by United States certified mail, return receipt requested, to the addresses shown at the end of this Agreement. Any time limitation provided for in this Agreement shall commence with the date that the party actually receives such written notice, and the date or postmark of any return receipt indicating the date of delivery of such notice to the addressee shall be conclusive of such receipt.

C. **Assignment.** Neither Manager nor anyone claiming under him or her may commute, encumber, or dispose of the right to receive any benefit hereunder. Such right to receive benefits hereunder is expressly declared to be non-assignable and non-transferable by Manager, and in the event of any attempted assignment or transfer, Ranch Owner shall have no further liability hereunder.

D. **Waiver.** The waiver by Ranch Owner of Manager’s breach of any provision hereof, shall not operate or be construed as a waiver of any subsequent breach by Manager.

E. **Binding Effect.** This Agreement shall be binding upon the parties hereto and their heirs, successors, executors, personal representatives, and assigns.

F. **Independent Contractor.** RANCH OWNER AND MANAGER INTEND BY THIS AGREEMENT TO CREATE AN INDEPENDENT CONTRACTOR RELATIONSHIP AND NOT ONE OF EMPLOYMENT. IN FURTHERANCE OF THIS INTENTION, CONTRACTOR SHALL PROVIDE ALL OF HIS OR HER OWN TOOLS, SET HIS OR HER OWN HOURS OF WORK, BE SUBJECT ONLY TO THE GENERAL GUIDANCE AND DIRECTION OF RANCH OWNER AND PERFORM IN SUCH OTHER WAYS AS SHALL BE SPECIFIED BY RULES AND REGULATIONS OF THE INTERNAL REVENUE SERVICE APPLICABLE TO INDEPENDENT CONTRACTORS.

EXECUTED at [* ranch name *] [* _____ *], [Texas], on the [* _____ *]
day of [* month *], [* year *]

Ranch Owner:

[* ranch name/owner *]
[* ranch address *]
[* city, state zip *]

Manager:

[* name of manager *]
[* ranch address *]
[* city, state zip *]

By: _____
[* _____ *],
[* title *]

Name: [* _____ *]

EXHIBIT "A"

Compensation

[*Alternative clause:

A. Equity Component:

Manager shall earn, upon the conclusion of each year of this Agreement, an ownership interest in the entity which is the Ranch Owner equal to a [* % *] ownership interest therein up to a maximum of [* % *] therein (hereinafter "Manager's Interest").

The governing ownership document (bylaws, buy-sell agreement or operating agreement of Ranch Owner shall provide, among other things, that:

1. In the event (i) Manager terminates this Agreement pursuant to paragraph 4.A.(1), (ii) Ranch Owner terminates this Agreement pursuant to paragraph 4.B.(2) or (iii) Manager becomes interested (directly or indirectly), as an employee, officer, director, shareholder, partner, consultant or advisor, with a competitor of Ranch Owner, then Ranch Owner shall have the exclusive right and option for [*one hundred twenty (120)*] days from the date of such termination to purchase all of Manager's Interest at a purchase price equal to [*seventy five percent (75%)*] of its fair market value. For purposes of this Agreement, the "fair market value" of the Manager's Interest shall be as determined by an appraiser located in [* *] County determined to be mutually agreeable to Ranch Owner and Manager. In the event Ranch Owner and Manager cannot agree upon such appraiser, each shall select an appraiser, who shall in turn select a third, independent appraiser whose value determination shall be controlling.
2. In the event Ranch Owner terminates this Agreement pursuant to paragraph 4.B.(1), or Manager terminates this Agreement pursuant to paragraph 4.A.(2), or this Agreement is terminated pursuant to paragraph 4.C, then Ranch Owner shall purchase all of Manager's Interest for a purchase price equal to [*one hundred twenty five percent (125%)*] of its fair market value.
3. In the event of the death of Manager while holding the Manager's Interest, the Manager's interest shall be redeemed by the Partnership in full in exchange for the disbursement of the proceeds of the life insurance described in paragraph D below.

[*Alternative clause:

B. Bonus Component:

Manager shall earn the following bonuses:

1. *Manager shall receive an annual bonus equal to [*three percent (3%)*] of all gross income of Ranch Owner arising solely from operations of the Ranch (the "Performance Bonus").*
2. *"Gross Income" shall mean all gross revenue to the Ranch Owner realized from the operations conducted on or about the Ranch including the sale of [*horses/cattle*], the sale of breeding rights to [*horses/cattle*] owned by Ranch Owner, the sale of crops or hay from the Ranch, the leasing of facilities of the Ranch to third parties and such other activities as Ranch Owner and Manager shall develop during the term of this Agreement.*
3. *During any calendar year that the gross income of the Partnership exceeds the Partnership's gross operating expenses by [*twenty percent (20%)*], the Performance Bonus shall be doubled for any such year (the portion of the Performance Bonus in excess of [*three percent (3%)*] is hereinafter referred to as the "Premium Bonus").*
4. *The Performance Bonus shall be paid quarterly within fifteen (15) days of the conclusion of each calendar quarter hereunder.*
5. *The Premium Bonus shall be paid, if applicable for a calendar year, within thirty (30) days after the conclusion of such calendar year.*
6. *Ranch Owner shall have the discretion to advance to Manager draws or loans against the Performance Bonus or the Premium Bonus, provided that such draws or loans shall be repayable to Ranch Owner out of the next available Performance Bonus.*

[*Alternative clause:

C. Other benefits/duties:

1. *Manager shall have the use of the living quarters provided by Ranch Owner as part of or adjacent to the primary barn facility on the Ranch. Manager shall also have the use of such barn facilities for the activities described in subparagraph 3 below.*
2. *Ranch Owner shall pay all utilities, water and fuel expenses of the Ranch except for such fuel expenses specifically incurred by Manager in connection with his or her training and showing activities for horse or cattle other than those owned by Ranch Owner.*
3. *Manager shall have the right to keep up to [*fifteen (15)*] [*horses/cattle*] owned by Manager or customers of Manager at the Ranch and shall have the right to retain all boarding, training and showing fees received by Manager with regard to such [*horses/cattle*]. All costs of feed, farrier care, veterinarian care, stall maintenance and*

labor associated with Manager's training and showing business shall be borne by Manager.

4. *Manager shall have the right to maintain a reasonable number of cattle up to one (1) year of age at the Ranch as reasonably required in connection with Manager's training and showing activities.*

[*Alternative clause:

D. *Right to real estate:*

Upon the death of _____, the Chief Executive Officer of Ranch Owner, Manager shall be entitled to receive free and clear title to that portion of the Ranch described on Exhibit "D" attached hereto and incorporated herein by reference provided the following conditions are satisfied: (a) the completion of ten (10) years of service to Ranch Owner under this Agreement (or any replacement agreement between Ranch Owner and Manager) and (b) this Agreement (or any replacement agreement) shall continue to be in full force and effect at the time of _____ death.

[*Alternative Clause:

E. *Life insurance:*

Ranch Owner shall provide Manager with life insurance coverage of no less than \$100,000.00 which shall also be in lieu of full and complete payment for the repurchase of all interests owned by Manager in Ranch Owner and the surrender by Manager of all such interests (including, without limitation, the real estate described in paragraph D immediately above).]*

EXHIBIT "B"

Confidentiality and Non-Compete Agreement

Manager has entered into an Agreement for Services with Ranch Owner, which is engaged in the business of raising [* horses/cattle *] and ranching. By signing this Agreement, Manager acknowledges his or her understanding of the following:

A. Ranch Owner has information generally not known to persons or entities other than Ranch Owner called "confidential information." All companies must conduct their business through their managers and consequently many managers must have access to confidential information.

B. The phrase "confidential information" as used in this Agreement comprises any technical, economic, financial, marketing, computer program, regardless of the medium on which they are stored or written, computer software, and other information which is not common knowledge among competitors or other companies who might like to possess such confidential information or might find it useful. Some examples include prospect lists, customer lists, items in research or development, products, inventions, innovations, designs, ideas, trade secrets, proprietary information, scientific studies or analyses, merchandising, accounting, long-range planning, financial plans and results, marketing plans, sales and profit figures, etc.

C. Ranch Owner's confidential information represents some of the most important, valuable, and unique aspect of Ranch Owner's business, and it would be seriously damaged if Manager breached the position of confidential trust Ranch Owner has placed in him or her by disclosing such confidential information to others or by departing and taking with him or her the aforesaid unique information compiled over a period of time for the purpose of Manager competing against Ranch Owner or disclosing such information to Ranch Owner's competitors.

Accordingly, in consideration of the disclosure of said confidential information by Ranch Owner to him or her and as a condition of his or her engagement, Manager agrees as follows (which agreement is part and parcel of this Agreement):

(1) Confidential information is proprietary to Ranch Owner. Manager agrees to hold such information in strictest confidence, and not to make use thereof except in performance of duties under this Agreement. Whether during or after his or her engagement with Ranch Owner, Manager may not disclose to any others any confidential information originated or acquired by Manager while engaged by Ranch Owner.

(2) (a) Manager expressly covenants that following the termination of this Agreement, for any reason, he or she will not use the confidential information directly or indirectly to own, manage, operate or be connected with the ownership, management, operation or control of, consult with, or to be an employee or agent for any business which solicits to hire or hires any former or current employees or vendors of Ranch Owner.

(b) Manager acknowledges and agrees that for a period of two (2) years after the termination of this Agreement, he or she will not solicit to hire or hire any former or current employees or vendors of Ranch Owner, nor will he or she aid any other person or entity in so doing.

(c) Manager acknowledges and agrees that for a period of two (2) years after the termination of this Agreement, he or she will not engage in or become an Manager or consultant or adviser to or have any direct or indirect interest in any other person, firm, corporation or other entity engaged in any business activities competitive with or similar or related to the business of Ranch Owner or any of its subsidiaries or any segment thereof, except to the extent that Manager engages in a business activity identical to that in which he or she was engaged at the time of his or her execution of this Agreement. This restriction shall be applicable to the following territory: the state of Texas. Manager agrees that such restrictions (including the length of time and the specified territory) are reasonable and necessary to the success of the business of Ranch Owner and that, but for his or her agreement to such restrictions, the offer of engagement contained in this Agreement would not have been extended to and finalized with Manager.

(d) In the event that any part or provision of this Paragraph 2 relating to the time period and/or the areas of restriction shall be declared by a court of competent jurisdiction to exceed the maximum time period such court deems reasonable and enforceable, the time period of restriction deemed reasonable and enforceable by the court shall become and thereafter be the maximum time period purposes of this Agreement.

(e) In the event of an actual or threatened breach by Manager of the provisions of this Paragraph 2, Ranch Owner shall be entitled to a permanent injunction for the remainder of the two (2) year period restraining Manager from violating the terms of the restrictive covenant in the above subparagraphs (a) and/or (b) and/or (c). Nothing herein stated shall be construed as prohibiting Ranch Owner from pursuing any other remedies available to Ranch Owner for such breach or threatened breach, including the recovery of damages from Manager.

(f) Manager makes this covenant in consideration of the mutual promises, covenants and benefits herein stated, and yet independent of any other provision of this Agreement and the existence of any other claim or cause of action of Manager against Ranch Owner, whether or not arising out of this Agreement, shall not constitute a defense to Ranch Owner's enforcement of this covenant to the fullest extent of its terms.

(3) Manager further agrees that in the event Ranch Owner finds it reasonably necessary to employ attorneys to enforce the covenants and agreements herein contained, Manager shall pay its reasonable attorney's fees and related legal costs.

DATED this ____ day of [* month *], 20 ____, in [* city, state *], where the obligations contained in this Agreement are performable.

[* name of Ranch Owner entity *],
[* type of entity *]

By: _____
[* printed name *],
[* title *]

Name: [* printed name *]

Appendix - Tab 3, James Eggleston: 3.13

Livestock Operations - Practice Guide

More than a million American families depend on livestock operations for all or part of their income. Many of these operations are, unfortunately, most likely unprofitable due to the demands of scaled operations required to support the costs of land, labor, equipment, feed, fuel, capital and marketing/delivery of products into supply chains.

Increasing efficiencies in operations, enhancing livestock health standards on the individual ranch, improving feed quality and its conversion by livestock, improving security in the food chain and meeting other technological and biological challenges are prerequisites to business profitability, satisfying domestic and international markets, and meeting consumer and supply chain demands. This is not your grandpa's ranch anymore.

Issues facing livestock producers:

The following elements are suggested for a livestock operator to consider in order to achieve profitability as well as to protect the owners of the operation while providing the participants with a livelihood and a transferrable asset to the next generation or to third parties:

1. Risk Management Issues/Requirements:
 - a. Maintenance of good books and records
 - b. Adequate, affordable insurance
 - c. Management of disease risks and diagnosis of the presence of disease in cattle and crops.
 - d. Maintaining safe and fair working conditions.
 - e. Managing environmental risks and clean water supplies.
 - f. Managing and developing contractual relationships with vendors, managers, joint venturers in land and cattle ventures, marketing channels, etc.
 - g. Balancing the use of land for wildlife habitats and recreational purposes.
 - h. Reducing risks of pesticide contamination of soil, water, livestock and humans.
 - i. Selecting good advisers as to legal, accounting and tax issues for proper structuring of entities involved in ownership, financial decisions impacting operations and capital expenditures, and preserving wealth through tax and estate planning.
 - j. Emergency planning for extraordinary weather or drought conditions.
2. Selecting and retaining productive animals which efficiently produce at least one offspring each year per mother (mother must conceive, carry and deliver her offspring at the least cost).
3. Selecting, retaining and caring for animals having health and disposition traits that make their handling and management more economical and less dangerous for those involved in working with such livestock.
4. Staying abreast of market demands for beef types and quality, trends in genetics and consumer demand.
5. Maintaining adequate sources of water and forage at costs that can support profitable operations.
6. Preserving labor resources without interruption or turnover.

7. Maintaining economical sources of fuel and other energy supplies.
8. Balancing land use between the livestock operation and either urban encroachment or use by other industries, e.g., oil and gas, recreational uses.
9. Locating sources of capital for capital investments in operational growth and/or land acquisition.
10. Dealing with governmental regulations that threaten to inhibit the creation of wealth or threaten sustainable ordinary income levels.
11. Participating in transportation systems and infrastructures that are adequate to support the delivery of commodities to the right markets.
12. Being responsive to changing consumer demands and financial changes (e.g., cost of money) in free market systems.
13. Competing for available land with the non-farmer/rancher buyer. Rising land costs poses the greatest threat to future participants (or continuing participation) in the farming and livestock industry.
14. Developing better management/production practices:
 - a. Reducing costs and frequency of handling cattle.
 - b. Marketing a uniform, heavier calf crop.
 - c. Optimizing feeding programs and improving cattle performance.
 - d. Increasing use of forage, improving its quality and quantity.
 - e. Using cow herd performance records to select animals to retain and to cull.
 - f. Reducing calf mortality, thereby increasing revenue streams from the herd.
 - g. Utilizing university and governmental resources, labs, and testing to gather data.

Types of livestock operations:

1. “Cow-calf operations” involve farmers and ranchers who own a permanent herd of cattle and produce a calf crop each year for sale. The operator’s emphasis is on producing young beef cattle from a herd of adult females and herd bulls (or breeding by artificial insemination). The conception and delivery rate of each female within the herd is the largest factor in the profitability of a cow-calf operation. Feed supplies generally come from pastures and other forms of roughage with the mother’s milk providing the nutrients and food sources for the calf. Ninety percent of such produced livestock will remain in the United States with 10% or less being exported.
2. “Background or intermediate operations” involve farmers and ranchers who are feeding weaned calves (sometimes called “stockers” or “backgrounders”) on pastures and forage (e.g., hay) until they are ready to “finish” in a feedlot. These animals gain weight using less feedstuff (as compared to feedlots) and develop immunities to diseases before being placed in a more stressful feedlot environment.
3. “Feedlot operations” are commercial operators who purchase weaned calves at approximately 6 to 8 months of age (weighing generally between 500 to 700 pounds) and, through a more structured growth and management environment, feed the calves a grain-based diet. After approximately six months in the feedlot, the calves are ready for harvest. The age of these animals at the time of slaughter may be as little as one year or

as old as two years. Their weights at will generally exceed 1,200 pounds per head (producing a fresh slaughter hanging weight carcass of between 60% and 70% of their live weight). These operations, together with major feed producers, are major innovators in livestock health and nutrition. Major issues to this operator are the sourcing of feed and water and the disposal of waste. Market fluctuations in beef prices will, of course, impact the feedlot operator as much as any participant in the livestock industry. This phase is also frequently called the “finishing phase.”

4. “Dairy operations” involve a business enterprise whose focus is the harvesting of bovine (cow) milk for human consumption. It is as cost and labor intensive an enterprise as any in the farming and ranching world. Raw milk products typically enter commerce through farmers’ cooperatives; from there, dairy products from the farm enter processing and marketing phases. Such processes are becoming increasingly concentrated among larger and larger agribusinesses operating increasingly automated and more efficient plants.
5. “Recreational operations” are those on which cattle are raised solely for aesthetic or recreational use. For example, many smaller landowners raise Texas Longhorn cattle solely for the appearance of the animals in their pastures or for the nostalgic or historical connection to “the old west.” Other livestock operations support the growing industries of rodeo entertainment, bull riding, team roping, cutting horses, and other industries where the cattle are part of the competitive environment. Producers specializing in such animals are paying less attention to published livestock market prices and more attention to the performance and/or appearance of the animals involved. These animals all ultimately enter the food chain after the usefulness in their particular recreational field has diminished. However, they will be sold at that time at prices wholly unrelated to their value as recreational animals.

In summary, livestock operations are as varied as they are complex. Within each operational category are an infinite number of possibly operational styles depending on available land and resources, whether the owner is primarily focused on farming and ranching or employs the labor required for the operation, the environmental and geographic profile of the available land and its favorability with respect to what the landowner desires to pursue, the age and experience of the proposed participant in the livestock industry, and numerous other factors.

Common to every operational model is the need to manage risks, prepare for contingencies, manage and preserve capital, pursue best practices possible in animal husbandry and operational management and either committing to meet head-on the market and industry challenges of a difficult challenging career or accepting the reality of income and costs that comes with a more passive participation in the farming or ranching industry.

Once that commitment is made, one way or another, the landowner should remain focused on what he or she enjoys doing and what they can do and/or afford, and not try to be that which is economically, time-wise or resource-wise beyond his or her ability. Stated another way, enjoy what you have and pursue your commitment and passion in the way that is most enjoyable to you. Accept and prosper in the circumstances in which you find yourself, always working towards improvement, but not frustrated or overwhelmed by a large and challenging world of

agriculture populated by many different kinds of people with vastly different resources and interests.

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Appendix - Tab 3, James Eggleston: 3.14

Cattle Feeding Agreements – Practice Guide

Cattle feeding agreements are entered into between parties who combine resources to purchase, feed and market cattle. Often one party brings capital to be used for purchasing cattle, veterinarian care, feed and other out-of-pocket costs and the other party contributes available land, time, labor and expertise.

These agreements take several forms:

- a. In the “ranch feeding” approach, the “feeder” simply manages grazing cattle on a ranch. The “owner” bears all loss, expenses and market risks. (It is similar to a grazing lease except the feeder (or ranch owner) manages and oversees the cattle for an absent owner.) At the time the cattle are ready to move to the feedlot for finishing, the parties share in the gain on either a “net revenue” basis or on a “per pound of gain” basis.
- b. Another form is the “feedlot approach” in which the “feeder” sells livestock to the “owner” and transports that livestock to the feeder’s feedlot. The owner bears all costs and expenses of feed (purchased from feeder at market prices) and veterinarian care. The owner pays a per pound of gain fee to the feeder or a day-rate of care. In either event, owner realizes 100% of the net revenue provided the costs incurred are reasonable and managed by the owner by contract or otherwise. The feeder makes his money providing land, labor, expertise, oversight and a number of other services required of the cattle while they are in his care.

Issues to be negotiated will include the following:

1. Who buys the cattle?
2. Who delivers the cattle to feeder’s location?
3. What condition are the cattle expected to be in when they arrive at the feeder’s location?
4. How are costs determined for various services provided by the feeder?
5. What type of mark-up will the feeder make on medicine, vet care, etc.?
6. Who makes the decision when to sell cattle? What is the condition of the market on that date? What are the feeder’s remedies if the owner elects not to sell?
7. If there is an early termination, how is the feeder to be paid since no “sale” event has yet occurred?
8. What costs are to be born be feeder?
9. Will the feeder share in any losses due to death of cattle in feeder’s care? Or will the calculation of net revenue or gain be adjusted to account for any lost cattle?
10. If the feeding agreement is terminated and there are still cattle in feeder’s care, will those cattle remain there until prudent practice dictates they be sold (i.e., an automatic extension of the term of the agreement)?
11. What if the feeding agreement is terminated due to a party’s breach, what happens to the cattle? Will the owner be entitled to recover any costs if the breach of the agreement is due to a bad act on the part of the feeder?

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Appendix - Tab 3, James Eggleston: 3.14.1

Cattle Feeding Agreement Sample Form
(Owner Bears All Expenses; Share of Gain)

Date: [* _____*]

Cattle Owner (“Owner”): [* _____*] [*marital status*], *or*
[* _____*] [*entity status, i.e., a
[Texas] limited liability company or a [Texas] limited
partnership*]

Owner’s Mailing Address:

[* _____*]
[* _____*]
[* _____*] County

Cattle Feeder (“Feeder”): [* _____*] [*marital status*], *or*
[* _____*] [*entity status, i.e., a
[Texas] limited liability company or a [Texas] limited
partnership*]

Feeder’s Mailing Address:

[* _____*]
[* _____*]
[* _____*] County

Feeder’s Ranch: See Exhibit “A” attached hereto and incorporated herein by
reference (herein “Feeder’s Ranch”).

Agreement: Owner desires to purchase and contract with Feeder to feed and
care for those livestock described on Exhibit “B” attached hereto
and incorporated herein by reference (the “Livestock”). The
number of Livestock subject to this Agreement may vary from
time-to-time due to death or loss from other natural causes. Owner
and Feeder will share in the net proceeds from the sale of the
Livestock according to the terms and conditions of this Agreement.

Term: The initial term of this Agreement shall be [* two (2) *] years
upon the terms and conditions contained herein (the “Initial Term”).

Renewal: After the Initial Term, the term of this Agreement shall automatically
be renewed for successive [* two (2) *] year periods upon the terms
and conditions contained herein, subject to either party’s rights of
termination as provided elsewhere herein. However, certain

provisions contained herein provide for earlier termination and the parties agree, subject to the specific requirements contained hereinbelow, to give each other thirty (30) days' notice of their intent to terminate the Agreement. This is to be a courtesy extended to the non-terminating party and is not intended to create an additional or different specified term of this Agreement.

Rights Upon Termination: Notwithstanding the termination of this Agreement at the end of the Initial Term, any renewal Term or prior to the expiration of any Term, Feeder shall have the right to complete the feeding of the Livestock then under Feeder's care and supervision until Feeder elects to sell the Livestock in accordance with customary operating practices hereunder or when the Livestock are of an age, size and condition meeting accepted industry standards for sale of Livestock into feed yard or other feeding environments.

Ownership of Livestock: At all times during the term of this Agreement, Owner shall be the sole and exclusive owner of the Livestock. Consequently, Owner shall bear all risk of loss, injury and death to the Livestock except in the event of Feeder's willful misconduct or gross negligence. Owner shall also be responsible for all out-of-pocket costs of care and maintenance of the Livestock except as otherwise provided herein below.

Duties of Feeder: Feeder shall provide the management and oversight to the feeding of the Livestock pursuant to the terms of this Agreement as follows:

- (1) On Feeder's Ranch, Feeder shall care for and feed all Livestock delivered to Feeder's Ranch by Owner in a first-class manner demonstrating good animal husbandry and competent and diligent care.
- (2) Feeder shall make the Livestock ready for transportation at the time of sale of the Livestock and shall gather all such Livestock in a mutually convenient location on Feeder's Ranch whereby the Livestock may be safely and efficiently gathered and loaded in trailers and vehicles owned by or contracted for by Owner.
- (3) Feeder shall manage and oversee all veterinarian care, nutritional needs and safety of the Livestock exercising Feeder's best judgment, including providing emergency care and transportation in Feeder's discretion reasonably exercised.

- (4) Feeder shall manage all horticultural, planting, cultivation, fertilizing and harvesting needs and operations of Feeder's Ranch.
- (5) Feeder shall perform such other normal and customary tasks reasonably required to maintain the Livestock and Feeder's Ranch in a first class condition and to maintain all Livestock in a fit and healthy condition.
- (6) All expenses incurred in connection with the foregoing activities shall be paid by Owner. If Feeder shall advance the payment on Owner's behalf for any such expenses, Owner shall promptly reimburse Feeder for such documented expenses or, if Feeder shall sell the Livestock prior to such time as Owner shall have reimbursed all of Feeder's advance payments on Owner's behalf, Feeder may withhold from such sales proceeds all amounts necessary to reimburse Feeder for its payment of such expenses.
- (7) Any single expense in excess of [* amount, e.g. \$500.00 *] shall be approved in advance via e-mail or fax by Owner.

Compensation:

See Exhibit "C" attached hereto and incorporated herein by reference.

**Early Termination
by Feeder:**

This Agreement may be terminated by Feeder prior to the expiration of the Initial Term or any renewal term upon written notice to Owner of its failure to comply with the terms of this Agreement and the continuation of such failure for a period of thirty (30) business days from the date of such notice.

In the event of the termination of this Agreement for the reasons specified in the preceding paragraph, Feeder shall be entitled to the compensation earned by Feeder prior to the date of termination as provided in Exhibit "C" to this Agreement. Such compensation shall be computed up to and including the date of termination.

**Early Termination
by Owner:**

This Agreement may be terminated by Owner upon written notice to Feeder of its termination for "cause" and the failure of Feeder to cure such "cause" within a period of fourteen (14) business days from the date of such notice. "Cause" for purposes of this paragraph shall mean one of the following: (a) Feeder's commission of an act of fraud or dishonesty against or with respect to Owner; (b) Feeder's conviction by a court of competent jurisdiction of (1) a felony or any kind or (2) any misdemeanor involving moral turpitude and/or

dishonesty; or (c) Feeder's breach of any covenant or condition contained in this Agreement.

In the event of the termination of this Agreement for the reasons specified under the preceding paragraph, Feeder shall be entitled to the compensation earned by Feeder prior to the date of termination as provided in Exhibit "C" to this Agreement LESS the greater of (i) 25% thereof in order to compensate Owner for the cost and expense of replacing Feeder with respect to the feeding of the Livestock and the cost of transportation to other locations or (ii) the actual cost and expenses incurred by Owner as a result of Feeder's actions which give rise to the termination for "cause." Such compensation shall be computed up to and including the date of termination.

This Agreement shall also terminate upon Feeder's death, dissolution, bankruptcy or insolvency, or Feeder attempts to sell, pledge or otherwise transfer or encumber the Livestock without Owner's consent. In any of such events, Feeder shall be entitled to compensation earned by Feeder prior to the date of termination as provided in Exhibit "C" to this Agreement.

Non-Disclosure:

Owner possesses secret and confidential information, techniques, procedures, technical data and information, and customer and client lists used or intended for utilization in its operations of which Feeder will obtain or may obtain knowledge and Owner would suffer serious harm if this confidential information were disclosed or if Feeder used this information to compete against Owner. Accordingly, Feeder agrees that it shall not disclose to any third party any of such secret or confidential information during any term of this Agreement and for a period of (1) year thereafter.

[Texas] Law to Apply:

This Agreement shall be construed under and in accordance with the laws of the State of [Texas]. The venue of any litigation arising from this Agreement shall be [* _____*] County, [Texas].

Risks:

Owner acknowledges that the business of raising and custom feeding cattle is subject to numerous risks applicable to agricultural enterprises including accidents, predators, thefts, pests, fluctuations in consumer demand, weather, floods, disease, governmental restrictions and quarantines, unfavorable market forces and many other factors which may affect Owner's profit opportunities. Owner has entered into this Agreement fully aware of all such risks and is not acting in reliance on any representation or warranty of any kind and character not expressly set forth herein.

Notices: All notices allowed or required to be given hereunder must be in writing and dispatched by United States certified mail, return receipt requested, to the addresses shown at the end of this Agreement. Any time limitation provided for in this Agreement shall commence with the date that the party actually receives such written notice, and the date or postmark of any return receipt indicating the date of delivery of such notice to the addressee shall be conclusive of such receipt.

No Partnership: This Agreement shall not be construed as creating any relationship between Owner and Feeder as partners, joint venturers, principal and agent, or other business relationship except that of contractual parties providing consideration one to the other. Feeder is operating an independent business and Owner has no right to exercise any control of Feeder's business except as may be provided by the terms and conditions of this Agreement.

Assignment: Neither Feeder nor anyone claiming under him or her may commute, encumber, or dispose of the right to receive any benefit hereunder. Such right to receive benefits hereunder is expressly declared to be non-assignable and non-transferable by Feeder and in the event of any attempted assignment or transfer, Owner shall have no further liabilities hereunder and may proceed to recover all Livestock covered by this Agreement.

[Statutory Landlord's and Pasturer's Lien: Owner acknowledges that Feeder has a statutory Landlord's and Pasturer's Lien on the Livestock grazed on Feeder's Ranch to secure payment of all obligations due hereunder. Nothing in this Agreement shall be construed to negate or diminish such statutory Landlord's or Pasturer's Lien on the Livestock.] *(Use if applicable.)*

Waiver: The waiver by Owner of Feeder's breach of any provision hereof, shall not operate or be construed as a waiver of any subsequent breach by Feeder..

Binding Effect: This Agreement shall be binding upon the parties hereto and their heirs, successors, executors, personal representatives, and assigns.

Independent Contractor: **OWNER AND FEEDER INTEND BY THIS AGREEMENT TO CREATE AN INDEPENDENT CONTRACTOR RELATIONSHIP AND NOT ONE OF EMPLOYMENT. IN FURTHERANCE OF THIS INTENTION, FEEDER SHALL PROVIDE ALL OF ITS OWN TOOLS AND EMPLOYEES, SET ITS OWN HOURS OF WORK, BE SUBJECT ONLY TO THE GENERAL GUIDANCE AND DIRECTION OF AND PERFORM IN SUCH OTHER WAYS AS SHALL BE**

**SPECIFIED BY RULES AND REGULATIONS OF THE
INTERNAL REVENUE SERVICE APPLICABLE TO
INDEPENDENT CONTRACTORS.**

Hold Harmless:

Feeder shall hold Owner harmless against any claim for taxes on wages paid to Feeder's employees, claims for workers' compensation by any of Feeder's employees, and claims for third parties arising out of the handling of Owner's cattle while they are in Feeder's care.

EXECUTED at [* _____ *], _____, on the [* _____] day of
[* month *], [* year *]

Owner:

[* Owner *]
[* ranch address *]
[* city, state zip *]

Feeder:

[* name of Feeder *]
[* ranch address *]
[* city, state zip *]

By: _____
[* _____ *]
[* title *]

By: _____
[* _____ *]
[* title *]

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Exhibit "A"

Description of Property

Exhibit "B"

Description of Cattle

Exhibit "C"

Compensation

Feeder shall earn, upon the conclusion of each year of this Agreement, a fee equal to [* _____ percent (_____ %) _____*] of the "Net Revenues" earned after the Effective Date. Feeder's share of the Net Revenues is hereinafter referred to as the "NR Percentage."

The term "Net Revenues" shall mean the sum of all gross receipts of Owner from the final sale of the Livestock LESS all expenses of veterinarian care, the original cost of the Livestock, the cost of any transportation of the Livestock to Feeder's Ranch and from Feeder's ranch to the point of sale of the Livestock, and all commissions and cost incurred in connection with the sale of the Livestock. Each party shall provide to the other all documents and records as are reasonably necessary to verify any of the foregoing expenses and costs.

[*Optional clause in the event of death of any livestock: In the event of any loss of any livestock, adjustments shall be made in the calculation of Net Revenue so as to remove from such calculation the original costs of such Livestock, the costs of care and the transportation costs of Livestock, so that Feeder shall be paid based on the number of live cattle actually sold pursuant to this Agreement.*]

In the event Feeder terminates this Agreement due to the default of Owner hereunder, which default is not cured prior to the expiration of any applicable cure period provided in the Agreement or (b) in the event Owner terminates this Agreement for "Cause" as defined in the Agreement and such cause is not cured prior the expiration of any applicable cure period provided in the Agreement, Owner shall have the option of either (i) paying Feeder an estimate of the NR Percentage calculated as provided herein above (subject to any adjustment provided in the Agreement for a termination due to "cause" or (ii) Feeder may transport the Livestock to the point of sale and receive its NR Percentage from the sale of the Livestock at the time (subject to any adjustment provided in the Agreement for a termination due to "cause." In the event Owner elects to pay Feeder pursuant to method (i) in the preceding sentence, any dispute between what Owner offers to pay as an estimate of the NR Percentage and what Feeder believes to be the proper payment of the NR Percentage shall be resolved through mediation using one or more mediators having knowledge and experience in the cattle feeding industry in the county in which the Property is located.

CHECKLISTS FOR AGRICULTURE LEASES

James D. Eggleston, Jr.

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The Investor/Lessee's Due Diligence Checklist

1. A priority item on any transaction will be the quality of the soils on the acquisition target. Soil samples and analysis are available from county extension services and/or from your state agriculture university.
 - a. If soil samples reveal less than desirable soils, what is the annual cost of fertilizing and otherwise improving the soils?
 - b. What will the cost to the operator be if substandard soils are present, e.g., in lower hay quality or lesser quantities produced? Or in lower foraging ability for cattle?
2. Does the property show any observable evidence of flooding? Can livestock access feed and water sources when water is at high levels?
3. Where are feed storage facilities? Convenient to where must feed be put out for livestock?
4. Are livestock water sources susceptible to running dry during drought periods? Are feed sources at risk during periods of little rain (either on-site or off-site)? What is the local market for hay, in good times? In bad times?
5. What are surrounding uses? Any potential uses that would be considered a nuisance or a trespass? Are such uses protected by the Texas Right to Farm Act? (Consider air quality, run-off issues from neighbors, proposed highways, potential for commercial development.)
6. Who is the commercial source for electricity? For internet?
 - a. Who do you contact for cut over to new owner?
 - b. Do any proposed operations of the lessee require uninterruptable sources of power?
 - c. Do back-up generators exist? Should they be considered if rural power sources are interrupted?
 - d. What are costs of utilities provided to the property?
 - e. Is owner required to join utility cooperatives or utility districts?
 - f. Any assessments pending? Any prior assessments being paid off over time?
 - g. Will the lessee work at home and need access to "always-on" internet service? What is the speed of what's available?
7. What is the primary water source?
 - a. If on-site wells, when were they last serviced? How deep do they go? If multiple levels of water, is one level better from human use and one better for livestock? When were the wells drilled and/or pumping facilities built?
 - b. Which underground aquifer do the wells access and what is the long term health of that aquifer?
 - c. Are any filtering systems or storage tanks present? If so, what condition are they in? (Metal storage tanks are always in various stages of rust and deterioration.) Strongly recommend professional inspection of water wells and recommend water samples be taken.

9. What is source of natural gas, propane, etc.? Are their on-site tanks, i.e., propane, gasoline, diesel, what is amount of fuel present? Inspected recently? Any visible spills? Condition of storage tanks?
10. What is source for disposal of sewer items? Septic system?
 - a. Type? Age?
 - b. When last serviced?
 - c. Complies with county standards? Inspection is strongly recommended.
 - d. What is the capacity? Adequate to handle expansion of residence?
11. How accessible are the physical transmission means of electric, phone, cable and internet services? Where do they come onto the property and how easily are they serviced?
12. What are the property taxes for the property? Obtain property tax statements. Are different parts of the property treated differently, i.e., open-space valuations? Is there any evidence of prior owner's application for special valuations? Does the property's current use meet the "use intensity" test that may be applied to determine "open-space valuation?"
13. Is there any roll-back exposure for property taxes due to a proposed change of use? Will local appraisal district require reapplication for open-space or ag-use valuation?
14. What is the financial condition of the agricultural operations occurring on the property?
 - a. Successful cattle operation or only "hobby farming?"
 - b. Profitable recreational leasing for hunting purposes?
 - c. Obtain financial statements.
15. Any existing hunting leases or ongoing recreational uses? Are they in writing? Insurance by users up to date? New certificates issued to lessee?
16. Are profitable operations dependent on government programs, annual grants? Are they transferrable? Has operation been compliant with program requirements?
17. What residential structures are present? What condition are they in? Obtain inspections by qualified inspectors. (Condition of HVAC and other systems, presence of lead paint or asbestos, condition of roof, floors, appliances, etc.) Age of such systems is critical to evaluate.
18. What restrictions or covenants are applicable to the property? Recorded covenants? Reservations or restrictions in prior deeds? Any proposed uses of lessee that may violate any such restrictions?
19. Is the property subject to any liens that may not be released at closing? Any local paving liens? Any mechanic's liens or other agriculture liens due to prior operations or activities on the property?
20. What liens, title issues and recorded instruments apply to the residential structures?
21. What school district(s) does the property reside in?
 - a. Will school bus run to property? Time of day?
 - b. What is "commute" to school for younger children?
22. What is status of roads?
 - a. Who maintains the roads?
 - b. Any pending special assessments for road construction applicable to the property?
 - c. Are roads paved to property boundary?
 - d. What is possible winter condition of roads and accessibility to school and town?
23. Any pending condemnation proceedings regarding pipeline installation? Any awards made but unpaid? Who gets these? Pipelines benefit this property or simple transmitting items across the property?

24. What surveys does the current owner have?
 - a. What is the cost of obtaining updated survey and proper surveyor's certificate?
 - b. Age of survey of lessor and possible changes since prepared?
 - c. Examine each and every item noted on the survey.
25. Do any of the following apply to the property? Ingress/egress easements (and where are they located), boundary line agreements, hunting leases, grazing leases, crop/harvesting agreements, oil and gas leases or other instruments, utility easements.
26. Does lessor have any prior appraisals? Will lessee obtain a new appraisal? Of land only or also of operations?
27. Any visible or apparent violations of laws or regulations? Has lessor received any notices of any violations?
28. Are any permits/licenses required for operating or conducting certain agriculture operations? If the proposed or continued agriculture operation is a commercial operation, what requirements are there to transfer any such permits? (Waste disposal permits and plans are required for certain operations.)
29. Are any applicable government programs, set-aside programs, conservation easements applicable to the program?
30. Is there any oil and gas production ongoing? Where?
 - a. Does it interfere with crop areas?
 - b. Any seismic or drilling activity present?
 - c. What minerals are transferable?
 - d. Who has "executive" rights as to further leasing?
 - e. Who receives bonus payments when new leases are signed?
 - f. Any royalties presently being paid on current production?
 - g. Any shut-in wells or well sites that haven't been cleaned up and equipment removed?
31. Are any pipelines on property?
 - a. If so, will they interfere with any proposed construction or farming activity?
 - b. Are they located within recorded easements?
 - c. Are there any above-ground valves or compressor equipment?
 - d. Any above-ground pipe that should be buried in easements?
 - e. On the survey is there any evidence of buried pipe that may not be within easement boundaries?
32. Are there any visible roads or other evidence of ingress/egress from adjoining properties?
 - a. Are there any gates in common fences?
 - b. Who has locks?
 - c. Any common driveways?
33. Is there any proposed oil/gas development or salt water disposal facility proposed in area?
 - a. Look several miles around the property.
 - b. What abandoned sites or equipment are located on the property?
 - c. Any evidence of any mining or quarrying?
34. What are conditions of fences?
 - a. Are fences on the property lines?
 - b. Do any fences cross creeks or high-water areas? If water is up, can cattle get out?
 - c. Do any fences catch brush, trash, etc. in high rains?
 - d. If any fences need to be built, will neighbors share in costs and labor?
35. Are there visible landfills, dumpsites, underground tanks or containers?

- a. Any visible contamination areas?
- b. What about unusual trees or grass appearance?
- c. Presence of spills?
- d. Any possible leaks from “burn pits” or “dumps” into stock tanks or creeks?
36. Obtain a listing of all prior uses as far back as possible. Talk to neighbors and ask their recall about the property.
37. Are there any wetlands or any habitats of endangered animals? Does the property show evidence of deer or other animal feeding? What about presence of feral hogs?
38. Does property show any observable evidence of flooding?
 - a. Can livestock access feed and water sources when water is at high levels?
 - b. Where is feed stored vs. where must it be put out for livestock?
39. Are livestock water sources susceptible to running dry during drought periods? Are feed sources at risk during periods of little rain (either on-site or off-site)? What is local market for hay, in good times? In bad times?
40. What are surrounding uses?
 - a. Any potential uses that would be considered a nuisance or a trespass?
 - b. Are such uses protected by the Texas Right to Farm Act? (Consider air quality, run-off issues from neighbors, proposed highways, potential for commercial development.)
41. What is condition of personal property? Cattle working facilities, feed storage facilities, shops, barns, equipment, water tanks and lines? Are such items safe and in good working condition?
42. What is the condition of all tractors and motor vehicles?
 - a. What are costs of replacement?
 - b. When were any of such items last serviced and where?
 - c. Can you look at titles and service records?
43. Are all items of purchased equipment adequate to conduct the operations desired? E.g., do tractors have adequate horsepower? Are the implements adequate for required operations?
44. What is the condition of any livestock being purchased?
 - a. Breeding status of livestock females?
 - b. Fertility testing of bulls?
 - c. Registration status of livestock?
 - d. Vet records available to inspect? Who is vet, call him/her.
 - e. Inspect working pens, cattle facilities, tanks, feeding troughs (are they safe and in good condition?) What are costs of replacement?
45. What is quality of grass?
 - a. Recommend grass evaluation (as mentioned above, county extension service (free).
 - b. If not in good condition, what is time/cost to bring them into good condition?
 - c. Is this a soil problem or a grass problem?
46. How far into environmental matters should you go?
 - a. Phase I survey
 - b. Phase II if necessary
 - c. Governmental notices?
 - d. Lessor’s records regarding environmental matters?
 - e. Any observable hazardous waste/dumping areas? Any workshops/paint areas?
47. Are there unrepaired damages to any property or equipment?

48. Are there any open insurance claims? Roof damage on residence or barns?
49. What is the current ETJ status?
 - a. How far are you away from city limits? From ETJ limits?
 - b. Which direction is the closest city growing?
 - c. What is condition of surrounding housing? Is the residence on the property to be purchased “overbuilt” for the neighborhood or compatible?
 - d. Is there a presence of a number of lower quality properties?
 - e. How do the neighbors keep their properties?
50. Where does fire protection come from?
 - a. Is property in an emergency service district (ESD)?
 - b. Property insurance is affected by accessibility to fire protection.
 - c. What is applicable ESD tax rate?
 - d. Get to know local volunteer fire department chief.
 - e. Make sure you have your address listed with them and that they have gate code or combinations for any locked gates.
51. What is availability of property insurance?
 - a. Liability insurance?
 - b. Insurance on employees, invitees?
 - c. What about insurance on livestock (at least for those that may get out)?
52. Where does trash pickup come from? (Private contractors? What rates?) Is private burning of trash permitted?
53. Are there any income items to straddle closing? E.g., crops in field, livestock to be sold.
54. Are there any expense items to straddle closing? E.g., fertilizer costs, pending repairs, unpaid labor?
55. Are their crops in the field they lessor will want to harvest?
56. Is there adjoining property lessor will continue to own and thus want to continue to have access to certain water wells, irrigation sources, equipment? Does lessee want a first right of refusal to buy such property?

Checklists for Completing the Lease

- a. Who is lessor?
- b. Is lessor an individual? Or, if an entity, what type of entity?
- c. If an entity, who are officers, shareholders, directors? If trusts or estates, who are authorized fiduciary parties?
- d. What is address of lessor?
- e. Who is lessee?
- f. Is lessee an individual? Or, if an entity, what type of entity?
- g. What is address of lessee?
- h. Will notice to lessor and lessee be permitted by email?
- i. What is lessor's broker's name and address? (commission share?)
- j. What is lessee's broker's name and address? (commission share?)
- k. What title company will be used?
- l. Who is title company contact person? What is his/her contact information, address, phone, fax, e-mail?
- m. Who is surveyor? What is his/her contact information, address, phone, fax, e-mail?
- n. What is estimated cost of updating existing survey?
- o. Did this surveyor prepare the existing survey?
- p. What is the date of the survey? Is it current?
- q. What is quality of survey certification?
- r. Who is lessor's lawyer? Will an attorney be copied on all correspondence?
- s. What is his/her contact information, address, phone, fax, e-mail?
- t. Who is lessee's lawyer? Will an attorney be copied on all correspondence?
- u. What is his/her contact information, address, phone, fax, e-mail?
- v. Will parties accept notices by email?
- w. If transaction involves a 1031 like-kind exchange, who will serve as intermediary?
- x. Has exchange property been identified?
- y. Is contract assignable by lessee? If assignment is conditioned, what are conditions?
- z. Assignment limited to a related or controlled party?
- aa. Does assignment require lessor's consent? Can lessor's condition be conditioned to "not unreasonably withheld or delayed?"
- bb. Applicable law? (Presumably Texas) Required venue? (County of property?)

1. Terms Applicable to Contract Offer and Effectiveness

- a. What is expiration date for the contract offer if not accepted?
- b. Will earnest money accompany contract offer or will it be delivered only after contract is fully signed? How much later? One day up to three days?
- c. What is the “effective date” of the contract? Is it the date that the last party signs, or is it a date certain, or is it when the title company receipts the contract and earnest money?
- d. Will a nominal amount of earnest money (e.g., \$100.00) be identified to support a “free-look” right of termination?

2. Property

- a. What property is to be purchased?
- b. Is there an existing survey available for real property?
- c. Is there an existing legal description available?
- d. Is the deed into lessor available? Other closing documents of lessor?
- e. What improvements will lessee purchase? Are they included in purchase price?
- f. What fixtures go with real property?
- g. Are there residential structures that go with real property? Mobile homes?
- h. Is a TREC Residential Disclosure required?
- i. What fences, barns, cattle handling and feeding equipment go with real property?
- j. Are there hunting or recreational fixtures, feeders, stands included?
- k. Are their written leases for hunting or other recreational uses? Insurance certificates?
- l. Are wells, irrigation structures and equipment included? Water tanks?
- m. What personal property is included?
- n. Tractors, trailers, other vehicles. Get titles.
- o. Is lessor conveying or retaining crops in field?
- p. Is lessor conveying or retaining crops in storage?
- q. Is lessor conveying any leases on adjoining properties?
- r. Any portion of water rights reserved?
- s. Are any future royalties or revenues being retained from future wind energy development projects?
- t. What is excluded from the transaction? What will lessor take with him or her as to personal property?
- u. Are there oil, gas and other minerals available to transfer? If not, who owns the minerals? Even if conveyed, will there be any restrictions on such conveyance?
- v. Is lessor reserving minerals or “royalty interests?”
- w. If there is no reservation, then presumption is that lessor conveys all minerals and mineral rights.
- x. If conveyed, what, if anything, is specifically reserved? What executive rights are reserved and what are transferred?
- y. “Royalty interest” only includes right to receive royalty payments and not right to develop the property, right to lease the property, right to receive delay rentals, or right to receive bonus payments.

- z. If lessor wants to retain all of the mineral estate, then lessor should retain “all of lessor’s interest in and to the oil, gas and mineral estate,” perhaps even describing the above additional attributes.
- aa. If reserving only a portion of minerals or royalty interest, how much? All that lessor owns, all that is available, or only a portion of what it owns?
- bb. Consider “Duhig” problem; See *Duhig v. Peavy-Moore Lumber Co., Inc.*, 135 Tex. 503, 144 S.W.2d 878 (1040). Duhig gives a preference to the “granted interest” rather than the “reserved interest.” Thus, a grantor who makes a mistake in describing what mineral interest he or she reserved in the deed or if they forget to account for a previously reserved interest, may end up with no mineral interests if the court finds that is necessary to make sure the grantee gets all of the mineral rights they were intended to get.
- cc. If some or all minerals reserved, are there restrictions on rights associated with minerals? E.g., access for development and production, drill sites, no surface rights at all?
- dd. See TREC 44-1 (Addendum for Reservation of Oil, Gas and Other Minerals, Rev. 12/5/11) for suggested clauses.
- ee. When will occupancy of the property be delivered?
- ff. If not at closing, will lessor lease the property for a period following closing?
- gg. If occupancy by lessee will be before closing, will lessee execute temporary lease?
- hh. Terms of lease: monthly rental, insurance requirement, personal guarantee of lease?
- ii. Provide for delivery of existing leases to which lessor is a party to lessee.
- jj. Any repairs or changes to the property or improvements required to be completed by closing?
- kk. Assignability of any other leases, grazing leases, ground leases for crops, etc.

3. Economic Terms

- a. What is purchase price?
- b. How much of the purchase price is to be paid in cash?
- c. How much of the purchase price is to be financed?
- d. Purchase price allocable to fixtures? Personal property? Any reserved items?
- e. Is financing to be provided by lessor? (An “owner-financed” transaction?)
- f. Is financing to be provided by third party?
- g. If so, what is third party’s name, contact information, contact person?
- h. Will any debt of lessor be assumed by lessee? What are the terms? Will lessor be released from such assumed debt?
- i. Is purchase transaction subject to sale of lessee’s property?
- j. Will purchase price be subject to adjustment if updated survey reveals a variance in acres?
- k. If variance is more than __x__% (e.g., 10%), will either party be able to terminate the contract?
- l. What is price per acre to be used for the adjustment amount?
- m. Is purchase price “fixed” regardless of number of acres shown on updated survey?
- n. If financed by a third party, is approval of financing a condition of closing? Or is actual closing and funding of the loan the real condition?

- o. What terms of third party financing must be offered to lessee in order to close?
- p. What is minimum required appraised value of property?
- q. What is the required interest rate on any financing? (fixed or variable at some point?)
- r. What is the required term of any financing? (how long is the minimum length of note as required by lessee?)
- s. What is frequency of payments on note? (monthly, quarterly, annual?)
- t. Will the financing be personally guaranteed by any individuals?
- u. Are there any limitations on any personal guarantees? Percentage of the note?
- v. If the financing is not personally guaranteed, are there any conditions upon which any individual may be personally liable? (e.g., any “carve-outs” from the non-recourse provisions, such as for property taxes, environmental costs, costs arising due to violation of covenants in deed of trust?)
- w. Is loan assumable? With or without consent of holder (e.g., lessor)?
- x. Will lender require escrow of property tax liabilities and insurance payments?
- y. Will lender require mortgagee’s title insurance?
- z. What events will give the financing party the option to call the note?
- aa. Will the note be due on sale of the property by lessee?
- bb. Will the note be callable if lessee allows or places additional liens on property?
- cc. Are any brokerage commissions payable? To whom? How much? Payable only upon closing? Separate written agreement?

4. Earnest Money

- a. What is the required earnest money?
- b. What form must all earnest money take? (i.e., cash, cashier’s check, personal check)
- c. What is deadline for delivering earnest money to title company?
- d. Will lessee require earnest money be deposited in an interest bearing account?
- e. Will there be any requirement for additional earnest money?
- f. What condition or event must occur for additional earnest money to be required?
- g. Will additional earnest money be required at the end of the inspection period? Of part way through inspection period?
- h. Will additional earnest money be required if the lessee is granted an option to extend the inspection period?
- i. Will additional earnest money be required if the lessee is granted an option to extend the closing date?
- j. What is the “option fee” amount? e.g., \$100.00? Kept by lessor no matter what in order for lessee to have an inspection period.
- k. Is any portion of the earnest money “non-refundable?”
- l. If no portion of the earnest money is “non-refundable” when the contract is signed, will any portion become non-refundable at a later time? (other than at the end of the inspection period?)

5. Due Diligence, Inspection Terms and Deliverables by Lessor

- a. Will lessee be allowed a “free-look” period, i.e., a period of inspection and option during such period to terminate the contract in its sole discretion?

- b. Is the inspection period beginning on a date certain? (e.g., the date of the contract or the date on which a certain list of deliverables has been delivered)
- c. If lessee has a “free-look” period, will lessee receive all of its earnest money back if it chooses to terminate the contract (other than a nominal amount as an “option fee”)?
- d. Will lessee be required to provide an insurance certificate to lessor prior to entry onto the property? (if so, will lessor be named as additional insured?)
- e. What records of lessor must be delivered to lessee for it to conduct its due diligence?
- f. What is deadline for delivery of such items?
- g. Any governmental programs apply to property that will be assumed by lessee?
- h. Any leases on the property that will remain after closing? Are they assignable or do such lessees have a right of termination?
- i. See required statutory notices under Texas law.
- j. If a property condition disclosure is required by Texas Property Code §5.08 (covering a transaction involving the sale of a single family residence, but not involving the sale of a newly constructed residence, previously unoccupied residence or a transaction in which the value of the dwelling is less than 5% of the value of the real property) and it is not delivered, lessee may terminate contract within 7 days of receiving the notice. See also TREC Form OP-H (Rev. 9/1/11).

6. Representation and Warranties

- a. Representations and warranties (list is greatly abbreviated):
 - (1) Formation and status of lessor
 - (2) Authority of lessor to enter into contract and close the deal
 - (3) Lessor is fee simple title holder
 - (4) All due diligence items delivered are correct
 - (5) No other contract obligations
 - (6) No litigation pending or threatened
 - (7) Lessor not a foreign person
 - (8) Lessor not insolvent or bankrupt
 - (9) No violation of laws
 - (10) No condemnation, zoning or land use proceedings
 - (11) No hazardous materials, no spills, no violation of laws
 - (12) No flooding, dumpsites, landfills, wetlands, threatened species
 - (13) Ad valorem taxes paid
 - (14) No government programs
 - (15) No other obligations to sell or lease
 - (16) No liens on property as of closing
 - (17) No underground tanks, no use on property involving hazardous materials
 - (18) Also an indemnification clause?
 - (19) Disclaimer of other reps and warranties
- b. How long does lessor remain liable for representations and warranties?
- c. Will conveyance be “as is, where is?”
(TREC Form 25-10 (rev. 10/4/13) provides the term “As Is” means, “the present condition of the property with any and all defects and without warranty except for the warranties of title and the warranties in this contract.”)

7. Preconditions to Closing

- a. Does lessee need financing to close the purchase?
- b. Must the required financing meet certain terms? Rate? Term? Recourse? Due on sale?
- c. How long will lessee need (or be allowed) to obtain financing approval?
- d. Is any financial information or operating information required from lessor as part of lessee's loan application?
- e. Does lessee need a minimum appraised value to close? How long will appraiser take to furnish its appraisal report?
- f. Must lessee sell another property?
- g. Must irrigation equipment, well systems or other personal property be operational?
- h. Must lessor solve any access issues?
- i. Are there any burial sites or cemeteries on the property that need to be documented or dedicated?

8. Default and Remedies

- a. Will contract provide for any liquidated damages (over and above option fee)?
- b. Any to lessee? (i.e., any amount required from lessor if it fails to close, in addition to lessee's getting its earnest money back; to cover lessee's expenses incurred believing a closing would occur?)
- c. Any to lessor? (i.e., any amount required from lessee if it fails to close, in addition to earnest money; to cover lessor's expenses assisting lessee?)
- d. If lessor defaults, what are lessee's remedies? Return of earnest money and/or specific performance? Lessor will want to limit lessee's remedies to one or the other, not both, as lessee's sole remedies.)
- e. Avoid exposure for "other damages." (If lessor wants to avoid exposure for damages and only allow lessee the above two remedies, then delete "damages" and specify that the above two are lessee's "sole and exclusive remedies.")
- f. If lessee defaults, what are lessor's remedies? Lessor retains earnest money and/or right to specific performance and/or damages (Lessee will want to negate one or more of these; probably only permit lessor to retain earnest money as lessor's sole and exclusive remedy).
- g. Parties should be aware of title company's requirements for a release of earnest money in event of demand by one or the other following a default situation. Will require consents? Consequences for not granting consent?
- h. Does contract include mediation or arbitration provisions? Are either mandatory?
- i. Does contract permit a "winning party" to recover attorney's fees in a dispute? Some standard forms also allow brokers, title companies and others to recover attorney's fees even though they are not signatory parties to the contract?

9. Survey

- a. Is an existing survey available?
- b. Will any survey updates be required by lessee?

- c. Will title company require an updated survey?
- d. If an updated survey will be obtained, which surveyor will provide it?
- e. Who will pay for new survey or updates? What if update is solely for lessee's particular requests and not for title purposes?
- f. If paid by lessee, will lessor reimburse lessee to closing?
- g. If lessee pays for the survey, will lessor receive a copy if transaction does not close?
- h. If lessor pays for survey or updates, will lessee pay for any portion? Cost sharing?
- i. Will earnest money be released at any time to cover lessor's cost of survey or updates?
- j. Is cost of survey allocable to one party or another to be limited to an amount certain?
- k. What type of survey required?
- l. Is there a specific category of survey required?
- m. If no specific category required, is a survey checklist to be delivered to surveyor?
- n. If environmental inspections are required, who pays? Will that party be reimbursed if contract terminated during inspection period? Any reimbursements to either party when transaction closes?

10. Title Review

- a. When is title commitment to be delivered to lessee?
- b. When is survey to be delivered to lessee?
- c. How long after receipt of the foregoing will lessee have to review the title commitment, exception documents and survey and provide objections?
- d. How long will lessor have to respond to lessee's title objections?
- e. How long will lessee have to accept status of title commitment and survey after lessor has completed its curative actions, if any?
- f. What if lessor refused to cure objections? May lessee cancel? Or will lessee close anyway? Can price adjustment be negotiated if title defect is material?

11. Closing

- a. What is closing date? Time of day?
- b. Where will closing be held?
- c. May closing be held by delivery of documents by parties or attorneys?
- d. Where will closing documents be sent? Via email to title company? Wiring instructions? Original signatures required?
- e. Are there any options by either party to extend the closing date? What are they? How much will an extension cost?
- f. What are allocations of closing costs?

12. Brokers/Agents

- a. Lessor agent? Address? Amount or percentage?
- b. Lessee's agent? Address? Amount or percentage?
- c. If only one, are they an intermediary? Requisite notices given?

Owner Financing the Transaction

General Parameters/Issues:

- i. Recreational properties/ranches common terms:
 - (a) 15% to 20% down is common, sometimes less.
 - (b) 10 year terms – 30 year amortization, but shorter balloon maturity – forces lessee to eventually refinance.
 - (c) 5% to 7% interest. (Interest slightly higher since lessor is not in business of financing and is thus taking on more risk than a traditional lender).
- ii. Why the large volume of owner financed transaction:
 - (a) Rates higher than bank pays on CD's.
 - (b) Security of collateral (lessor who becomes a noteholder is familiar with collateral; they owned it and if they foreclose, can operate again).
 - (c) Get higher price for sale of property if lessor offers financing.
 - (d) Lessee pays more to avoid tying up personal credit.
- iii. Downside
 - (a) Lessor may stay too involved, too many visits to property.
 - (b) Lessor may claim defaults that are just matters of personal preference.
 - (c) Lessor may assume a practice of picking up checks.

1. Promissory Note - Unique Terms

- a. Trusts and estate planning entities for elderly lessors (who will hold notes, perhaps after death of lessors).
- b. Amount of payments often dictated by lessor's monthly cash needs.
- c. Place where payments are to be made.
- d. Grace periods for monetary defaults?
- e. Non-monetary defaults and grace periods for same?

2. Deed of Trust - Unique Terms

- a. Grace periods – Monetary defaults? Non-monetary defaults? Different periods for each. Put such periods in note and deed of trust, but make sure they are consistent.
- b. Identification (subordination) of other liens – what do they say?
- c. Property description – important to accurately, plainly and completely described collateral for obligation.
- d. Obligation of obligor to maintain property condition/insurance. Can noteholder obtain insurance if obligor does not?
- e. Escrows? For property taxes? For insurance? For required improvements?
- f. Additional collateral? Personal property? Cash collateral? Other property?
- g. Partial releases? When granted? In what order?
- h. Assumability of lessor financing?
- i. Accelerating events? Noteholder's death? Obligor's death? Guarantor's death?

3. Guaranty Agreement – Unique Terms

- a. Husband and wife?
- b. Joint and several?
- c. Primary liability – may lender proceed against the guarantors and ignore collateral or the primary named borrower?
- d. Unconditional and irrevocable? Does it survive death of guarantor and applicable to his or her estate?
- e. Full or partial guaranty – a percentage of the entire note or only a portion?
- f. Condition extension of loan upon execution of guaranty or is guaranty automatically extended?
- g. Broad waiver of rights – Notice of default? Notice of acceleration?
- h. Delivery of financial statements – required? Who approves?

Perhaps by starting with one or more of these checklists, the lawyer can build an always useful, but always changing checklist and run less chance of overlooking a major due diligence item or contract provision. Also, having the checklist at hand avoid numerous and costly phone calls to the client.

Appendix - Tab 3, James Eggleston: 3.16

Hunting Leases - Practice Guide

A properly drafted Hunting Lease is of mutual benefit – to the landowner (Lessor) and the hunter (Lessee). It is not merely to place burdensome restrictions on a Lessee which only serve to limit his or her enjoyment of a weekend of hunting. Rather, the Hunting Lease serves the following purposes and addresses the following issues:

1. Establishes the party who is responsible for injuries to persons or property occurring while the Lessee and his or her family and guests are on the property. In fact, a Lessee can use the terms of the Hunting Lease as justification for establishing his or her own set of rules for safety and conduct in the “hunting camp” or while his or her guests are using firearms or recreational vehicles.
2. Divides the responsibility between Lessor and Lessee as to who controls the Property.
3. Reduces a Lessor’s liability exposure for Lessor’s negligent acts which may cause injury to various types of parties, i.e., trespassers, license holders, invitees, recreational users. (The Lease helps identify who these parties are with respect to this particular Lessee or group of Lessees.)
 - a. A Lessor’s duty to a trespasser is only to not injure such person by willful or wanton acts or gross negligence.
 - b. A Lessor’s duty to a licensee (one entering with permission, but for no consideration or benefit to the Lessor) is to not injure such licensee by intentional or wilful acts or gross negligence.
 - c. A Lessor’s duty to an invitee (one entering with permission for the mutual benefit of Lessor and invitee) is to exercise reasonable care to keep his or her property in a reasonably safe condition and to exercise reasonable care in his or her activities so as not injure an invitee on his or her property.
 - d. A Lessor’s does not assure a recreational user (defined by [Texas] law as one entering onto agriculture land at the invitation of another for recreational purposes), specifically one who is entering for hunting and fishing activities, that the property is safe. A Lessor owes such user only the same duty as he or she does to a trespasser, which is not to injure that person by willful or wanton acts or gross negligence, or through acts of malicious intent or bad faith. If the recreational user should in turn injure another while on the property, a Lessor is also not liable for those injuries.

This broad protection is available to landowners, lessees or occupants of agricultural land whose total income from all recreational users for the previous year did not exceed four times the *ad valorem* taxes paid in the previous year, or who carry insurance in compliance with [Texas law (TEX. CIV. PRAC. & REM. CODE ANN. § 75.003)]. Generally this insurance requirement is \$100,000 for each single occurrence of injury to or destruction of property, \$500,000 for injury or damages to each person, and \$1million for each single occurrence of bodily injury and death. The total liability of an owner, lessee or occupant of agricultural land for a single occurrence is limited to \$1 million and the liability also is subject to the limits for each single occurrence of bodily injury or death and each single occurrence for injury to or destruction of property.

Thus, if the landowner obtains this insurance, his or her liability to recreational users is capped at the amount of the insurance limits in the statute and he or she is protected by this statute regardless of the income he or she receives from leasing his property. **Obtaining and maintaining this insurance is strongly recommended.**

Questions/issues to answer or consider:

1. What type of lease is intended?
 - i. Single year or multi-year lease?
 - ii. Limited to number of animals harvested?
 - iii. Limited to a season within a year?
 - iv. Is only day-time access permitted or is lessee permitted to establish over-night facilities?
 - v. Are certain animal species off-limits?
 - vi. Are certain animals restricted from harvesting due to age or sex?
 - vii. Will Lessor provide guide services? Food? Lodging?
2. Who are the parties?
 - i. Lessor? Individuals or entities?
 - ii. Lessee? Individuals or entities? All individuals must be named in the Lease and sign the lease?
 - iii. While there be an sub-lessees?
 - iv. Each must agree to be bound by all of the terms of the Hunting Lease.
3. Legal description of property?
 - i. Are any portions of the property off-limits?
 - ii. Are there any items of personal property off-limits? Locked sheds or storage areas? Residential structures?
 - iii. Is any area restricted from vehicular traffic? Foot traffic only?
 - iv. Is any area off-limits due to oil and gas drilling activity?
 - v. Are parties restricted to hunting “blinds” or “stands” provided by Lessor?

4. What is the term of the Lease?
 - i. Extension options?
 - ii. May Lessor terminate in the event of safety issues?
 - iii. If terminated early, must Lessor refund any Base Rent?

5. What is Base Rent and when is it paid?
 - i. What all does this include? Are utilities included?
 - ii. Does Base Rent escalate each year or periodically?
 - iii. Is Base Rent tied to success of hunters in harvesting animals? (it should not)
 - iv. Is Base Rent tied to a number of hunters? (Price per “gun”)
 - v. Will Base Rent properly compensate the Lessor for costs of maintenance of property and managing the wildlife?
 - vi. Base Rent should be set so as to prevent over-hunting, i.e., limit the number of hunters by an acceptable rental rate and by limiting the number of hunters?
 - vii. Must be fully paid by time of the Commencement Date.
 - viii. Annual renewals of the Lease must be conditioned upon timely receipt of the Base Rent.

6. Is the Hunting Lease assignable?
 - i. With Lessor’s consent?
 - ii. May he or she decline to approve an assignment in their sole discretion?

7. What are the insurance requirements of Lessee (to be provided to Lessor)?
 - i. Each Lessee must provide insurance as required in the Lease?
 - ii. Does Lessor have insurance meeting guidelines of [Chapter 75 of the Texas Practices and Remedies Code]?

8. Who are all of the hunters? (whether Lessees or not)
 - i. List on Exhibit “A”
 - ii. List relationship to Lessees

9. What are the limits on game or animals harvested?
 - i. Is a wounded animal considered an “animal harvested” for purposes of the restrictions?
 - ii. Can Lessor cancel or suspend the Hunting Lease in the event the population of the wildlife is not sufficient to support that season’s hunting?

10. Is there a limit on types of firearms that may be used?
 - ii. Maximum caliber?
 - iii. No automatic firearms?
 - iv. Limited to bows (and no firearms)?

11. Is Lessee only permitted on the Property during the Lease Term?
 - i. Or may they come on the Property to set up “stands,” corn feeders, mineral dispensers, etc.?

12. Will Lessee be permitted to build any improvements on the Property?

13. Is Lessee’s use going to interfere with Lessor’s grazing of cattle?

14. Lessor’s defaults – require Lessee to give 30 days’ notice before cancelling the Lease.

15. Lessee’s default – immediate termination if (i) Base Rent not paid, (ii) if Lessee abandons the property or (iii) Lessee injures property or persons or permits unsafe activity. Other defaults require notice and cure.

16. Have each hunter execute the Release and Indemnity attached as Exhibit “B.”

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Weatherford, TX 76086
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817-596-4200

Appendix - Tab 3, James Eggleston: 3.16.1

Hunting Lease Sample Form

Date: [* _____*]

Lessor: [* _____*] [*marital status*], *or*
[* _____*] [*entity status, i.e., a
[Texas] limited liability company or a [Texas] limited
partnership*]

Lessor's Mailing Address:

[* _____*]
[* _____*]
[* _____*] County

Lessees: [* _____*]
[* _____*]
[* _____*]
[* _____*]

Lessees' Mailing Addresses:

[* _____*]
[* _____*]
[* _____*] County

Base Rent: [* _____*] per twelve-month period
beginning with the Commence Date, payable prior to the beginning
of each such twelve-month period.

[*Alternative clause: [*\$_____ per Lessee per twelve-month period
beginning with the Commencement Date*]

Term (months): [* _____*]

Commencement Date: [* _____*]

Termination Date: [* _____*]

Permitted Use: Solely for the purpose of hunting White Tail Deer
[*Alternative clause: list other game_____*]

Lessees' Insurance: See Schedule "I" (Insurance Addendum) attached hereto and
incorporate herein by reference. (Required for each Lessee.)

Property (including any improvements):

That certain real property situated in [*_____ *County], [Texas], consisting of [*_____ *] acres of real property out of the [*_____ *] Survey, Section [*_____ *], Abstract [*_____ *], as more particularly described on Exhibit “A” attached hereto and incorporated herein by reference (herein all of the foregoing, together with all structures and improvements thereon other than the Excluded Improvements is referred to as the “Property”).

Excluded Improvements: Any structure, improvement, or equipment situated on the Property and constructed or installed by any person other than Lessees.

Definitions

“Injury” means (a) harm, damage, impairment or loss of or to property or its use or (b) harm or injury to or death of a person.

“Lessor” means Lessor and its agents, employees, invitees, licensees or visitors.

“Rent” means Base Rent plus any other amounts of money payable by Lessees to Lessor.

“Lessees” means Lessees and their family members, agents, contractors, employees, invitees, licensees or visitors.

Agreement

A. Lessees agree to -

1. Lease the Property for the entire Term beginning on the Commencement Date and ending on the Termination Date.
2. Accept the Property in their present condition “AS IS,” the Property being suitable for Lessees’ Permitted Use.
3. Obey all laws, ordinances, orders, rules, and regulations enacted or promulgated by any governmental authority relating to (a) the Permitted Use; (b) Lessees’ activities while on the Property; (c) any existing structure, improvement, or equipment that Lessees is permitted to utilize pursuant to this Lease; or (d) any structure, improvement, or equipment erected or installed by Lessees on the Property in accordance with this Lease, including times and manner for hunting and removing game (and keeping of any applicable records), handling and discharging firearms, operating motor vehicles, and consuming alcoholic beverages.

4. Pay, in advance, Base Rent to Lessor at Lessor's Address. Base Rent for the first twelve-month period under this Lease shall be due on or before the Commencement Date. Base Rent for each succeeding twelve-month period shall be due on or before each anniversary date of the Commencement Date so that such Base Rent is received prior to the next occurring twelve-month period hereunder.
5. Pay for all utility services used by Lessees.
6. Pay all taxes on Lessees' property located on the Property.
7. Allow Lessor to enter the Property to inspect the Property and show the Property to prospective purchasers or Lessees.
8. Repair, replace, and maintain any part of the Property used by Lessees.
9. Operate vehicles on the Property in a manner that will not damage existing roads, trails, or vegetation.
10. Keep all gates on the Property closed and locked.
11. Enter and exit the Property only at those places designated by Lessor.
12. Repair or replace any damage caused by Lessees to the Property, crops, livestock, or Excluded Improvements.
13. Vacate the Property on the last day of the Term.
14. Maintain the insurance coverages described in the attached Insurance Addendum (with respect to each Lessee).
15. Properly supervise all persons present on the Property at the invitation or request of Lessees.
16. Deliver to Lessor a Release, Indemnity, and Assumption of Risks in the form attached to this Lease as Exhibit "B," executed by each individual (including all Lessees) who will enter the Property at the invitation or request of Lessees before entry by any such individual.
17. INDEMNIFY, DEFEND, AND HOLD LESSOR HARMLESS FROM ANY INJURY (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS) ARISING FROM OR RELATED TO LESSEE'S USE OF THE PROPERTY. **THE INDEMNITY**

CONTAINED IN THIS PARAGRAPH (a) IS INDEPENDENT OF LESSEE'S INSURANCE, (b) WILL SURVIVE THE END OF THE TERM, AND (c) WILL APPLY EVEN IF AN INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LESSOR BUT WILL NOT APPLY TO THE EXTENT AN INJURY IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LESSOR.

B. Lessees agree not to -

1. Use the Property for any purpose other than the Permitted Use.
2. Create or allow a nuisance or permit any waste or injury to the Property or the crops or livestock thereon.
3. Change Lessor's lock system.
4. Alter the Property, including clearing new roads or trails, cutting or trimming any trees digging ponds or tanks, moving or erecting any fences, or locating on the Property any type of manufactured housing or mobile home.
5. Allow a lien to be placed on the Property.
6. Assign this Lease or sublease any portion of the Property without Lessor's written consent, which may be withheld in its sole and absolute discretion.
7. Litter or leave trash, debris, or shell casings on the Property.
8. Allow anyone other than those persons listed in Exhibit "A" to hunt or use the Property.
9. Construct any kennel, blind or stand on the Property without Lessor's prior written consent.

C. Lessor agrees to Lease to Lessees the Property for the entire Term beginning on the Commencement Date and ending on the Termination Date.

D. Lessor agrees not to -

1. Allow any use of the Property inconsistent with Lessees' Permitted Use as long as Lessees is not in default.

E. Lessor and Lessees agree to the following:

1. **Alterations.** Any physical additions or improvements to the Property made by Lessees will become the property of Lessor. Lessor may require that Lessees, at termination of this Lease and at Lessees' expense, remove any physical additions and improvements, repair any alterations, and restore the Property to the condition existing at the Commencement Date, normal wear excepted.
2. **Abatement.** Lessees' covenant to pay Rent and Lessor's covenants are independent. Except as otherwise provided, Lessees will not be entitled to an abatement or refund of Rent for any reason.
3. **Release of Claims.** LESSEES RELEASE LESSOR FROM ALL CLAIMS OR LIABILITIES FOR ANY INJURY TO LESSEES WHILE PRESENT ON THE PROPERTY OR TO LESSEES' PROPERTY LOCATED ON THE PROPERTY. THE RELEASE IN THIS PARAGRAPH WILL APPLY EVEN IF THE DAMAGE OR LOSS IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF LESSOR BUT WILL NOT APPLY TO THE EXTENT THE DAMAGE OR LOSS IS CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LESSOR.
4. **Condemnation/Substantial or Partial Taking**
 - a. If the Property cannot be used for the Permitted Use because of condemnation or purchase in lieu of condemnation, this Lease will terminate.
 - b. If there is a condemnation or purchase in lieu of condemnation and this Lease is not terminated, the Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable.
 - c. Lessees will have no claim to the condemnation award or proceeds in lieu of condemnation.
5. **Default by Lessor/Events.** A default by Lessor is the failure to comply with any provision of this Lease that is not cured within thirty (30) days after written notice.
6. **Default by Lessor/Lessees' Remedies.** Lessees' remedies for Lessor's default are to sue for damages and terminate this Lease. Lessees shall have no claim against or any right, title or interest in and to the Property for any reason.
7. **Default by Lessees/Events.** Defaults by Lessees are (a) failing to pay timely Rent; (b) abandoning or vacating a substantial portion of the Property; and (c) failing to

comply within ten (10) days after written notice with any provision of this Lease other than the defaults set forth in (a) and (b) above. No 10-day grace period shall be required if Lessees' failure to comply with this Lease causes a material injury or damage to any property of Lessor, an injury or death to any third period or in Lessor's sole discretion causes a material risk of any injury or death to property or persons.

8. **Default by Lessees/Lessor's Remedies.** Lessor's remedies for Lessees' default are to (a) enter and take possession of the Property, after which Lessor may relet the Property on behalf of Lessees and receive the Rent directly by reason of the reletting, and Lessees agrees to reimburse Lessor for any expenditures made in order to relet; (b) enter the Property and perform Lessees' obligations; and (c) terminate this Lease by written notice (except where such notice is expressly not required) and sue for damages. Lessor may enter and take possession of the Property by self-help, by picking or changing locks if necessary, and may lock out Lessees or any other person who may be hunting on the Property, until the default is cured, without being liable for damages. In the event of any termination for Lessees' failure to comply with this Lease, no refund or reimbursement of any Base Rent or any other payment by Lessees hereunder shall be required and all such amounts shall be deemed forfeited as a reasonable estimate of the liquidated damages suffered by Lessor as a result of such termination.
9. **Default/Waiver/Mitigation.** It is not a waiver of default if the nondefaulting party fails to declare immediately an event of default or delays in taking any action. Pursuit of any remedies set forth in this Lease does not preclude pursuit of other remedies in this Lease or provided by law. Lessor and Lessees have a duty to mitigate damages.
10. **Holdover.** If Lessees does not vacate the Property following termination of this Lease, Lessees will become a Lessees at will and must vacate the Property on receipt of notice from Lessor. No holding over by Lessees, whether with or without the consent of Lessor, will extend the Term.
11. **Alternative Dispute Resolution.** Lessor and Lessees agree to mediate in good faith before filing a suit for damages.
12. **Attorneys' Fees.** If either party retains an attorney to enforce this Lease, the party prevailing in litigation is entitled to recover reasonable attorneys' fees and other fees and court and other costs.
13. **Venue.** Exclusive venue is in the county in which the Property is located.

14. **Entire Agreement.** This Lease, together with the attached exhibits and riders, is the entire agreement of the parties, and there are no oral representations, warranties, agreements, or promises pertaining to this Lease or to any expressly mentioned exhibits and riders not incorporated in writing in this Lease.
15. **Amendment of Lease.** This Lease may be amended only by an instrument in writing signed by Lessor and Lessees.
16. **Limitation of Warranties.** THERE ARE NO IMPLIED WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER KIND ARISING OUT OF THIS LEASE, AND THERE ARE NO WARRANTIES THAT EXTEND BEYOND THOSE EXPRESSLY STATED IN THIS LEASE.
17. **Notices.** Any notice required or permitted under this Lease must be in writing. Any notice required by this Lease will be deemed to be delivered (whether actually received or not) when deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Lease. Notice may also be given by regular mail, personal delivery, courier delivery, facsimile transmission, or other commercially reasonable means and will be effective when actually received. Any address for notice may be changed by written notice delivered as provided herein.
18. **Mineral Interests.** This Lease is subordinate to any present or future oil, gas, or other mineral exploration agreements and leases. Lessor will not be liable to Lessees for any damages for actions attributable to those agreements and will receive all consideration paid therefor.
19. **Lessor's Use.** Lessor, both for Lessor and for third parties, retains the right to enter on and use the Property for grazing, farming, erecting telecommunications towers or antennas, and other uses that do not materially interfere with the Permitted Use.
20. **Identity.** Lessor reserves the right to verify the identity of all persons on the Property. Any person on the Property, even at the invitation of Lessees or accompanied by Lessees, who are in the possession of a firearm and who are not listed on Exhibit "A" attached hereto, shall be subject to the immediate removal from the Property.
21. **Option to Terminate.** Lessor will have the option to terminate this Lease with respect to any portion of the Property that is sold. Lessor's option will be exercisable by written notice delivered to Lessees no later than thirty (30) days before the date of termination. The Rent payable during the unexpired portion of the Term will be adjusted as may be fair and reasonable. Lessees will receive a refund

of any prepaid Base Rent fairly and reasonably allocable to the portion of the Property for which this Lease has been terminated.

22. **Right to Terminate or Suspend in Certain Circumstances.** Lessor reserves the right to cancel this Lease entirely or suspend Lessee's rights hereunder for a twelve-month calendar period if Lessor has been advised by a consulting wildlife biologist that it is inadvisable to harvest any portion of the game animals or wildlife on the Property and contemplated by this Agreement. Not later than twenty (20) days prior to the beginning of the next applicable twelve-month period, Lessor shall notify Lessees of such cancellation or suspension and such notice shall be accompanied by the written opinion of the biologist to the effect that such hunting is inadvisable. Lessor shall, at Lessees' option, either refund the Base Rent paid for the applicable twelve-month period or apply such Base Rent to the twelve-month period that shall occur after the period of suspension.
23. **No Guarantees or Warranties of Success.** Lessor makes no representations or warranties whatsoever that Lessees will be successful in harvesting any game animals on the Property as there are many variables beyond the control of Lessor that may prevent Lessees from successfully harvesting such animals. Lessor makes no warranties as to the fitness of the Property or its improvements for the purposes of this Lease.

[* Alternative Clauses:

- ____. **Base Rent Adjustment.** Beginning one (1) year from the Commencement Date, the Base Rent will be adjusted on each anniversary of the Commencement Date (the "Adjustment Date") by increasing the Base Rent by an amount equal to five percent (5%) of the Base Rent for the immediately preceding year.
- ____. **Base Rent Adjustment.** Beginning one (1) year from the Commencement Date, the Base Rent will be adjusted on each anniversary of the Commencement Date (the "Adjustment Date") to reflect increases in the Consumer Price Index for "All Urban Consumers, U.S. City Average, All Items," issued by the Bureau of Labor Statistics of the United States Department of Labor.
- a. The adjustments in the Base Rent will be determined by multiplying the Base Rent specified in the Lease ("Initial Base Rent") by a fraction, the numerator of which is the index number for the last month before the adjustment and the denominator of which is the index number for the first month of the first year of the Term. If the product is greater than the Initial Base Rent, Lessees will pay this greater amount as Base Rent until the next rental adjustment. Base Rent will never be less than the Initial Base Rent.

b. Lessor will notify Lessees of each adjustment to Base Rent no later than sixty (60) days after the Adjustment Date and Lessees shall pay Base Rent for such year at the adjusted rate beginning as of the Adjustment Date.

[*Alternative Clause:

____. *Advertisement of Property.* During the last thirty days of the Term, Lessor may place a sign on the Property advertising the Property for rent or sale.

[*Alternative Clause:

____. *Extension Option.* Lessees has the option to extend the Term as provided in the attached Extension Option Rider, if any, attached hereto as Exhibit “C” and incorporated herein by reference.

Lessor:

[* _____ *entity name if an entity, type of entity* _____*]

By: _____
[* _____*] [*title if appropriate*]

Lessees:

By: _____
[* _____*]

By: _____
[* _____*]

By: _____
[* _____*]

Schedule "I" to Hunting Lease

Insurance Addendum (Required for each Lessee)

Lease

Date: [* _____*]

Lessor: [* _____*] [*marital status*], *or*
[* _____*] [*entity status, i.e., a [Texas]
limited liability company or a [Texas] limited partnership*]

Lessees: [* _____*]
[* _____*]
[* _____*]
[* _____*]

Lessees agrees to -

1. Maintain the property and/or liability insurance policies required below during the Lease Term and any period before or after the Lease Term when Lessees (or any one of them) are present on the Property:

Type of Insurance

Minimum Policy Limit

Hunting Lease liability	Per occurrence:	\$ _____
	Aggregate:	\$ _____

Endorsement extending homeowner's policy liability to Property

[Texas] personal/business auto (Must include ATV's, 4-wheelers, etc.)	Greater of minimum limits required by law or \$ _____
--	--

2. Comply with the following additional insurance requirements: (a) the hunting Lease liability or homeowner's insurance policy must be endorsed to name Lessor as "additional insured;" (b) additional insured endorsements must not exclude coverage for the ordinary negligence of Lessor; (c) any property insurance policies covering Lessees' property on the Property must contain a waiver of subrogation of claims against Lessor; and (d) certificates of insurance and copies of any additional insured and waiver of subrogation endorsements must be delivered by Lessees to Lessor before entering the Property and thereafter at least ten (10) days before the expiration of the policies.

Exhibit “A” to Hunting Lease

Individuals Who Will Hunt on the Property

If an individual’s name does not appear on the list below and they are found in possession of a firearm on the Property, they will be subject to immediate removal from the Property and Lessees may be subject to the additional pro rata charges for having more than the permitted number of hunters on the Property:

[* _____*]

[* _____*]

[* _____*]

[* _____*]

Exhibit “B” to Hunting Lease

Release, Indemnity, and Assumption of Risks

Lease

Date: [* _____*]

Lessor: [* _____*] [*marital status*], *or*
[* _____*] [*entity status, i.e., a Texas
limited liability company or a [Texas] limited partnership*]

Lessees: [* _____*]
[* _____*]
[* _____*]
[* _____*]

1. **Assumption of Risks.** THE UNDERSIGNED ACKNOWLEDGES THAT (A) DANGEROUS NATURAL OR MAN-MADE CONDITIONS MAY EXIST OR OCCUR ON THE PROPERTY DESCRIBED IN THE LEASE, INCLUDING STREAMS AND RIVERS WITH CURRENTS AND WATER THAT MAY BE DEEP OR FLOOD, HAZARDOUS DRIVING AND WALKING CONDITIONS, UNEVEN TERRAIN, THE PRESENCE OF WILD, DOMESTIC, POISONOUS, OR DISEASED ANIMALS, ELEVATED HUNTING STANDS, AND/OR CAMOUFLAGED SUNKEN HUNTING BLINDS; AND (B) HUNTING IS AN INHERENTLY DANGEROUS ACTIVITY INVOLVING THE USE OF FIREARMS AND OTHER LETHAL IMPLEMENTS AND THE PRESENCE OF OTHER HUNTERS. THE UNDERSIGNED ASSUMES ALL SUCH DANGERS AND RISKS.

2. **Indemnity.** THE UNDERSIGNED WILL INDEMNIFY, DEFEND, AND HOLD LESSOR AND ITS AGENTS, EMPLOYEES, INVITEES, LICENSEES, OR VISITORS (COLLECTIVELY, “LESSOR”) HARMLESS AGAINST ALL CLAIMS, DAMAGES, AND COSTS (COLLECTIVELY, “CLAIMS”) INCURRED BY OR ALLEGED AGAINST LESSOR AND ARISING OUT OF OR RELATING TO ANY ACT OR OMISSION OF THE UNDERSIGNED OR ANY OF THE UNDERSIGNED’S FAMILY MEMBERS, AGENTS, EMPLOYEES, CONTRACTORS, LICENSEES, OR VISITORS (COLLECTIVELY, “HUNTERS”) WHILE AT THE PROPERTY, INCLUDING ANY CLAIMS BASED ON ANY (a) INJURY TO OR DEATH OF ANY PERSON(S), (b) DAMAGE TO OR LOSS OF PROPERTY, OR (c) FAILURE OF HUNTERS TO COMPLY WITH ANY APPLICABLE LAWS OR THE LEASE.

3. **Release.** THE UNDERSIGNED WAIVES ALL CLAIMS AGAINST LESSOR AND RELEASES LESSOR FROM ANY LIABILITY, BASED ON ANY (A) INJURY TO OR DEATH

OF HUNTERS OR (B) DAMAGE TO OR LOSS OF ANY PROPERTY BELONGING TO HUNTERS.

4. **Negligence of Lessor.** THE FOREGOING INDEMNITIES, WAIVERS, AND RELEASES WILL APPLY EVEN IF THE INCIDENT GIVING RISE TO THE CLAIM IS CAUSED IN WHOLE OR IN PART BY THE CONDITION OF THE PROPERTY OR BY THE SOLE OR CONCURRENT ORDINARY NEGLIGENCE OF LESSOR (BUT NOT THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LESSOR).

Lessee:

Printed name: _____

Date: _____
(Date of Signature)

Exhibit “C” to Hunting Lease

Extension Option Rider

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817-596-4200

Appendix - Tab 3, James Eggleston: 3.17

Grazing Lease Agreements

Practice Guide

A Grazing Lease is similar to other real estate leases as they involve the transfer of a leasehold estate from the landowner (Lessor) to the person intending to use the Property (Lessee) for a term for an agricultural purpose, i.e., grazing. There are significant differences, however, as Texas law grants Lessor's certain rights in Lessee's cattle to secure payment of the rental and because Lessor may not have frequent access or time to inspect the property involved, the lease agreement should carefully address the standard of care the Lessee must observe and Lessee's obligations for covering losses to persons and property. Those are addressed below.

Key Differences between Grazing Leases:

The key difference between types of Grazing Leases is generally determined by the method by which Rent is determined and paid to the Lessor. The following methods are frequently used:

1. Per Acre Cash Price. Payment of a fixed cash sum per acre during the term of the Lease. This amount does not fluctuate regardless of the number of head of cattle that Lessee may put on the Property. A limit should be placed on the number of head of cattle allowed to graze the Property in order to preserve its long-term grazing value.
2. Per Unit Cash Price. Payment of a fixed cash sum per head of cattle placed on the Property. Lessor may be paid annually or monthly depending on how many animals are grazing the Property, subject to the limitations on the number of animals in the Lease.
3. Per Pound of Gain Payment. This method allows the Lessor to share in the amount of the actual gain in weight of the Livestock while on the Property. Depending on the weight gain and Lessor's percentage, Lessor assumes some of the risk, but may enjoy a greater return by sharing in the results of a profitable grazing operation. Care should be taken to determine a fair weighing arrangement to determine in-bound or beginning weights and out-bound or finishing weights.
4. Percentage of Total Sales. Payments may be based on Lessor sharing in sales removes the gain component, which may be preferred if the animals consist of young calves. If the grazing enterprise consists of a cow/calf operation, the Lessor may share in the total sales of all calves produced from the cows grazing on his or her property. Care should be taken to manage and record the number of calves sold and the movement of cow/calf pairs on and off the Property to determine a fair payment.
5. Gain Contracts. Under a pure "Gain Contract," a landowner may actually assume management of the cattle placed on the Property. The Grazing Lease in this section is not applicable to such a relationship and will be dealt with elsewhere.

Information to Gather and Issues to Consider:

1. Names and identities of parties and any entities in which they are doing business.
2. A complete and accurate legal description of the Property. (It should also specify areas of the Property where Lessee's cattle are not permitted to graze.)
3. A precise statement of the intended use. Uses which the Lessor does not want on the Property should be clearly stated, i.e., recreational horseback riding, hunting, fishing.
4. The term of the Lease. Usually expressed in years.
5. Rent – may be expressed as a fixed sum per month, a price per head of cattle, a gain sharing arrangement or percentage of sales.
6. Lessor should require a minimum rent rate be provided to cover confusion that arises from the frequent move-in and move-out of cattle.
7. Lessee will obviously want access to water. Lessor should consider any restrictions on such use, prohibiting drilling of other wells, prohibiting cattle from certain sensitive or eroded areas.
8. Lessor will want a security interest in the livestock as “collateral” to secure Lessee's obligations for rent and other payments under the Lease.
9. Lessor will also want a broad definition of “collateral” so as to be able to have the most security for Lessee's obligation.
10. Lessor should restrict sales of his or her “collateral” so as to insure payment of what is owed. Lessor should receive his or her share of any proceeds within a very limited period of time.
11. Texas law also grants a Landlord's and Pasturer's Lien to secure the payment of rent from those who lease pasture for livestock grazing.
12. Lessor will want to make sure that Lessee bears all responsibilities for employee liability issues, including all tax matters.
13. Insurance should be obtained by Lessee, as lessees do in most lease situations. Insurance certificates must name Lessor as an additional insured and must be for certain minimum liability amounts.
14. All expenses connected with Lessee's operations should clearly belong to Lessee. Lessee should protect the Property from any liens of any contractors or suppliers.
15. Permanent fixtures and improvements become the property of Lessor.
16. Lessee should not be able to make alterations without Lessor's consent. Occasionally Lessees are permitted to offset the documented costs of such improvements against future rent obligations.
17. Lessee should be responsible for all environmental issues and should take care in the application of any pesticides, fertilizers and other agricultural chemicals.
18. Lessee should have the primary responsibility for all security around the Property including keeping gates locked.
19. Lessee's representations and warranties will cover the care required of the livestock (the Lessor's collateral), maintaining the property, maintaining records, etc.
20. Lessee's defaults will include failure to pay rent, filing bankruptcy, allowing liens on the property, sale or assignment of the livestock without Lessor's consent and other breaches of the Lease.

21. In the event of Lessee's defaults, Lessor will want the right to terminate the Lease, repossess the Property, collect past-due rent and rent to become due, plus his or her attorney's fees and costs.
22. Will Lessee have hunting rights?
23. Will Lessor be allowed to go on his or her own property to hunt, explore for minerals, clear land, and do improvements?
24. Lessor will always want an unrestricted right to go on the Property and make inspections, perform repairs, examine Lessee's performance under the Lease, etc.
25. Lessor will want Lessee to have the obligation to periodically sign estoppel letters confirming the status of the Lease and other facts, particularly for Lessor's lender or mortgage holder.
26. The Lease should expressly negate any possible rights or interests of Lessee may claim in any oil, gas or other mineral interests under the Property.
27. Lessor will want to negate any rights of Lessee to assign the Lease or sublet the Property. That right should remain solely within the discretion of Lessor.
28. Other standard terms are included which are found in most well-drawn leases.

Practice Tip for Securing Interest in Livestock:

Like crop lease agreement, cattle feeding leases offer the landowner a unique type of the "collateral" for the lessee's obligation. The secured party has statutory rights to what is produced as a result of the farming activity. These "lien" rights are very unique to farm products. These lien rights of the lessor (as the secured party) are worth very close attention.

A lessor reserving a "landlord's lien" in an agricultural lease creates a security interest in goods which the Texas Business and Commerce Code called "Farm Products." "Farm Products" include (1) crops grown, growing, or to be grown including crops produced on trees, vines, and bushes and aquatic goods produced in aquacultural operations; (2) livestock, born or unborn, used or produced in a farming operation; (2) supplies used or produced in a farming operation; or (4) products of crops or livestock in their unmanufactured states.

"Perfection" of the security interest is required just as it is with other security interests in collateral in a more conventional business context. However, "perfection" is often difficult and it is certainly unique to the type of collateral known as Farm Products.

Two relevant statutory schemes must be consulted and it is recommended that the secured party's perfection of the security interests in the Farm Products follow both statutes:

1. Texas Business and Commerce Code Article 9 ("UCC 9").
2. Federal Food Security Act of 1985 (the "Food Security Act").

Under the UCC, perfection of security interests in Farm Products as collateral is achieved by filing a financing statement with the Texas Secretary of State. These are generally the same as other types of financing statements for other classifications of collateral.

Practice Tips under the UCC 9:

1. Effective Period of Perfection. A properly filed financing statement will maintain perfection of the security interest for 5 years from the date of filing. This period may be extended for up to 5 years by a continuation statement filed within 6 months of the expiration of the original financing statement.
2. Purchase Money Security Interest (“PMSI”). Similar to other types of collateral, a PMSI in Farm Products will generally take priority over a conflicting and prior security interest in the same collateral. However, with respect to livestock, and conflicts with holders of conflicting security interests having filed security statements covering the same types of livestock, the PMSI holder in livestock generally must have send an authenticated notification to the holder of the conflicting security interest and such holder receives the notification within six months before the debtor receives possession of the livestock. See UCC §324(d), (e) for these special rules.
3. Priority of a PMSI. A PMSI holder has a 20 day grace period of automatic perfection in which the holder of the PMSI may file a financing statement in order to continue the priority of the PMSI. Such filing will cause the PMSI’s priority to relate back to the date the debtor first acquired the collateral.
4. PMSI as to Products, Offspring and Increases. The priority status of a PMSI generally does not automatically extend to products or increases of the collateral. It is recommended that the financing statement contain words like “Products,” Increase,” or “Offspring” in the description of the collateral.
5. Proceeds from Sale of Farm Products. A perfected security interest of the secured party will automatically apply to any identifiable proceeds of the sale for a period of 20 days after the obligated party receives the proceeds. Extension of this perfection is possible. The “proceeds” from the sale of the Farm Products may be included in the description of collateral in the financing statement. It is recommended that the secured party require a two-party check be issued in order to make sure the proceeds are kept in a separate account. Again, the rules with respect to livestock proceeds are slightly different and require some additional actions on behalf of the secured party. See UCC §324(d), (e) for these special rules.
6. Termination. A security interest in Farm Products is terminated by their authorized sale to a third party. The sale must be authorized by the secured party. If the secured party’s conduct infers its knowing and intentional relinquishment of its continued secured interest, it will be deemed to have waived its security interest.

Practice Tips under the Food Security Act:

1. Coverage of Livestock. The FSA covers livestock in the same fashion as the UCC 9.
2. General Rule. A buyer of Farm Products from a seller engaged in farming activity generally takes them free and clear of any security interest even if the security interest is

perfected and even if the buyer knows of its existence. No good faith is required by the FSA on the part of the buyer to take “free and clear.”

3. Super-Perfection Options. The FSA provides two options whereby a secured party may continue its prior lien on collateral notwithstanding its sale. They are (1) a Prenotification Statement to potential buyers or (2) a filing of an effective Financing Statement under a Farm Products Central Filing System. In Texas, the second option is not available, so secured parties in Texas must use the Prenotification option.
4. Basic Steps of Prenotification.
 - a. The debtor must furnish the secured party with a list of potential buyers of debtor’s Farm Products.
 - b. If an unidentified buyer comes into the picture, the debtor must notify the secured party at least 7 days prior to the proposed sale date.
 - c. The Prenotification Statement (the “PNS”) must satisfy the following:
 - i. The PNS must be in writing.
 - ii. The PNS must contain name and address of debtor.
 - iii. The PNS must contain debtor’s social security number or tax identification number.
 - iv. The PNS must contain a description of the collateral (per the FSA’s classification).
 - v. The PNS must contain the amount or quantity of the collateral.
 - vi. The PNS must contain a reasonable description of the real property where the collateral is located including all counties.
 - vii. The PNS must identify the crop year of the collateral (if crops are the collateral).
 - viii. The PNS must contain any payment obligations of debtor that must be satisfied in order for the collateral to be released from the security interest.
 - ix. No minor errors are permitted in the PNS.
 - x. A PNS is effective for one year. Must be annually renewed.
 - xi. The PNS must be received by the buyer. (“Receipt” is determined by the state law of the buyer’s location.)
 - xii. Penalties in favor of the secured party apply if the debtor sells the “off list” (but this may practically be an ineffective remedy).

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Appendix - Tab 3, James Eggleston: 3.17.1

Grazing Lease Agreement Sample Farm

Date: [* _____*]

Lessor: [* _____*] [*marital status*], *or*
[* _____*] [*entity status, i.e., a
[Texas] limited liability company or a [Texas] limited
partnership*]

Lessor's Mailing Address:

[* _____*]
[* _____*]
[* _____*] County

Lessee: [* _____*] [*marital status*], *or*
[* _____*] [*entity status, i.e., a
[Texas] limited liability company or a [Texas] limited
partnership*]

Lessee's Mailing Address:

[* _____*]
[* _____*]
[* _____*] County

Agreement: Lessee hereby agrees to lease the Property from Lessor and pay the Rent and perform and pay all of the other obligations provided hereinbelow in exchange for the Use of the Property for the Term of this Lease, according to the terms and conditions of this Lease. Lessor agrees to lease the Property to Lessee on the terms and conditions contained herein.

Property: That certain real property situated in [* _____* County], [Texas], consisting of [* _____*] acres of real property out of the [* _____*] Survey, Section [* _____*], Abstract [* _____*], as more particularly described on Exhibit "A" attached hereto and incorporated herein by reference, together with all rights, easements, rights of way, privileges, appurtenances, water rights, fixtures, and all other personal property and permanently installed improvements, located on or about the real property described on Exhibit "A" (herein all of the foregoing is referred to as the "Property").

Use: Livestock grazing and other uses reasonably incident thereto.

Term: [* _____*] years, beginning [* _____*] and ending [* _____*], unless further extended, in writing, by Lessor and Lessee (sometimes collectively referred to herein as the “Parties.”)

Rent: [*\$ _____*] per head of livestock (herein “Livestock”). Lessee shall summarize calculation of Rent with each payment thereof. (One cow and one nursing calf shall be considered one “head” of Livestock.)

If any Livestock are added during any month, Rent payable with respect to such Livestock will be prorated and added to next month’s payment of Rent.

Minimum Rent: Irrespective of how many head of Livestock are on the Property, the minimum Rent payment shall be [*\$ _____*] per month (even if no Livestock are present).

Due Date: Payments of Rent and the calculation of Rent due shall be delivered to Lessor on or before the first (1st) day of each month.

Late Payment: 5% of total Rent due if paid more than seven (7) days after Due Date.

Water Use: Lessee shall have the right use all water resources on the Property as presently existing from streams, water courses, ponds, lakes, wells and other present sources. Lessee shall not drill any new water wells on the Property without Lessor’s consent. Lessee shall exercise reasonable care and due diligence in protecting all water resources on the Property from any contamination or other damage.

Security Agreement: This Lease and Exhibit “B” attached hereto and incorporated herein by reference shall be deemed a Security Agreement for purposes of creating a security interest in accordance with [Texas] Business and Commerce Code, any applicable federal law and all of those terms and conditions attached hereto as Exhibit “B.” Lessor shall have the authority to file a financing statement with the [Texas] Secretary of State to perfect its security interest hereunder and under Exhibit “B.”

[*Alternative Clause: (as an alternative to attaching Exhibit “B” and using a separate security agreement):

This Lease shall be deemed a Security Agreement for purposes of creating a security interest in accordance with [Texas] Business and Commerce Code and any applicable federal law. Lessor shall be a “secured party” and Lessee shall be a “debtor” for all purpose thereunder. Lessee grants to Lessor a present security interest in the “Collateral” hereinafter described to secure the payment and performance of all obligations and indebtedness of Lessee created or incurred pursuant to this Lease.

The “Collateral” for this Security Agreement is (a) all of the Livestock grazed on the Property during the Term of this Lease whether presently or hereafter existing, (b) all proceeds of the Livestock whether now owned or hereafter acquired or realized by Lessee, (c) all documents of title or other documents relating to the Livestock, (d) all insurance proceeds for the loss, damage or theft of the Collateral, (e) all products, increase or offspring of the Collateral, all claims or causes of action relating to the use, sale, lease, damage or loss of the Collateral, (f) all additions to or replacements of the Collateral, (g) all fees, income charges or things of value earned by the Collateral, and (h) all intellectual property rights connected therewith.

The Collateral shall, unless otherwise authorized herein, remain in Lessee’s possession on the Property unless Lessor shall authorize its removal to another location.

Lessee shall notify Lessor at least seven (7) days prior to the date of any sale of any of the Collateral. Provided it receives such notice, Lessor authorizes Lessee to sell the Collateral for cash conditioned upon Lessee’s immediate delivery to Lessor of all unpaid amounts due hereunder. In the event Lessee shall the Collateral in violation of this paragraph, Lessee shall account to Lessor within ten (10) days of any such sale for Lessor’s share of any such proceeds.]*

**Statutory Landlord’s and
Pasturer’s Lien:**

In addition to the security interest granted hereinabove, Lessee acknowledges that Lessor has a statutory Landlord’s and Pasturer’s Lien on the Livestock grazed on the Property to secure payment of rent. Nothing in this Lease shall be construed to negate or diminish such statutory Landlord’s or Pasturer’s Lien on the Livestock.

Ranch Labor:

Lessee shall pay for all ranch labor or services used on the Property. All such labor shall be employees of Lessee and shall

always be under the supervision and control of Lessee. Lessee shall pay all of the employer's share of all federal, social security and other employment or unemployment taxes. Lessee shall also pay all federal income tax, franchise taxes, and sales taxes applicable to Lessee's activities on the Property.

Insurance:

Lessee shall maintain insurance (from a company reasonably acceptable to Lessor) protecting Lessor and Lessee from any liability caused by Lessee or its agents, employees and representatives, or the Livestock in the following amounts: \$500,000 coverage for personal injury to or death of any one person, \$1,000,000 coverage for personal injury to or death of more than one person, \$250,000 coverage for property damage liability. Lessee will provide Lessor (naming Lessor as and additional insured) with certificates of insurance prior to placing any Livestock on the Property and updated certificates as insurance is updated and renewed during term of the Lease. All insurance policies insuring personal property owned by Lessee shall contain a provision waiving all rights of subrogation against Lessor.

Expenses:

Lessee shall bear all expenses of maintenance, fence repair, repair of improvements, and all expenses relating to Lessee's use of Property for grazing of the Livestock and uses related thereto.

Improvements:

Any improvements made on and/or permanently made a part of the Property by Lessee shall remain on the Property and shall not be removed by Lessee without the consent of Lessor.

Lessee shall maintain all improvements on the Property (including all barns, pens, chutes, fences, gates and other major improvements), in good condition and working order.

Alternations:

Lessee shall not make any changes to the Property that would diminish the value of the Property.

[*Alternative clause:

Lessor hereby grants Lessee the right to apply up to \$ _____ of Lessee's rental payments to the improvement of the Property, specifically _____ on the Property (the "Improvement Allowance"). Lessee shall provide Lessor written invoices and copies of checks for all expenditures for the improvements. The application of the rental payments shall be by the waiver of rent (or "free rent") for such period of time as is necessary for Lessee to recoup the amount of the Improvement Allowance. Rent shall continue to be calculated during this time in accordance with the requirements specified above.

In the event Lessee terminates this Lease by written notice to Lessor or due to default in the payment of rent, any unrecouped portion of the Improvement Allowance, shall be forfeited and Lessor shall have no obligation to refund any portion of such allowance.

In the event Lessor or authorized representative of Lessor terminates this Lease by written notice to Lessee (except in the event of Lessee's default), any unrecouped portion of the Improvement Allowance shall be refunded to Lessee.]*

Preservation of Title:

Lessee shall not do any act which would result in any encumbrances or liens against the title of Lessee in and to the Property, nor shall the interest or estate of Lessor in the Property be in any way subject to any claim by way of lien or encumbrance. Any claim or lien arising due to any act or omission of Lessee shall accrue only against the leasehold estate of Lessee and shall be subject and subordinate to the first and superior title and rights of Lessor in and to the Property.

Environmental:

Except in accordance with normal and usual agricultural practices, Lessee shall not use and shall not permit any agent, employee or other contractor to use any portion of the Property for the storage, disposal, application or handling of any "Hazardous Materials" (hereinafter defined.) With respect to Hazardous Materials, Lessee shall store, manage, handle and provide safeguards for the Property and all persons coming onto the Property in accordance with all state and federal laws, rules, regulations, orders and other directives. Lessee shall not apply, store, use, transport, handle or spray any pesticide, rodenticide, herbicide, fertilizer or other agricultural chemicals except in compliance with all [Texas] laws, rules and regulations, all labeling restriction on any such chemicals, all requirements of federal laws and regulations, and the standard of good agricultural husbandry.

"Hazardous Materials" shall mean (a) any hazardous waste, hazardous substances, pollutant or contaminant as defined by or provided in any federal, state or local statute, regulation, rule, ordinance or law, (b) any substance which is toxic, explosive, corrosive, flammable, radioactive, or otherwise hazardous under any federal, state or local governmental authority, agency department or commission; (c) any substance which may cause or threaten any erosion, contamination, drainage or nuisance problem on the Property or any adjacent properties, public roads, water courses or streams, bodies of water, underground water tables, or

poses or threatens to pose a hazard to the health or safety of persons, livestock or vegetation in or about the Property; (d) any substance which contains gasoline, diesel fuel or other petroleum hydrocarbons; and (e) any substance which requires special handling, investigation, notification or remediation under any federal, state or local statute, regulation, ordinance, order, action or policy.

LESSEE SHALL INDEMNIFY AND HOLD HARMLESS LESSOR AND ITS AGENTS, SUCCESSORS AND ASSIGNS FROM AND AGAINST ANY LOSS, COST, LIABILITY OR EXPENSE (INCLUDING REASONABLY ATTORNEY'S FEES, EXPENSES AND COURT COSTS) ARISING OUT OF THE PLACEMENT, APPLICATION, STORAGE, MANUFACTURE, DISPOSAL, HANDLING, REMOVAL, SPILL, DISPOSAL, ABATEMENT OR REMEDIATION OF ANY HAZARDOUS MATERIALS BY LESSEE, OR ANY REMOVAL, ABATEMENT, OR REMEDIATION OF HAZARDOUS MATERIALS REQUIRED HEREUNDER TO BE PERFORMED OR PAID FOR BY LESSEE. THE PROVISIONS OF THIS SECTION SHALL SURVIVE THE TERMINATION OF THIS LEASE.

Signage: Lessor may maintain on the Property such signage as Lessor shall deem necessary and appropriate. Lessee shall not place any signage on the Property except with Lessor's prior consent.

Security: Lessee will keep all perimeter gates to the Property closed and locked. Ingress and egress from the Property shall be at those places designated by Lessor. Lessee shall not change any lock system or lock combinations of Lessor without Lessor's prior consent.

Care of Property: Lessee shall practice good husbandry of the Property and proper care of all Livestock. Lessee shall also take all reasonable steps to prevent overgrazing of the Property including placing no more than [*_____ *] head of Livestock on the Property at any one time.

Lessee's Representations and Warranties:

1. The Collateral is and will always remain in the possession of Lessee.
2. There is no Financing Statement covering the Collateral or its proceeds on file in any public office. Lessee has granted no other lien, security interest or encumbrance in the Collateral except as approved by Lessor.

3. Lessee is the sole owner of the Collateral and Lessee has not entered into any contract for the sale of the Collateral.
4. Lessee will pay any costs, attorney's fees and expenses reasonably incurred in establishing, perfecting, enforcing, preserving and defending Lessor's prior and superior lien on the Collateral.
5. Lessee will keep the Collateral in good condition and protect it against waste.
6. Lessee will notify Lessor of any material change in the Collateral or any other fact warranted to herein by Lessee or which may affect the Collateral.
7. Lessee will maintain accurate records with respect to the Collateral and confirm for Lessor any fact or circumstance reasonably requested by Lessor with respect to the Collateral.
8. Lessee will maintain, preserve and protect the Collateral according to the standards of good agricultural husbandry.

**Lessee's Additional
Obligations:**

Lessee shall be obligated to do the following:

1. Lessee shall graze the Property in a workmanlike manner in accordance with the standards of good agricultural husbandry.
2. Pay all costs of production and related expenses on the Property.
3. Pay when due any water, sewer, gas, electricity, telephone or other utility expenses incurred by Lessee.
4. Prevent noxious weeds from growing to seed on the Property and destroy such weeds in an appropriate manner.
5. Keep the Property neat and orderly and free from trash and debris.
6. Enforce security on the Property by evicting any trespassers
7. Maintain all fences and gates on the Property.
8. Assume all risk of loss to all agricultural equipment and machinery and other personal property of Lessee.
9. Not permit any activity or omission that shall endanger, effect or terminate any agricultural or open-space *ad valorem* tax exemption.
10. Pay all taxes on the Livestock grazed or raised on the Property and on Lessee's personal property.
11. Notify Lessor of any vandalism, theft, spills of Hazardous Materials or casualty damage.

Default of Lessee:

Lessee shall be deemed to be in default under this Lease upon the occurrence of any of the following events ("Events of Default"):

1. Lessee's failure to pay any installment of Rent on the Due Date.
2. Lessee's filing for bankruptcy protection under federal law.
3. Lessee's making an assignment for the benefit of Lessee's creditors.
4. The attachment or levying upon any of Lessee's interest in the Property.
5. Lessee's abandonment of the Property during the Term.
6. Lessee's sale, assignment or transfer of the Collateral, or any part thereof, without the prior written consent of Lessee unless such sale is otherwise conducted as permitted elsewhere herein.
7. Lessee's failure to keep or observe any of the covenants or agreement of this Lease.
8. Any impairment of the Collateral by loss, theft, damage or destructions.

Remedies of Lessor:

In the event of one or more Events of Default, Lessor may, at its election, accelerate any and all payments due under this Lease and/or terminate this Lease upon written notice to Lessee. Upon such termination, Lessee shall immediately surrender possession and vacate the Property. Lessor shall thereafter have the full and free right, without demand or notice of any kind to Lessee, to enter into and upon the Property in order to repossess the Property and to expel or remove Lessee or any others who may occupying the Property. Such entry shall not be deemed to be a surrender or waiver of any of Lessor's other rights granted hereunder or by operation of law. Lessee shall have no rights to return to the Property to harvest any crops.

Lessee shall be liable for and hereby agrees to pay any and all losses, liabilities, costs and expenses, including attorney's fees, which Lessor incurs in connection with any of the Events of Defaults and the enforcement of Lessor's rights and remedies hereunder. All of Lessor's remedies hereunder shall be cumulative.

Surrender:

Lessee shall surrender and deliver the Property to Lessor upon the expiration or termination of this Lease. It shall be surrendered and delivery in as good condition and repair as at the time Lessee first assumed possession of the Property, reasonable wear and tear excepted. All fixtures or permanent improvements on the Property shall remain the property of Lessor. All personal property of Lessee shall be removed by Lessee.

Holdover:

If Lessee remains in possession of the Property after the expiration or termination of this Lease, Lessee shall be deemed to be

occupying the Property as a tenant at sufferance of Lessor subject to all terms and provisions herein except that Rent shall be payable by Lessee at a rate equal to 150% of the Rent applicable during the Term of the Lease.

Hunting Rights:

Lessor reserves all hunting and fishing rights and privileges provided the exercise of such rights will not unreasonably interfere with Lessee's use of the Property.

No party, including Lessee, shall be permitted to hunt on the Property **[*Alternative clause:** EXCEPT, _____ may hunt on the Property during hunting season (with notice to Lessee by phone call for safety purposes).*]

Right of Entry:

Lessee shall permit Lessor or Lessor's representatives to enter upon the Property at all reasonable hours to inspect same or make any necessary repairs. Lessor may also enter upon the Property for purposes of developing mineral resources, for conducting clearing operations and for evaluating Lessee's use and care of the Property.

Estoppel Letter:

Lessee shall provide upon Lessor's request an estoppel letter in a form prepared by Lessor acknowledging the existence of this Lease, that Lessor is not in default hereunder, that Rent is paid up through the date specified in such letter, that there have been no modification of this Lease except as identified therein, and such other statements and certifications as contained therein.

Lessor's Right to Cure:

Lessor may, but shall not be obligated to, cure any default by Lessee (including, without limitation, Lessee's obligation to obtain insurance, make repairs or satisfy lien claims). If Lessor does so cure a default, all costs and expenses reasonably incurred by Lessor in doing so shall be the obligation of Lessee and shall be added to Lessee's rental obligation hereunder, including all reasonable attorney's fees incurred by Lessor. All of such amounts shall be immediately due from Lessee and such amounts shall bear interest at the high rate permitted by law until such time as they are fully paid.

Quiet Enjoyment:

Lessor warrants that Lessor has good title to the Property, subject to matters of record and visible easements, roadways, and subject to all existing and future oil, gas and mineral leases and reservations covering the Property. All bonus, rents and damages paid by any oil and gas producer or lessee shall belong exclusively to Lessor. So long as Lessee is not in default under this Lease,

Lessee may peaceably and quietly have, hold and enjoy the Property with all rights and privileges provided in this Lease.

- No Waiver:** No acceptance by Lessor of any partial Rent payment by Lessee, nor Lessor's failure to notify Lessee of any Event of Default, will constitute a waiver by Lessor or any of Lessor's rights or remedies under this Lease. Lessor's waiver of any right or Event of Default shall not constitute a waiver or any other right of Lessor with respect to a subsequent default of the same obligation or for any other default.
- No Partnership:** This Lease shall not be construed as creating any relationship between Lessor and Lessee as partners, joint venturers, principal and agent, or other business relationship except that of landlord and tenant. Lessee is operating an independent business and Lessor has no right to exercise any control of Lessee's business except as may be provided by the terms and conditions of this Lease.
- Successors:** The terms, covenants and conditions of this Lease shall be binding upon, and inure to the benefit of, the heirs, personal representatives, successor and assigns of Lessor and Lessee.
- Notice:** Any notice required under this Lease shall be in writing and sent by personal delivery, expedited delivery service (with proof of delivery), or certified mail, return receipt requested, to the addresses set forth on the first page of this Lease (or at such addresses as Lessor or Lessee shall have designated in writing to one another).
- Mineral Rights:** Nothing in this Lease shall confer upon Lessee any rights or interests in and to any minerals underlying the Property. All of such rights and interests are reserved to Lessor together with the right to enter on the Property and to explore, develop and produce such minerals including the laying of pipelines, storage tanks, power lines and other structures and roads as may be necessary or convenient for these purposes.
- Law and Venue:** [Texas] law shall govern this Lease and the venue for any dispute hereunder shall be in the County in which the Property is located.
- Time of Essence:** Time is of the essence of this Lease, and all provisions herein relating thereto shall be strictly construed.
- Assignment/Subletting:** Lessee may not assign this Lease or sublet the Property without the prior written consent of Lessor.

Attorney's Fees: If either Party retains an attorney to enforce this Lease, the prevailing Party at time of trial is entitled to recover from the other Party the prevailing Party's reasonable attorney's fees.

Complete Agreement: This Lease constitutes the entire agreement between the parties. No prior written or prior or contemporaneous oral promises or representations will be binding.

No Recording of Lease: This Lease shall not be recorded by Lessee.

Lessor's Disclaimer: Lessor makes no warranty, and expressly disaffirms any warranty, express or implied, as to the Property, including, without limitation, any warranty regarding: (i) the adequacy or usefulness of any improvements, (ii) the habitability of any improvements, (iii) the viability, content or adequacy of surface or sub-surface water, (iv) the condition or suitability of the forage, grasses, soil, subsoil, or the Property generally, or (v) the fitness of the Property for any particularly use or purpose.

Risks: Lessee acknowledges that its intended use of the Property is subject to numerous risks applicable to agricultural enterprises including accidents, predators, thefts, pests, fluctuations in consumer demand, weather, floods, disease, governmental restrictions and quarantines, unfavorable market forces and many other factors which may affect Lessee's profit opportunities. Lessee has entered into this Lease fully aware of all such risks and is not acting in reliance on any representation or warranty of any kind and character not expressly set forth herein.

Underground Utilities: Lessee shall immediately locate and familiarize itself with the location and depth of all underground utilities and lines.

General Liability and Indemnification: **LESSEE ASSUMES ALL RISKS AND RESPONSIBILITIES FOR ACCIDENT, INJURIES OR DEATH RESULTING FROM SUCH INJURIES OR DAMAGES TO PERSON OR PROPERTY OCCURRING IN, ON OR ABOUT THE PROPERTY AND AGREES TO INDEMNIFY AND HOLD HARMLESS LESSOR AND LESSOR'S EMPLOYEES, AGENTS AND ASSIGNS FROM ANY AND ALL CLAIMS, LIABILITIES, LOSSES, COSTS AND EXPENSES (INCLUDING ATTORNEY'S FEES) ARISING FROM, OR IN CONNECTION WITH, THE CONDITION, USE OR CONTROL OF THE PROPERTY, INCLUDING THE IMPROVEMENTS AND EQUIPMENT THEREON, DURING THE TERM OF THIS LEASE. LESSEE SHALL**

BE LIABLE TO LESSOR FOR ANY DAMAGES TO THE PROPERTY, INCLUDING THE IMPROVEMENTS AND EQUIPMENT THEREON, AND FOR ANY ACT DONE BY LESSEE OR ANY EMPLOYEE, AGENT, INVITEE, LICENSEE OR CONTRACTOR OF LESSEE OR THE LIVESTOCK. LESSOR'S RIGHT OF INDEMNIFICATION FROM LESSEE SHALL NOT BE LIMITED BY THE AMOUNT OF INSURANCE MAINTAINED BY LESSEE. THE PROVISIONS OF THIS SECTION SHALL SURVIVE THE TERMINATION OF THIS LEASE WITH RESPECT TO ANY CLAIM ARISING BEFORE SUCH TERMINATION.

Lessor:

[* _____*],
a [Texas] [*type of entity*]

By: _____

Name: _____

Title: _____

OR

[* _____*],
[Name if individual grantor]

Lessee:

[* _____*],
a [Texas] [*type of entity*]

By: _____

Name: _____

Title: _____

OR

[* _____*],
[Name if individual grantee]

PREPARED IN THE OFFICE OF:

Phone: _____

Fax: _____

Exhibit "A"

Legal Description of Property

If Alternative Clause is sued under “Security Agreement” then do not use this Exhibit

Exhibit “B”

**Security Agreement – Farm Products
(Livestock)**

1. **Parties and Grant of a Security Interest.** Lessee (herein ““Debtor”) grants a present security interest in the “Collateral” hereinafter described to secure the payment and performance of all obligations and indebtedness of Lessee created or incurred pursuant to the Lease to which this Exhibit “B” is attached. Lessor shall be the “Secured Party” for all purpose hereunder.
2. **Collateral.** The “Collateral” for this Security Agreement is (a) all of the livestock, born or unborn described in the Lease (the “Livestock”), (b) all proceeds of the Livestock whether now owned or hereafter acquired or realized by Debtor, (c) all documents of title or other documents relating to the Livestock, (d) all insurance proceeds for the loss, damage or theft of the Livestock, (e) all claims or causes of action relating to the use, sale, lease, damage or loss of the Livestock, (f) all additions to or replacements of the Livestock, and (g) all intellectual property rights connected therewith.
3. **Debtor’s Obligation.** The Collateral secures the payment of all obligations of Debtor to Secured Party arising under the Lease, absolute or contingent, however they may have arisen (collectively the “Liabilities”). Debtor is also obligated to remit to Secured Party all proceeds from the sale of the Collateral up to an amount sufficient to pay all of the Liabilities.
4. **Possession of Collateral.** Debtor may keep possession of the Collateral until the earlier of (a) the due date for the payment of the Liabilities or (b) an Event of Default (defined hereinbelow).
5. **Event(s) of Default.** An Event of Default under this Agreement occurs if:
 - a. **Failure to Make Payments.** Debtor fails to pay any amount due as a Liability under the Lease or fails to perform or comply with the Lease or any other agreement made by Debtor to Secured Party.
 - b. **False Warranty or Misrepresentation.** Debtor, or a third party on behalf of Debtor, makes any statement, warranty, or representation to Secured Party, in connection with this Agreement, or to induce Secured Party to enter into the Lease, that is false in any material respect when made.
 - c. **Loss, Theft or Destruction of Collateral.** The Collateral is lost, stolen, destroyed or substantially damaged.
 - d. **Attachment, Levy or Seizure.** Any levy, pledge, seizure or attachment is made against the Collateral.
 - e. **Death, Insolvency, Etc.** Debtor or any third party who liable for the Liabilities as a guarantor, endorser or surety, suffers death, dissolution, termination, insolvency,

failure to pay debts as they mature, appointment of a receiver, an assignment for the benefit of creditors or a proceeding under any bankruptcy or insolvency law is commenced either by or against Debtor or any third party who is liable for the Liabilities as a guarantor, endorser or surety.

- f. **Insecurity of Secured Party.** If Secured Party reasonably deems itself insecure for any reason.
6. **Remedies on Default.** Upon the occurrence of an Event of Default, all of the Liabilities, without demand or notice, shall become immediately due and payable, at the option of Secured Party. Any obligations of Secured Party to Debtor provided in the Lease shall be immediately terminated. In addition, Secured Party may exercise any rights and remedies available to Secured Party under the law. Debtor, at Secured Party's request, will assemble the Collateral, at Debtor's own expense, in a convenient place designated by Secured Party.
7. **Secured Party's Expenses.** Any expense incurred by Secured Party in the collection of the Liabilities and the retaking, preparing for sale, and sale of the Collateral, including reasonable attorney's fees and legal expenses, or the repair of any real property to which the Collateral may be attached, will be paid by Debtor.
8. **Notice to Debtor.** Any notice of sale of the Collateral by Secured Party will be deemed reasonable and properly given if mailed to Debtor at least seven (7) days before the disposition of the Collateral. The notice must be addressed to Debtor at the address set forth hereinbelow, or at such other address designated in writing by Debtor.
9. **Proceeds from Sale of Collateral.** Secured Party may apply the proceeds from the sale of the Collateral to the payment of Debtor's liabilities in such order as Secured Party chooses.
10. **Exercise of Rights.** Delay in the exercise of a right or remedy by Secured Party will not act as a waiver of that right. A partial exercise, by Secured Party, of a right or remedy will not preclude further exercise of other rights or remedies by Secured Party.
11. **Debtor's Warranties.** Debtor warrants that Debtor:
 - a. **Title.** Holds full title to the Collateral free from any encumbrance or lien other than this Agreement.
 - b. **Defense of Claims, Etc.** Will defend the Collateral against the claims and demands of persons other than Secured Party.
 - c. **Sale of Collateral.** Will not sell, transfer, lease, or dispose of the Collateral, or any interest in the Collateral, or do anything to impair the value of the Collateral as security, without the prior written consent of Secured Party.; provided, however, Debtor may sell [list] in the ordinary course of business until notified to the contrary by Secured Party.
12. **Transfer of Proceeds.** Debtor will, at the request of Secured Party, transfer any proceeds of the Collateral, upon receipt, to Secured Party. Until transfer to Secured Party, Debtor

will hold all proceeds separate and apart from Debtor's own funds, and upon express trust for Secured Party. Secured Party may (a) such proceeds to Debtor's liabilities in such order as Secured Party chooses and (b) release all or any part of these proceeds to Debtor.

13. **Purchase of Collateral by Debtor.** If Debtor intends to use the proceeds from the any loans by Secured Party or the sale of any of the initial Collateral to buy any of the Collateral, Debtor will so notify Secured Party. In this event, Debtor or Secured Party will transfer these funds director to the seller of such Collateral
14. **Use and Sale of Collateral.** The Collateral is to be is to be raised by Debtor exclusively in the course of Debtor's farming operations. Lessee shall notify Lessor at least seven (7) days prior to the date of any sale of any of the Collateral. Provided it receives such notice, Lessor authorizes Lessee to sell the Collateral for cash conditioned upon Lessee's immediate delivery to Lessor of all unpaid amounts due hereunder. In the event Lessee shall sell the Collateral in violation of this paragraph, Lessee shall account to Lessor within ten (10) days of any such sale for Lessor's share of any such proceeds.
15. **Record Owner of Land.** Lessor/Secured Party is the record owner of the real property on which the Collateral is growing or is to be planted.
16. **Location of Collateral.** The Collateral shall, unless otherwise authorized herein, remain in Lessee's possession on the Property unless Lessor shall authorize its removal to another location.
17. **Financing Statements and Prenotification Statements.** There is no financing statement covering the Collateral on file with any public office except any filed or to be filed by Secured Party. At the request of Secured Party, Debtor will from time to time (a) execute financing statements and pay the cost of filing them and (b) do such other acts (e.g., deposit with Secured Party certificates of title to the Collateral) as Secured Party may request to establish and maintain a valid security interest in the Collateral, free of other liens and claims. Debtor shall also, upon Secured Party's request, deliver to Secured Party a list of the potential buyers of the Collateral in accordance with the Federal Food Security Act of 1985. Debtor shall also, upon Secured Party's request, assist Secured Party in making Prenotification Statements ready for delivery to all such potential buyers.
18. **Maintenance of Collateral and Taxes.** Debtor will (a) do whatever is necessary for the proper maintenance of the Collateral consisting of crops and livestock in accordance with proper husbandry and acceptable farming standards; (b) keep all other Collateral in good condition and repair; (c) promptly pay all taxes and assessments on the Collateral, or its use or operation, as they come due; and (d) permit inspection of the Collateral, at reasonable times, by Secured Party.
19. **Insurance.**
 - a. **Form of Policies.** Debtor will insure the Collateral for its full insurable value, at Debtor's own expense, against risks of fire, theft, and such other risks, and in such

form and with such companies as are satisfactory to Secured Party. All policies must provide that losses are payable to Secured Party and Debtor according to their respective interests in the Collateral.

- b. **Possession of Policies.** At Secured Party's request, Debtor will deliver to Secured Party all insurance policies or certificates.
- c. **Secured Party as Attorney-in-Fact.** Secured Party is authorized to act as an attorney-in-fact for Debtor to obtain, cancel, or adjust any insurance policy, and indorse checks or drafts drawn by the insurers.
- d. **Proceeds.** Debtor will transfer any insurance proceeds to Secured Party. Secured Party may apply these proceeds toward the Liabilities, in such order as Secured Party chooses.

20. **Performance of Debtor's by Secured Party.** If Debtor fails to perform any act required by this Security Agreement, Secured Party may do so on Debtor's behalf. Secured Party may also take any other action Secured Party deems necessary for the maintenance and preservation of the Collateral and Secured Party's interest in it. In this event, Debtor will reimburse Secured Party for all of Secured Party's expenses plus interest, at the rate of twelve percent (12%) per year (but not exceeding the maximum amount permitted by law), from the date the expense was incurred until the date Debtor makes reimbursement.

21. **Miscellaneous.**

- a. **Address for Notice.** The addresses of Debtor and Secured Party shall be as set forth below each party's signature herein below and, if none, the addresses set forth on the first page of the Grazing Lease Agreement to which this Security Agreement is attached.
- b. **Definitions.** The term "Debtor" refers to all debtors signing this Agreement. Each of them is jointly and severally obligated under this Agreement.
- c. **Successors and Assigns.** The rights and privileges of Secured Party will inure to the benefit of Secured Party's successors and assigns. The warranties and agreements of Debtor will bind Debtor's successors and assigns.
- d. **Further Information.** Debtor will furnish Secured Party with such further information concerning Debtor of the Collateral as Secured Party may request from time to time.
- e. **Applicable Law.** This Agreement is governed by the laws of [Texas].
- f. **Severability.** The provisions of this Agreement are to be interpreted in such a manner as to be effective and valid under the applicable law. However, if any provision is deemed to be invalid or prohibited by law, that provision will be ineffective to the extent of the invalidity or prohibition, without invalidating the remainder of this Agreement.

Debtor:

[* _____ *],
a [Texas] [*type of entity*]

By: _____

Name: _____

Title: _____

Address:

James D. Eggleston, Jr.
Eggleston King, LLP
102 Houston Ave., Suite 300
Weatherford, TX 76086
jim@ektexas.com
817-596-4200

Appendix - Tab 3, James Eggleston: 3.18

Crop Lease Agreements - Practice Guide

A “crop lease” is a transaction in which the land owner (lessor) leases farm land to the lessee for purposes of planting, growing and harvesting crops. The various methods of payment include (a) a price per acre per year, (b) a “share crop” agreement whereby the lessor receives a percentage share of the crop produced or combinations of the foregoing. Under both methods, the price will likely vary on the crop involved due to the different costs of producing different crops. Thus, a lessor’s percentage “share” of a produced crop will vary depending on the production costs associated with that particular type of crop.

The distinguishing factors about crop leases and cattle feeding leases are the nature of the “collateral” for the lessee’s obligation. The secured party has statutory rights to what is produced as a result of the farming activity. These “lien” rights are very unique to farm products. Most of the crop lease’s terms and provisions are fairly self-explanatory and can be analyzed in light of practical guidance provided with respect to other lease forms in the farm and ranch area. The lien rights of the lessor (as the secured party) are worth very close attention.

A lessor reserving a “landlord’s lien” in an agricultural lease creates a security interest in goods which the Texas Business and Commerce Code called “Farm Products.” “Farm Products” include (1) crops grown, growing, or to be grown including crops produced on trees, vines, and bushes and aquatic goods produced in aquaculture operations; (2) livestock, born or unborn, used or produced in a farming operation; (2) supplies used or produced in a farming operation; or (4) products of crops or livestock in their unmanufactured states.

“Perfection” of the security interest is required just as it is with other security interests in collateral in a more conventional business context. However, “perfection” is often difficult and it is certainly unique to the type of collateral known as Farm Products.

Two relevant statutory schemes must be consulted and it is recommended that the secured party’s perfection of the security interests in the Farm Products follow both statutes:

1. Texas Business and Commerce Code Article 9 (“UCC 9”).
2. Federal Food Security Act of 1985 (the “Food Security Act”).

Under the UCC, perfection of security interests in Farm Products as collateral is achieved by filing a financing statement with the Texas Secretary of State. These are generally the same as other types of financing statements for other classifications of collateral.

Practice Tips under the UCC 9:

1. Effective Period of Perfection. A properly filed financing statement will maintain perfection of the security interest for 5 years from the date of filing. This period may be extended for up to 5 years by a continuation statement filed within 6 months of the expiration of the original financing statement.

2. Purchase Money Security Interest (“PMSI”). Like other types of collateral, a PMSI in Farm Products will generally take priority over a conflicting and prior security interest in the same collateral. (Different rules apply to PMSI’s in livestock. See UCC §324(d), (e).
3. Priority of a PMSI. A PMSI holder has a 20 day grace period of automatic perfection in which the holder of the PMSI may file a financing statement in order to continue the priority of the PMSI. Such filing will cause the PMSI’s priority to relate back to the date the debtor first acquired the collateral.
4. PMSI as to Products, Offspring and Increases. The priority status of a PMSI generally does not automatically extend to products or increases of the collateral. It is recommended that the financing statement contain words like “Products,” Increase,” or “Offspring” in the description of the collateral.
5. Proceeds from Sale of Farm Products. A perfected security interest of the secured party will automatically apply to any identifiable proceeds of the sale for a period of 20 days after the obligated party receives the proceeds. Extension of this perfection is possible. The “proceeds” from the sale of the Farm Products may be included in the description of collateral in the financing statement. It is recommended that the secured party require a two-party check be issued in order to make sure the proceeds are kept in a separate account.
6. Termination. A security interest in Farm Products is terminated by their authorized sale to a third party. The sale must be authorized by the secured party. If the secured party’s conduct infers its knowing and intentional relinquishment of its continued secured interest, it will be deemed to have waived its security interest.

Practice Tips under the Food Security Act:

1. General Rule. A buyer of Farm Products from a seller engaged in farming activity generally takes them free and clear of any security interest even if the security interest is perfected and even if the buyer knows of its existence. No good faith is required by the FSA on the part of the buyer to take “free and clear.”
2. Super-Perfection Options. The FSA provides two options whereby a secured party may continue its prior lien on collateral notwithstanding its sale. They are (1) a Prenotification Statement to potential buyers or (2) a filing of an effective Financing Statement under a Farm Products Central Filing System. In Texas, the second option is not available, so secured parties in Texas must use the Prenotification option.

3. Basic Steps of Prenotification.

- a. The debtor must furnish the secured party with a list of potential buyers of debtor's Farm Products.
- b. If an unidentified buyer comes into the picture, the debtor must notify the secured party at least 7 days prior to the proposed sale date.
- c. The Prenotification Statement (the "PNS") must satisfy the following:
 - i. The PNS must be in writing.
 - ii. The PNS must contain name and address of debtor.
 - iii. The PNS must contain debtor's social security number or tax identification number.
 - iv. The PNS must contain a description of the collateral (per the FSA's classification).
 - v. The PNS must contain the amount or quantity of the collateral.
 - vi. The PNS must contain a reasonable description of the real property where the collateral is located.
 - vii. The PNS must identify the crop year of the collateral.
 - viii. The PNS must contain any payment obligations of debtor that must be satisfied in order for the collateral to be released from the security interest.
 - ix. These requirements are DIFFERENT than the UCC 9.
 - x. No minor errors are permitted in the PNS.
 - xi. A PNS is effective for one year. Must be annually renewed.
 - xii. The PNS must be received by the buyer.
 - xiii. Penalties in favor of the secured party apply if the debtor sells the crops "off list" (but this may practically be an ineffective remedy).

James D. Eggleston, Jr.
Eggleston King, LLP
102 Houston Ave., Suite 300
Weatherford, TX 76086
jim@ektexas.com
817-596-4200

Appendix - Tab 3, James Eggleston: 3.18.1

Crop Lease Agreement Sample Form

Date: [* _____*]

Lessor: [* _____*] [*marital status*], *or*
[* _____*] [*entity status, i.e., a
[Texas] limited liability company or a [Texas] limited
partnership*]

Lessor's Mailing Address:

[* _____*]
[* _____*]
[* _____*] County

Lessee: [* _____*] [*marital status*], *or*
[* _____*] [*entity status, i.e., a
[Texas] limited liability company or a [Texas] limited
partnership*]

Lessee's Mailing Address:

[* _____*]
[* _____*]
[* _____*] County

Agreement: Lessee hereby agrees to lease the Property from Lessor for the agriculture purposes stated herein and pay the Rent and perform and pay all of the other obligations provided hereinbelow. Lessor agrees to lease the Property to Lessee on the terms and conditions contained herein.

Property: That certain real property situated in [* _____*County], [Texas], consisting of [* _____*] acres of real property out of the [* _____*] Survey, Section [* _____*], Abstract [* _____*], as more particularly described on Exhibit "A" attached hereto and incorporated herein by reference, together with all rights, easements, rights of way, privileges, appurtenances, water rights, fixtures, and all other personal property and permanently installed improvements, located on or about the real property described on Exhibit "A" (herein all of the foregoing is referred to as the "Property").

Use: Planting, cultivation, raising and harvesting of crops (herein collectively the "Crops").

Term: [* _____*] years, beginning [* _____*] and ending [* _____*], unless further extended, in writing, by Lessor and Lessee (sometimes collectively referred to herein as the "Parties.")

Rent: Option 1: Cash Rent (including Additional Rent)

[*\$_____*] per month, payable in advance on the first (1st) day of each calendar month during the term of this Lease, according to the following schedule:

Crop	Acres	Rent/Acre \$	Total
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
Total	_____	_____	_____

The foregoing rental amounts shall be adjusted on the first day of the next January following the expiration of twelve (12) months from the date hereof in the following manner: _____

Rent: Option 2: Crop-Share Rent

1. Lessor and Lessee agree to share in the Crop expenses and share in the Crop(s) in the following proportions:

Crop	_____	_____	_____	_____
No. of acres	_____	_____	_____	_____
Share of Expenses				
	Lessor %	Lessee %	Lessor %	Lessee %
Seed	_____	/	_____	/
Fertilizer	_____	/	_____	/
Lime	_____	/	_____	/
Insecticide	_____	/	_____	/
Fungicide	_____	/	_____	/
Herbicide	_____	/	_____	/
_____	_____	/	_____	/
_____	_____	/	_____	/
Share of Crops	_____	/	_____	/

2. The net proceeds payable to Lessor shall be payable upon the delivery and sale of the Crops to the location and scale specified as follows: _____

3. Records of all expenses and yields will be kept by the Lessee and shall be available to the Lessor for inspection upon request.
4. U.S.D.A. farm program payments will be shared in the following manner: _____

Security Deposit: Upon execution of this Lease, Lessee shall pay as a security deposit to Lessor an amount equal to \$ _____. The Security Deposit is given to secure Lessee's performance under this Lease. If Lessee defaults, Lessor may use the Security Deposit to pay arrears of Rent, to repair any damage or injury, or to pay any expense or liability incurred by Lessor as a result of the default.

Security Agreement: This Lease and Exhibit "B" attached hereto and incorporated herein by reference shall be deemed a Security Agreement for purposes of creating a security interest in accordance with [Texas] Business and Commerce Code, any applicable federal law and all of those terms and conditions attached hereto as Exhibit "B." Lessor shall have the authority to file a financing statement with the [Texas] Secretary of State to perfect its security interest hereunder and under Exhibit "B."

Statutory Landlord's Lien: In addition to the security interest granted hereinabove, Lessee acknowledges that Lessor has a statutory Landlord's Lien on the Crops. Nothing in this Lease shall be construed to negate or diminish such statutory Landlord's Lien on the Livestock.

Lessee's Obligations: Lessee agrees to:

1. Lease the Property for the entire Term of the Lease.
2. Accept the Property in its present condition "AS IS," the Property being currently suitable for Lessee's intended Use.
3. Keep in good repair all terraces, open ditches, and drainage ways; preserve all established watercourse or ditches including grassed waterways, and refrain from any operations or practices that will injure such structures.
4. Remain in compliance with any conservation plan for the Property provided by Lessor.
4. Pay all other costs of production and related expenses on the Property except as provided under "Rent: Option 2: Crop-Share Rent" above.
5. Pay, as Additional Rent, all other amounts due under this Lease.
6. Pay when due any water, sewer, gas, electricity, telephone or other utility expenses incurred by Lessee.
7. Obey all laws relating to Lessee's Use and occupancy of the Property.
8. Prevent noxious weeds from growing to seed on the Property and destroy such weeds in an appropriate manner.
9. Keep the Property neat and orderly and free from trash and debris.
10. Assume all risk of loss to all agricultural equipment and machinery and other personal property of Lessee.
11. Pay all taxes on Lessee's personal property.

Lessor's Obligations: Lessor agrees to:

1. Lease to Lessee the Property for the entire Term, subject to Lessor's rights to terminate this Lease in the event of Lessee's default hereunder.
2. Obey all laws, ordinances, orders, rules, regulations and covenants applicable to the use, condition and occupancy of the Property.

Water Use: Lessee shall have the right use all water resources on the Property as presently existing from streams, water courses, ponds, lakes, wells and other present sources. Lessee shall not drill any new water wells on the Property without Lessor's consent. Lessee shall exercise reasonable care and due diligence in protecting all water resources on the Property from any contamination or other damage.

Ranch Labor: Lessee shall pay for all ranch labor or services used on the Property. All such labor shall be employees of Lessee and shall always be under the supervision and control of Lessee. Lessee shall pay all of the employer's share of all federal, social security and other employment or unemployment taxes. Lessee shall also pay all federal income tax, franchise taxes, and sales taxes applicable to Lessee's activities on the Property.

Insurance: Lessee shall maintain insurance (from a company reasonably acceptable to Lessor) protecting Lessor and Lessee from any liability caused by Lessee or its agents, employees and representatives on forms and in amounts mutually acceptable to Lessor and Lessee.

Improvements: Any improvements made on and/or permanently made a part of the Property by Lessee shall remain on the Property and shall not be removed by Lessee without the consent of Lessor. Lessee shall maintain all improvements on the Property (including all barns, pens, chutes, fences, gates and other major improvements), in good condition and working order.

Alternations: Lessee shall not make any changes to the Property that would diminish the value of the Property.

Preservation of Title: Lessee shall not do any act which would result in any encumbrances or liens against the title of Lessee in and to the Property, nor shall the interest or estate of Lessor in the Property be in any way subject to any claim by way of lien or encumbrance.

Environmental: Except in accordance with normal and usual agricultural practices, Lessee shall not use and shall not permit any agent, employee or other contractor to use any portion of the Property for the storage, disposal, application or handling of any "Hazardous Materials" (hereinafter defined.) With respect to Hazardous Materials, Lessee shall store, manage, handle and provide safeguards for the Property and all persons coming onto the Property in accordance with all state and federal laws, rules, regulations, orders and other directives. Lessee shall not apply, store, use, transport, handle or spray any pesticide, rodenticide, herbicide, fertilizer or other agricultural chemicals except in compliance with all [Texas] laws, rules and regulations, all labeling restriction on any such chemicals, all requirements of federal laws and regulations, and the standard of good agricultural husbandry.

“Hazardous Materials” shall mean (a) any hazardous waste, hazardous substances, pollutant or contaminant as defined by or provided in any federal, state or local statute, regulation, rule, ordinance or law, (b) any substance which is toxic, explosive, corrosive, flammable, radioactive, or otherwise hazardous under any federal, state or local governmental authority, agency department or commission; (c) any substance which may cause or threaten any erosion, contamination, drainage or nuisance problem on the Property or any adjacent properties, public roads, water courses or streams, bodies of water, underground water tables, or poses or threatens to pose a hazard to the health or safety of persons, livestock or vegetation in or about the Property; (d) any substance which contains gasoline, diesel fuel or other petroleum hydrocarbons; and (e) any substance which requires special handling, investigation, notification or remediation under any federal, state or local statute, regulation, ordinance, order, action or policy.

LESSEE SHALL INDEMNIFY AND HOLD HARMLESS LESSOR AND ITS AGENTS, SUCCESSORS AND ASSIGNS FROM AND AGAINST ANY LOSS, COST, LIABILITY OR EXPENSE (INCLUDING REASONABLY ATTORNEY’S FEES, EXPENSES AND COURT COSTS) ARISING OUT OF THE PLACEMENT, APPLICATION, STORAGE, MANUFACTURE, DISPOSAL, HANDLING, REMOVAL, SPILL, DISPOSAL, ABATEMENT OR REMEDIATION OF ANY HAZARDOUS MATERIALS BY LESSEE, OR ANY REMOVAL, ABATEMENT, OR REMEDIATION OF HAZARDOUS MATERIALS REQUIRED HEREUNDER TO BE PERFORMED OR PAID FOR BY LESSEE. THE PROVISIONS OF THIS SECTION SHALL SURVIVE THE TERMINATION OF THIS LEASE.

Default of Lessee: Lessee shall be deemed to be in default under this Lease upon the occurrence of any of the following events (“Events of Default”):

1. Lessee’s failure to pay any installment of Rent on the Due Date.
2. Lessee’s filing for bankruptcy protection under federal law.
3. Lessee’s making an assignment for the benefit of Lessee’s creditors.
4. The attachment or levying upon any of Lessee’s interest in the Property.
5. Lessee’s abandonment of the Property during the Term.
6. Lessee’s sale, assignment or transfer of the Collateral, or any part thereof, without the prior written consent of Lessee unless such sale is otherwise conducted as permitted elsewhere herein.
7. Lessee’s failure to keep or observe any of the covenants or agreement of this Lease.
8. Any impairment of the Collateral by loss, theft, damage or destructions.

Remedies of Lessor: In the event of one or more Events of Default, Lessor’s remedies for Lessee’s default are to:

1. Enter and take possession of the Property, after which Lessor may relet the Property on behalf of Lessee and receive the Rent directly by reason of the reletting, and Lessee agrees to reimburse Lessor for any expenditures made in order to relet;
2. Enter the Property and perform Lessee’s obligations; and/or
3. Terminate this Lease by written notice and sue for possession or damages or both. Upon any termination of the Lease hereunder, Lessee shall immediately surrender possession and vacate the Property.

Lessor shall thereafter have the full and free right, without demand or notice of any kind to Lessee, to enter into and upon the Property in order to repossess the Property and to expel or remove Lessee or any others who may be occupying the Property. Such entry shall not be deemed to be a surrender or waiver of any of Lessor's other rights granted hereunder or by operation of law. Lessee shall have no right to return to the Property to harvest any crops.

Lessee shall be liable for and hereby agrees to pay any and all losses, liabilities, costs and expenses, including attorney's fees, which Lessor incurs in connection with any of the Events of Defaults and the enforcement of Lessor's rights and remedies hereunder. All of Lessor's remedies hereunder shall be cumulative.

Surrender: Lessee shall surrender and deliver the Property to Lessor upon the expiration or termination of this Lease. It shall be surrendered and delivered in as good condition and repair as at the time Lessee first assumed possession of the Property, reasonable wear and tear excepted. All fixtures or permanent improvements on the Property shall remain the property of Lessor.

Right of Entry: Lessee shall permit Lessor or Lessor's representatives to enter upon the Property at all reasonable hours to inspect same or make any necessary repairs.

Lessor's Right to Cure: Lessor may, but shall not be obligated to, cure any default by Lessee (including, without limitation, Lessee's obligation to obtain insurance, make repairs or satisfy lien claims). If Lessor does so cure a default, all costs and expenses reasonably incurred by Lessor in doing so shall be the obligation of Lessee and shall be added to Lessee's rental obligation hereunder, including all reasonable attorneys' fees incurred by Lessor.

Quiet Enjoyment: Lessor warrants that Lessor has good title to the Property. So long as Lessee is not in default under this Lease, Lessee may peaceably and quietly have, hold and enjoy the Property with all rights and privileges provided in this Lease.

No Waiver: No acceptance by Lessor of any partial Rent payment by Lessee, nor Lessor's failure to notify Lessee of any Event of Default, will constitute a waiver by Lessor or any of Lessor's rights or remedies under this Lease.

No Partnership: This Lease shall not be construed as creating any relationship between Lessor and Lessee as partners, joint venturers, principal and agent, or other business relationship except that of Lessor and Lessee.

Successors: The terms, covenants and conditions of this Lease shall be binding upon, and inure to the benefit of, the heirs, personal representatives, successor and assigns of Lessor and Lessee.

Notice: Any notice required under this Lease shall be in writing and sent by personal delivery, expedited delivery service (with proof of delivery), or certified mail, return receipt requested, to the addresses set forth on the first page of this Lease (or at such addresses as Lessor or Lessee shall have designated in writing to one another).

Mineral Rights: Nothing in this Lease shall confer upon Lessee any rights or interests in and to any minerals underlying the Property. All of such rights and interests are reserved to Lessor.

Law and Venue: Venue for any dispute hereunder shall be in the County in which the Property is located. This Agreement shall be governed and construed in accordance with the laws of the State of [Texas] and the Crops shall be classified as “goods” within the meaning the [Texas] and Business Commerce Code.

Time of Essence: Time is of the essence of this Lease, and all provisions herein relating thereto shall be strictly construed.

Assignment/Subletting: Lessee may not assign this Lease or sublet the Property without the prior written consent of Lessor.

Attorney’s Fees: If either Party retains an attorney to enforce this Lease, the prevailing Party at time of trial is entitled to recover from the other Party the prevailing Party’s reasonable attorney’s fees.

Complete Agreement: This Lease constitutes the entire agreement between the parties. No prior written or prior or contemporaneous oral promises or representations will be binding.

No Recording of Lease: This Lease shall not be recorded by Lessee.

Lessor’s Disclaimer: Lessor makes no warranty, and expressly disaffirms any warranty, express or implied, as to the Property, including, without limitation, any warranty regarding: (i) the adequacy or usefulness of any improvements, (ii) the habitability of any improvements, (iii) the viability, content or adequacy of surface or sub-surface water, (iv) the condition or suitability of the forage, grasses, soil, subsoil, or the Property generally, or (v) the fitness of the Property for any particularly use or purpose.

Risks: Lessee acknowledges that its intended use of the Property is subject to numerous risks applicable to agricultural enterprises including accidents, predators, thefts, pests, fluctuations in consumer demand, weather, floods, disease, governmental restrictions and quarantines, unfavorable market forces and many other factors which may affect Lessee’s profit opportunities. Lessee has entered into this Lease fully aware of all such risks and is not acting in reliance on any representation or warranty of any kind and character not expressly set forth herein.

Underground Utilities: Lessee shall immediately locate and familiarize itself with the location and depth of all underground utilities and lines.

Alternative Dispute Resolution: Lessor and Lessee agree to mediate in good faith before filing a suit for damages.

Mitigation: Lessor and Lessee have a duty to mitigate damages.

General Liability and Indemnification: LESSEE ASSUMES ALL RISKS AND RESPONSIBILITIES FOR ACCIDENT, INJURIES OR DEATH RESULTING FROM SUCH INJURIES OR DAMAGES TO PERSON OR PROPERTY OCCURRING IN, ON OR ABOUT THE PROPERTY AND AGREES TO INDEMNIFY AND HOLD HARMLESS LESSOR AND LESSOR'S EMPLOYEES, AGENTS AND ASSIGNS FROM ANY AND ALL CLAIMS, LIABILITIES, LOSSES, COSTS AND EXPENSES (INCLUDING ATTORNEY'S FEES) ARISING FROM, OR IN CONNECTION WITH, THE CONDITION, USE OR CONTROL OF THE PROPERTY, INCLUDING THE IMPROVEMENTS AND EQUIPMENT THEREON, DURING THE TERM OF THIS LEASE.

Lessor:

[* _____ *],
a [Texas] [*type of entity*]

By: _____

Name: _____

Title: _____

Lessee:

[* _____ *],
a [Texas] [*type of entity*]

By: _____

Name: _____

Title: _____

Exhibit "A"

Legal Description of Property

Exhibit "B"

Security Agreement – Farm Products (Crops)

1. **Parties and Grant of a Security Interest.** Lessee (herein ""Debtor") grants a present security interest in the "Collateral" hereinafter described to secure the payment and performance of all obligations and indebtedness of Lessee created or incurred pursuant to the Lease to which this Exhibit "B" is attached. Lessor shall be the "Secured Party" for all purpose hereunder.
2. **Collateral.** The "Collateral" for this Security Agreement is (a) all of the Crops grown or growing on the Property during the Term of this Lease whether presently or hereafter existing and all crops planted within one (1) year from the date of this Agreement, (b) all proceeds of the Crops whether now owned or hereafter acquired or realized by Debtor, (c) all documents of title or other documents relating to the Crops, (d) all insurance proceeds for the loss, damage or theft of the Crops, (e) all claims or causes of action relating to the use, sale, lease, damage or loss of the Crops, (f) all additions to or replacements of the Crops, and (g) all intellectual property rights connected therewith.
3. **Debtor's Obligation.** The Collateral secures the payment of all obligations of Debtor to Secured Party arising under the Lease, absolute or contingent, however they may have arisen (collectively the "Liabilities"). Debtor is also obligated to remit to Secured Party all proceeds from the sale of the Collateral up to an amount sufficient to pay all of the Liabilities.
4. **Possession of Collateral.** Debtor may keep possession of the Collateral until the earlier of (a) the due date for the payment of the Liabilities or (b) an Event of Default (defined hereinbelow).
5. **Event(s) of Default.** An Event of Default under this Agreement occurs if:
 - a. **Failure to Make Payments.** Debtor fails to pay any amount due as a Liability under the Lease or fails to perform or comply with the Lease or any other agreement made by Debtor to Secured Party.
 - b. **False Warranty or Misrepresentation.** Debtor, or a third party on behalf of Debtor, makes any statement, warranty, or representation to Secured Party, in connection with this Agreement, or to induce Secured Party to enter into the Lease, that is false in any material respect when made.
 - c. **Loss, Theft or Destruction of Collateral.** The Collateral is lost, stolen, destroyed or substantially damaged.
 - d. **Attachment, Levy or Seizure.** Any levy, pledge, seizure or attachment is made against the Collateral.
 - e. **Death, Insolvency, Etc.** Debtor or any third party who liable for the Liabilities as a guarantor, endorser or surety, suffers death, dissolution, termination, insolvency, failure to pay debts as they mature, appointment of a receiver, an assignment for the

benefit of creditors or a proceeding under any bankruptcy or insolvency law is commenced either by or against Debtor or any third party who is liable for the Liabilities as a guarantor, endorser or surety.

- f. **Insecurity of Secured Party.** If Secured Party reasonably deems itself insecure for any reason.
6. **Remedies on Default.** Upon the occurrence of an Event of Default, all of the Liabilities, without demand or notice, shall become immediately due and payable, at the option of Secured Party. Any obligations of Secured Party to Debtor provided in the Lease shall be immediately terminated. In addition, Secured Party may exercise any rights and remedies available to Secured Party under the law. Debtor, at Secured Party's request, will assemble the Collateral, at Debtor's own expense, in a convenient place designated by Secured Party.
7. **Secured Party's Expenses.** Any expense incurred by Secured Party in the collection of the Liabilities and the retaking, preparing for sale, and sale of the Collateral, including reasonable attorney's fees and legal expenses, or the repair of any real property to which the Collateral may be attached, will be paid by Debtor.
8. **Notice to Debtor.** Any notice of sale of the Collateral by Secured Party will be deemed reasonable and properly given if mailed to Debtor at least seven (7) days before the disposition of the Collateral. The notice must be addressed to Debtor at the address set forth hereinbelow, or at such other address designated in writing by Debtor.
9. **Proceeds from Sale of Collateral.** Secured Party may apply the proceeds from the sale of the Collateral to the payment of Debtor's liabilities in such order as Secured Party chooses.
10. **Exercise of Rights.** Delay in the exercise of a right or remedy by Secured Party will not act as a waiver of that right. A partial exercise, by Secured Party, of a right or remedy will not preclude further exercise of other rights or remedies by Secured Party.
11. **Debtor's Warranties.** Debtor warrants that Debtor:
- a. **Title.** Holds full title to the Collateral free from any encumbrance or lien other than this Agreement.
 - b. **Defense of Claims, Etc.** Will defend the Collateral against the claims and demands of persons other than Secured Party.
 - c. **Sale of Collateral.** Will not sell, transfer, lease, or dispose of the Collateral, or any interest in the Collateral, or do anything to impair the value of the Collateral as security, without the prior written consent of Secured Party.; provided, however, Debtor may sell [list] in the ordinary course of business until notified to the contrary by Secured Party.
12. **Transfer of Proceeds.** Debtor will, at the request of Secured Party, transfer any proceeds of the Collateral, upon receipt, to Secured Party. Until transfer to Secured Party, Debtor will hold all proceeds separate and apart from Debtor's own funds, and upon express trust

for Secured Party. Secured Party may (a) such proceeds to Debtor's liabilities in such order as Secured Party chooses and (b) release all or any part of these proceeds to Debtor.

13. **Purchase of Collateral by Debtor.** If Debtor intends to use the proceeds from the any loans by Secured Party or the sale of any of the initial Collateral to buy any of the Collateral, Debtor will so notify Secured Party. In this event, Debtor or Secured Party will transfer these funds director to the seller of such Collateral
14. **Use and Sale of Collateral.** The Collateral is to be is to be raised by Debtor exclusively in the course of Debtor's farming operations. Lessee shall notify Lessor at least seven (7) days prior to the date of any sale of any of the Collateral. Provided it receives such notice, Lessor authorizes Lessee to sell the Collateral for cash conditioned upon Lessee's immediate delivery to Lessor of all unpaid amounts due hereunder. In the event Lessee shall sell the Collateral in violation of this paragraph, Lessee shall account to Lessor within ten (10) days of any such sale for Lessor's share of any such proceeds.
15. **Record Owner of Land.** Lessor/Secured Party is the record owner of the real property on which the Collateral is growing or is to be planted.
16. **Location of Collateral.** The Collateral shall, unless otherwise authorized herein, remain in Lessee's possession on the Property unless Lessor shall authorize its removal to another location.
17. **Financing Statements and Prenotification Statements.** There is no financing statement covering the Collateral on file with any public office except any filed or to be filed by Secured Party. At the request of Secured Party, Debtor will from time to time (a) execute financing statements and pay the cost of filing them and (b) do such other acts (e.g., deposit with Secured Party certificates of title to the Collateral) as Secured Party may request to establish and maintain a valid security interest in the Collateral, free of other liens and claims. Debtor shall also, upon Secured Party's request, deliver to Secured Party a list of the potential buyers of the Collateral in accordance with the Federal Food Security Act of 1985. Debtor shall also, upon Secured Party's request, assist Secured Party in making Prenotification Statements ready for delivery to all such potential buyers.
18. **Maintenance of Collateral and Taxes.** Debtor will (a) do whatever is necessary for the proper maintenance of the Collateral consisting of crops and livestock in accordance with proper husbandry and acceptable farming standards; (b) keep all other Collateral in good condition and repair; (c) promptly pay all taxes and assessments on the Collateral, or its use or operation, as they come due; and (d) permit inspection of the Collateral, at reasonable times, by Secured Party.
19. **Insurance.**
 - a. **Form of Policies.** Debtor will insure the Collateral for its full insurable value, at Debtor's own expense, against risks of fire, theft, and such other risks, and in such form and with such companies as are satisfactory to Secured Party. All policies must

provide that losses are payable to Secured Party and Debtor according to their respective interests in the Collateral.

- b. **Possession of Policies.** At Secured Party's request, Debtor will deliver to Secured Party all insurance policies or certificates.
- c. **Secured Party as Attorney-in-Fact.** Secured Party is authorized to act as an attorney-in-fact for Debtor to obtain, cancel, or adjust any insurance policy, and indorse checks or drafts drawn by the insurers.
- d. **Proceeds.** Debtor will transfer any insurance proceeds to Secured Party. Secured Party may apply these proceeds toward the Liabilities, in such order as Secured Party chooses.

20. **Performance of Debtor's by Secured Party.** If Debtor fails to perform any act required by this Security Agreement, Secured Party may do so on Debtor's behalf. Secured Party may also take any other action Secured Party deems necessary for the maintenance and preservation of the Collateral and Secured Party's interest in it. In this event, Debtor will reimburse Secured Party for all of Secured Party's expenses plus interest, at the rate of twelve percent (12%) per year (but not exceeding the maximum amount permitted by law), from the date the expense was incurred until the date Debtor makes reimbursement.

21. **Miscellaneous.**

- a. **Address for Notice.** The addresses of Debtor and Secured Party shall be as set forth below each party's signature herein below and, if none, the addresses set forth on the first page of the Crops Lease Agreement to which this Security Agreement is attached.
- b. **Definitions.** The term "Debtor" refers to all debtors signing this Agreement. Each of them is jointly and severally obligated under this Agreement.
- c. **Successors and Assigns.** The rights and privileges of Secured Party will inure to the benefit of Secured Party's successors and assigns. The warranties and agreements of Debtor will bind Debtor's successors and assigns.
- d. **Further Information.** Debtor will furnish Secured Party with such further information concerning Debtor of the Collateral as Secured Party may request from time to time.
- e. **Applicable Law.** This Agreement is governed by the laws of [Texas].
- f. **Severability.** The provisions of this Agreement are to be interpreted in such a manner as to be effective and valid under the applicable law. However, if any provision is deemed to be invalid or prohibited by law, that provision will be ineffective to the extent of the invalidity or prohibition, without invalidating the remainder of this Agreement.

Debtor:

[* _____ *],
a [Texas] [*type of entity*]

By: _____

Name: _____

Title: _____

James D. Eggleston, Jr.
Eggleston King, LLP
102 Houston Ave., Suite 300
Weatherford, TX 76086
jim@ektexas.com
817-596-4200

Appendix - Tab 3, James Eggleston: 3.19

Custom Farming Agreements - Practice Guide

Custom Farming Agreements memorialize compensation agreements with third party “custom or contract farmers” (i.e., “Operators”) and details the duties and responsibilities of the Operators in managing farms which constitute large investments for their owners. Such investments may include livestock, though this form focuses on the farm where crops and their cultivation are of greater emphasis to the Operator.

These are particularly useful in the cases where long term contract farmers are sharing in net revenue of the farms.

This form addresses the following important concepts:

1. Names of parties
2. Term of the agreement and whether it automatically renews
3. Notice requirement for termination of the agreement.
4. Dues of the Operator including planting, cultivating and harvesting of crops.
5. Whether the Operator has limits on spending money from farm operations
6. Whether the owner and Operator will establish quarterly budgets and requiring the owner to consent to expenditures that vary from the budget.
7. What “free” services will the manger provide to the owner, i.e., training of a certain number of horses?
8. Whether Operator may train horses for others and who gets that revenue, i.e., perhaps the revenue from boarding belongs to the farm owner and the fees for training are revenues belonging to eh owner.
9. What is the compensation of the owner?
 - a. Salary?
 - b. Is monthly payment a “draw” against quarterly or year-end bonus?
 - c. Bonuses based on a share of net revenue?
 - d. Premium bonuses if certain revenue goals are achieved?
 - e. Other benefits such as the following:
 - i. The right to keep horses and livestock belonging to the Operator
 - ii. The right to use fuel provided by farm owner and for what purposes.
 - iii. The right to use living quarters and who pays the utilities.
 - iv. The right to keep cattle use in training of Operator’s horses.
10. What are Operator’s termination rights and what payments he receives in certain events causing him or her to terminate the agreement
11. What is the farm owner’s right to terminate the agreement and what obligations thereafter does the farm owner have to the Operator? Depends on why the termination occurred. Some payments involve a premium, some payments will be only through the day of termination, i.e., if there is a termination for “cause.”

12. An Operator should keep the business of the farm owner confidential and should also not disclose any trade secrets of the farm owner. It allows the farm owner to maintain certain competitive advantages.
13. Resolution of disputes should first be by mediation and then by binding arbitration.
14. Among the miscellaneous provisions, an important one is contained which insures the relationship is one of an independent contractor and not as an employee. The Operator must handle his or her own tax obligations and the farm owner should not be obligated for payroll tax obligations to the IRS.
15. If the Operator is going to earn an equity stake in the farm, see applicable provisions in Exhibit “A” to the Ranch Management Agreement form.
16. Life insurance is often provided to a long term farm Operator in lieu of any rights the Operator may have in the farm, its operations or the real property.

James D. Eggleston, Jr.
Eggleston King, LLP
102 Houston Ave., Suite 300
Weatherford, TX 76086
jim@ektexas.com
817-596-4200

Appendix - Tab 3, James Eggleston: 3.19.1

Custom Farming Agreement Sample Form

This Custom Farming Agreement (the "Agreement") is made this [* _____*] day of [* month *], [* year *], between [* farm owner *], a [Texas] limited [* type of entity *] having a principal place of business in [* address, city, state, zip *] (here "Farm Owner") and [* contract farmer/operator *], an individual residing at [* address, city, state, zip *] (hereinafter referred to as "Operator") as follows:

Term

1. Operator is retained for a term of [* two (2) *] years upon the terms and conditions contained herein. Thereafter, the term of this Agreement shall automatically be renewed for successive [* two (2) *] year periods upon the terms and conditions contained herein, subject to either party's rights of termination as provided elsewhere herein. However, certain provisions contained herein provide for earlier termination and the parties agree, subject to the specific requirements contained hereinbelow, to give each other sixty (60) days' notice of their intent to terminate the Agreement. This is to be a courtesy extended to the non-terminating party and is not intended to create an additional or different specified term of this Agreement.

Duties

2. Operator is initially retained pursuant to this Agreement with the following duties listed below. For purposes of this Agreement, the term "Farm" shall mean all real property owned by the Farm Owner.

A. Operator shall provide Farm operations, management and oversight to the operations of the Farm Owner at the Farm including the following:

- (1) Care and feeding of all [* cattle *] owned by Farm Owner in a first class manner demonstrating good animal husbandry and competent and diligent care.
- (2) Preparation of all [* cattle *] for sale, breeding and transport as directed by Farm Owner. All such transportation shall be done in equipment and vehicles provided by Farm Owner and for which Operator shall operate in a careful and prudent manner.
- (3) Oversight of all veterinarian care, nutritional needs, safety and boarding needs of all [* cattle *] as directed by Farm Owner, with such emergency care and transportation occurring in Operator's discretion reasonably exercised.
- (4) Management of all forage, grazing and hay production, needs and operations of the Farm.
- (5) Planting, fertilizing, cultivation and harvesting of all crops on the Farm as mutually agreed upon by Farm Owner and Operator.

- (5) Other normal and customary tasks reasonably required to maintain the Farm in a first class condition and the livestock thereon in a fit and healthy condition.
- (6) All expenses incurred in connection with the foregoing activities shall be paid by Farm Owner. Any single expense in excess of [** \$500.00 **] shall be approved in advance via e-mail or fax by Farm Owner.
- (7) Farm Owner and Operator shall agree at the beginning of each calendar quarter on a budget for operations for Farm and Farm Owner's consent shall be required for any expenditure in excess of such quarterly budget in addition to any expense specified in subparagraph (6) above.

B. It is understood and agreed that Operator is subject to the direction and control of Farm Owner [**alternatively: Farm Owner's Chief Executive Officer**]. Operator further agrees that he or she will not directly or indirectly engage or participate in any activities at any time during the term of this Agreement that are in conflict with the best interests of Farm Owner. Further, both during and after the term of this Agreement, Operator shall be restricted by the terms of the provisions contained herein.

Compensation

3. As compensation for services rendered under this Agreement, Operator shall be entitled to receive the compensation described as follows: _____

[***Alternative clause:**

_____. As compensation for services rendered under this Agreement, Operator shall be also entitled to receive the compensation described on Exhibit "A" attached hereto and incorporated herein by reference.

Termination

4. This Agreement may be terminated as follows:

A. By Operator (1) "at will," that is, upon the providing of the written notice specified above; or (2) upon written notice to Farm Owner of its failure to comply with the terms of this Agreement and the continuation of such failure for a period of thirty (30) business days from the date of such notice.

B. By Farm Owner (1) "at will," that is, upon the providing of the written notice specified above, or (2) upon written notice to Operator of his or her termination for "cause" and the failure of Operator to cure such "cause" within a period of fourteen (14) business days from the date of such notice. "Cause" for purposes of this paragraph shall mean one of the following: (a) Operator's commission of an act of fraud or dishonesty against or with respect to Farm Owner as shall be reasonably determined to have occurred by Farm Owner [**alternatively: Farm Owner's Chief Executive Officer**]; (b) Operator's conviction by a court of competent jurisdiction of (1) a

felony or any kind or (2) any misdemeanor involving moral turpitude and/or dishonesty; (c) Operator's failure to perform to the reasonable satisfaction of Farm Owner [**alternatively: Farm Owner's Chief Executive Officer**]; or (d) Operator's breach of any covenant or condition contained in this Agreement.

C. By Farm Owner upon the giving of written notice to Operator that Farm Owner has determined that Operator is disabled, that is, unable to perform his or her duties hereunder due to illness, accident or other physical or mental incapacity.

EFFECT OF TERMINATION

5. **A. Termination by Operator.** In the event of the termination of this Agreement for the reasons specified under Paragraph 4.A.(1), Operator shall be entitled to the compensation earned by him or her prior to the date of termination as provided in this Agreement computed pro rata up to and including the date of termination. In the event of the termination of this Agreement for the reasons specified under Paragraph 4.A.(2), Operator shall be entitled to an amount of compensation equal to [** 125% **] of the total compensation which was earned by him or her in the [** ninety (90) **] days prior to the date of termination computed pro rata up to and including the date of termination.

B. Termination by Farm Owner. In the event of the termination of this Agreement for the reasons specified under Paragraph 4.B.(1), Operator shall be entitled to an amount of compensation equal to [** 125% **] of the total compensation which was earned by him or her in the [** ninety (90) **] days prior to the date of termination computed pro rata up to and including the date of termination. In the event of the termination of this Agreement for the reasons specified under Paragraph 4.B.(2), Operator shall be entitled to the compensation earned by him or her prior to the date of termination as provided in this Agreement computed pro rata up to and including the date of termination.

NON-COMPETE AGREEMENT AND DISCLOSURE OF CONFIDENTIAL INFORMATION

6. Farm Owner possesses secret and confidential information, techniques, procedures, technical data and information, and customer and client lists used or intended for utilization in its operations of which Operator has obtained or may obtain knowledge and Farm Owner would suffer serious harm if this confidential information were disclosed or if Operator used this information to compete against Farm Owner. Further, Operator, in the performance of services hereunder, may develop or conceive new and additional inventions and improvements with respect to such matters. Accordingly, Operator hereby agrees, during and after the term of this Agreement, that he or she shall abide by the terms of the "Confidentiality and Non-Compete Agreement" attached hereto as Exhibit "B" and incorporated herein by reference.

MEDIATION AND ARBITRATION

7. Should there be at any time any dispute between the parties to this Agreement or the Confidentiality and Non-Compete Agreement, as to any matter and such dispute is not settled by

mutual agreement between the parties involved, then either party may by writing notify the other party of the dispute and the parties are hereby bound to mediate the controversy in good faith according to the American Arbitration Association (“AAA”) rules of mediation in effect at the time. If mediation fails, the parties hereto agree to submit the matter to binding arbitration and an arbitrator shall be appointed and the arbitration shall be governed pursuant to the Commercial Arbitration Rules of the AAA, as they exist from time to time. The decision of such arbitrator as to any matter submitted to arbitration shall be final, conclusive, and binding on all parties to this Agreement. Any mediation or arbitration held under this Agreement shall be administered and conducted by the AAA. Each party shall equally bear the cost and expense of the mediator or arbitrator appointed.

MISCELLANEOUS

8. A. **[Texas] Law to Apply.** This Agreement shall be construed under and in accordance with the laws of the State of [Texas]. The venue of any litigation arising from this Agreement shall be [*_____] County, [Texas].

B. **Notices.** All notices allowed or required to be given hereunder must be in writing and dispatched by United States certified mail, return receipt requested, to the addresses shown at the end of this Agreement. Any time limitation provided for in this Agreement shall commence with the date that the party actually receives such written notice, and the date or postmark of any return receipt indicating the date of delivery of such notice to the addressee shall be conclusive of such receipt.

C. **Assignment.** Neither Operator nor anyone claiming under him or her may commute, encumber, or dispose of the right to receive any benefit hereunder. Such right to receive benefits hereunder is expressly declared to be non-assignable and non-transferable by Operator, and in the event of any attempted assignment or transfer, Farm Owner shall have no further liability hereunder.

D. **Waiver.** The waiver by Farm Owner of Operator’s breach of any provision hereof, shall not operate or be construed as a waiver of any subsequent breach by Operator.

E. **Binding Effect.** This Agreement shall be binding upon the parties hereto and their heirs, successors, executors, personal representatives, and assigns.

F. **Independent Contractor.** FARM OWNER AND OPERATOR INTEND BY THIS AGREEMENT TO CREATE AN INDEPENDENT CONTRACTOR RELATIONSHIP AND NOT ONE OF EMPLOYMENT. IN FURTHERANCE OF THIS INTENTION, CONTRACTOR SHALL PROVIDE ALL OF HIS OR HER OWN TOOLS, SET HIS OR HER OWN HOURS OF WORK, BE SUBJECT ONLY TO THE GENERAL GUIDANCE AND DIRECTION OF FARM OWNER AND PERFORM IN SUCH OTHER WAYS AS SHALL BE SPECIFIED BY RULES AND REGULATIONS OF THE INTERNAL REVENUE SERVICE APPLICABLE TO INDEPENDENT CONTRACTORS.

EXECUTED at [* Farm owner *] [* _____ *], [Texas], on the [* _____ *]
day of [* month *], [* year *]

Farm Owner:

Operator:

[* Farm owner *]
[* Farm address *]
[* city, state zip *]

[* name of Operator *]
[* Farm address *]
[* city, state zip *]

By: _____
[* _____ *],
[* title *]

Name: [* _____ *]

James D. Eggleston, Jr.
Eggleston King, LLP
102 Houston Ave., Suite 300
Weatherford, TX 76086
jim@ektexas.com
817-596-4200

Exhibit "A"

Compensation

[*Alternative clause:

1. Base Salary Component:

Operator shall be paid the fixed monthly minimum amount of \$_____ which shall be treated as a draw against the Bonus Component payable as provided hereinbelow.

[*Alternative clause:

B. Bonus Component:

Operator shall earn the following bonuses:

1. *Operator shall receive an annual bonus equal to [*thirty percent (30%, forty (40%), fifty (50%)*] of all net income of Farm Owner arising solely from operations of the Farm (the "Performance Bonus").*
2. *"Net Income" shall mean all gross revenue to the Farm Owner realized from the operations conducted on or about the Farm including the sale of [*cattle*], the sale of crops or hay from the Farm, the leasing of facilities of the Farm to third parties and such other activities as Farm Owner and Operator shall develop during the term of this Agreement, less all normal and customary operating costs of operating the Farm including, without limitation, all costs of seed, fertilizer, fuel, feed, third party contractors and labor, and other normal and customary expenses incurred in operating farms in the immediate vicinity of the Farm.*
3. *The Performance Bonus shall be paid quarterly within fifteen (15) days of the conclusion of each calendar quarter hereunder, provided Farm Owner may retain a reasonable cash reserve for the upcoming quarter's operations and anticipated expenses.*
4. *The Performance Bonus shall be paid, if applicable for a calendar year, within thirty (30) days after the conclusion of such calendar year. Any reserves which Farm Owner anticipates for the next succeeding calendar quarter shall be established from Farm Owner's cash and Operator shall be fully and finally paid his or her Performance Bonus for the preceding year within thirty (30) days after the conclusion of such calendar year.*
6. *Farm Owner shall have the discretion to advance to Operator draws or loans against the Performance Bonus or the Premium Bonus, provided that such draws or loans shall be repayable to Farm Owner out of the next available Performance Bonus.*

[*Alternative clause:

C. Other benefits/duties:

1. *Operator shall have the use of the living quarters provided by Farm Owner as part of or adjacent to the primary barn facility on the Farm. Operator shall also have the use of such barn facilities for the activities described in subparagraph 3 below.*
2. *Farm Owner shall pay all utilities, water and fuel expenses of the Farm except for such fuel expenses specifically incurred by Operator in connection with his or her own vehicles used for personal use.*
3. *Operator shall have the right to keep up to [* fifteen (15) *] [* horses/cattle *] owned by Operator or customers of Operator at the Farm and shall have the right to retain all boarding, training and showing fees received by Operator with regard to such [*horses/cattle*] . All costs of feed, farrier care, veterinarian care, stall maintenance and labor associated with Operator's horses and any training of horses shall be borne by Operator.*
4. *Operator shall have the right to maintain a reasonable number of cattle up to one (1) year of age at the Farm as reasonably required in connection with Operator's training and showing activities.*

Exhibit "B"

Confidentiality and Non-Compete Agreement

Operator has entered into an Agreement for Services with Farm Owner, which is engaged in the business of Farming. By signing this Agreement, Operator acknowledges his or her understanding of the following:

A. Farm Owner has information generally not known to persons or entities other than Farm Owner called "confidential information." All companies must conduct their business through their Operators and consequently many Operators must have access to confidential information.

B. The phrase "confidential information" as used in this Agreement comprises any technical, economic, financial, marketing, computer program, regardless of the medium on which they are stored or written, computer software, and other information which is not common knowledge among competitors or other companies who might like to possess such confidential information or might find it useful. Some examples include prospect lists, customer lists, items in research or development, products, inventions, innovations, designs, ideas, trade secrets, proprietary information, scientific studies or analyses, merchandising, accounting, long-range planning, financial plans and results, marketing plans, sales and profit figures, etc.

C. Farm Owner's confidential information represents some of the most important, valuable, and unique aspect of Farm Owner's business, and it would be seriously damaged if Operator breached the position of confidential trust Farm Owner has placed in him or her by disclosing such confidential information to others or by departing and taking with him or her the aforesaid unique information compiled over a period of time for the purpose of Operator competing against Farm Owner or disclosing such information to Farm Owner's competitors.

Accordingly, in consideration of the disclosure of said confidential information by Farm Owner to him or her and as a condition of his or her engagement, Operator agrees as follows (which agreement is part and parcel of this Agreement):

(1) Confidential information is proprietary to Farm Owner. Operator agrees to hold such information in strictest confidence, and not to make use thereof except in performance of duties under this Agreement. Whether during or after his or her engagement with Farm Owner, Operator may not disclose to any others any confidential information originated or acquired by Operator while engaged by Farm Owner.

(2) (a) Operator expressly covenants that following the termination of this Agreement, for any reason, he or she will not use the confidential information directly or indirectly to own, manage, operate or be connected with the ownership, management, operation or control of, consult with, or to be an employee or agent for any business which solicits to hire or hires any former or current employees or vendors of Farm Owner.

(b) Operator acknowledges and agrees that for a period of two (2) years after the termination of this Agreement, he or she will not solicit to hire or hire any former or current employees or vendors of Farm Owner, nor will he or she aid any other person or entity in so doing.

(c) Operator acknowledges and agrees that for a period of two (2) years after the termination of this Agreement, he or she will not engage in or become an Operator or consultant or adviser to or have any direct or indirect interest in any other person, firm, corporation or other entity engaged in any business activities competitive with or similar or related to the business of Farm Owner or any of its subsidiaries or any segment thereof, except to the extent that Operator engages in a business activity identical to that in which he or she was engaged at the time of his or her execution of this Agreement. This restriction shall be applicable to the following territory: the state of [Texas]. Operator agrees that such restrictions (including the length of time and the specified territory) are reasonable and necessary to the success of the business of Farm Owner and that, but for his or her agreement to such restrictions, the offer of engagement contained in this Agreement would not have been extended to and finalized with Operator.

(d) In the event that any part or provision of this Paragraph 2 relating to the time period and/or the areas of restriction shall be declared by a court of competent jurisdiction to exceed the maximum time period such court deems reasonable and enforceable, the time period of restriction deemed reasonable and enforceable by the court shall become and thereafter be the maximum time period purposes of this Agreement.

(e) In the event of an actual or threatened breach by Operator of the provisions of this Paragraph 2, Farm Owner shall be entitled to a permanent injunction for the remainder of the two (2) year period restraining Operator from violating the terms of the restrictive covenant in the above subparagraphs (a) and/or (b) and/or (c). Nothing herein stated shall be construed as prohibiting Farm Owner from pursuing any other remedies available to Farm Owner for such breach or threatened breach, including the recovery of damages from Operator.

(f) Operator makes this covenant in consideration of the mutual promises, covenants and benefits herein stated, and yet independent of any other provision of this Agreement and the existence of any other claim or cause of action of Operator against Farm Owner, whether or not arising out of this Agreement, shall not constitute a defense to Farm Owner's enforcement of this covenant to the fullest extent of its terms.

(3) Operator further agrees that in the event Farm Owner finds it reasonably necessary to employ attorneys to enforce the covenants and agreements herein contained, Operator shall pay its reasonable attorney's fees and related legal costs.

DATED this ____ day of [* month *], 20 ____, in [* city, state *], where the obligations contained in this Agreement are performable.

[* name of Farm Owner entity *],
[* type of entity *]

Operator:

By: _____
[* printed name *],
[* title *]

Name: [* printed name *]

Appendix - Tab 3, James Eggleston: 3.20

Surface Use and Drill Site Designation Agreements – Practice Guide

Terms used in this Practice Guide and the Form of Surface use Agreement:

“Leased Premises” or “Property” refers to the surface of the real property conveyed by a warranty deed or leased pursuant to an oil, gas and mineral lease. It is assumed that, in either event, this real property will be subsequently explored and developed by an oil and gas operator. The “Leased Premises” may not be all the Property as a lease may cover less than all the owner’s Property.

“Surface Owner” refers to the owner of the surface of the Leased Premises who may be (i) the buyer in a farm and ranch purchase transaction or (ii) a lessor in a subsequent lease transaction involving some or all of the mineral estate to an oil and gas operator (or one who will assign such lease to an operator).

“Lessee” refers to the person or entity who leases the mineral estate from the Surface Owner and who will either explore and develop the minerals under the Property (or who will assign the lease they obtain to such an operator). The term “Lessee” includes the actual oil and gas operator, whether they are the initial Lessee or an assignee of the initial Lessee.

“Mineral Estate Owner” refers to owners of mineral rights and interests under the Property other than the Surface Owner or Lessee. They may obtain such mineral rights due to prior reservations of minerals in prior conveyance transactions or under conveyances from prior owners of such minerals, i.e., pursuant to mineral deeds or in testamentary transactions.

When Restrictions May be Obtained (or When it is Too Late!)

These agreements are generally only possible in two scenarios:

- a. The Surface Owner who purchases a farm and ranch property, but who receives no minerals in the transaction, may want to negotiate restrictions on the use of the surface of the Property. These restrictions will likely only be able to be agreed upon by someone motivated to conclude the sale transaction, i.e., the seller of the Property. The seller’s agreement to restrict the use surface of the Property will only be valuable if the seller owns a majority of the outstanding mineral estate, thus the ability to effect any restrictions on the Lessee, i.e., the oil and gas operator or other holders of the mineral estate.
- b. Someone seeking to acquire the mineral estate (i.e., a Lessee or other purchaser of other Mineral Estate Owner) may agree to restrict their rights to the surface if:
 - (i) the value of the transaction and their costs of the mineral estate acquisition outweighs, in the event of a restriction on any drilling, the cost of locating drilling wells off-site from the surface estate above the acquired minerals or, in the event

of significant restrictions on the use, the costs of complying with such restrictions such as building roads to certain specifications, restricting drill sites to remote locations, making repairs or upgrades to water sources, etc., or

(ii) the transaction will not be possible without agreeing to some restrictions which will still permit oil and gas exploration and development at a reasonable cost.

If the mineral estate has already been leased or severed from the ownership of the surface, the ability to restrict the surface use may be lost. Once the Property is leased without adequate protection of the surface, the Lessee will likely have little interest in protecting the Surface Owner or the actual surface of the Property, particularly if it involves the addition of new costs and expenses to its cost of drilling an oil and gas well. Thus, getting restrictions at the time of the purchase of the Property or at the time of the execution of a lease is critical.

Importance of Agreements Restricting Surface Use

These agreements are important given significant advantage *Texas* law gives to the Lessees and Mineral Estate Owners (called the “dominant estate”) over the Surface Owner who owns the Property’s surface (the “servient estate”) unless the Surface Owner also owns all of the mineral rights under the Property. Occasionally these restrictions are contained in the warranty deed conveying the surface of the Property or as an addendum to an oil and gas lease. This Practice Guide will treat the issues as part of the negotiation of a separate agreement. However, the issues and suggestions are applicable regardless of the form of the restriction. (Reference to the provisions of the Addendum under the “Oil and Gas Surface Use Agreements Practice Guide” is strongly advised as well.)

In *Texas*, the mineral interest is the dominant estate in the land and, absent express language to the contrary in the instrument which created (or severed) the estate, the Mineral Estate Owner is entitled to use as much of the surface of the Property as is reasonably necessary to develop the mineral estate as long as such rights are exercised with “due regard” for the rights of the Surface Owner.

In addition, there is no implied duty of a Lessee to restore the surface of the Property to its original condition so long as the exploration, development and production activities were conducted in a non-negligent manner. Different requirements for reclamation and liability for damages in the area of coal and uranium mining have arisen under common law and subsequently codified by statute, [e.g., *the Texas Surface Coal Mining and Reclamation Act and the Texas Uranium Exploration, Surface Mining and Reclamation Act*. See *Texas Natural Resources Code Chapters 131 and 134*.]

In the oil and gas context, the Mineral Estate Owner (including a Lessee) owes the following duties to the Surface Owner:

- a. The duty to exercise of its rights on implied easements over the surface of the Property in a non-negligent manner.
- b. The duty to use only as much of the surface as is “reasonably necessary.”
- c. The duty to operate with due regard to the rights of the surface Owner in such cases where there are reasonable alternatives available on the Leased Premises.

Solutions to Protect Surface Owners

In order to protect the Surface Owner beyond what duties the law implies or specifies by statute, his or her attorney should consider the following solutions:

1. Buy the outstanding minerals. The more of the mineral estate which is purchased by a surface owner, the more such owner creates an economic disincentive for the remaining mineral owners to drill. Since a developer of the minerals cannot force a non-consenting mineral owner to share in the costs of drilling a well, the risks and costs of such a project may be beyond what an operator is willing to take on given that less than 100% of the mineral owners are on board.
2. Negotiate surface waivers. These waivers or partial surface waivers restrict the use of the surface. This is, of course, most easily done at the time the mineral estate is separated from the surface and/or the point at which the minerals are leased to an operator. Some examples are as follows:
 - a. A grantor reserves some or all the minerals at the time grantor conveys the property to a third party (grantee). The grantee should strongly consider whether to negotiate for a waiver of the grantor’s surface rights so that the grantee, though it may own none of such mineral rights, may control what happens to his or her surface. If grantor refuses to turn over all such rights to the grantee, the grantee may negotiate for a limitation of grantor’s rights such as limiting the locations where drill sites may be placed.
 - b. A landowner leasing their minerals to an operator may reserve the right to designate the location of drill sites.
3. Negotiate a Surface use Agreement. This involves obtaining either a comprehensive Surface Use Agreement or the inclusion of such restrictions in the Oil, Gas and Mineral Lease itself (usually in an Addendum).

Partial checklist of suggested terms and requirements for surface use agreements:

1. Require that Lessee notify Surface Owner prior to commencement of operations of any kind. Require notice of the conclusion of such operations.
2. Terms of ingress and egress upon the surface of the Leased Premises.

3. Require that Lessee repair the Leased Premises, fences, roads, buildings, etc. Require that roads be constructed to avoid erosion. Minimize impact of water drainage on the surface.
4. Permit Surface Owner to participate in the decisions where to construct and place well pads, gathering lines, roads, water and mud pits, equipment. Specify the standards of maintenance of such items after constructed.
5. Lessee must restore the Leased Premises to their pre-operation conditions. Lessee must maintain the impacted surface and make interim repairs. Will Lessee have to maintain or restore plant life?
6. Lessee must take steps to control and manage noise, weeds, dust, traffic, trespassing, litter and interference with the use by the surface owner.
7. Lessee must timely remove all equipment and personal property after concluding operations. The removal of pipeline may be negotiable in that Surface Owner may want the option to keep it and use it for transportation of other items through it.
8. If fences are cut, Lessee should install braces and gates so that Surface Owner will have access at such points and so that fences will not late sag requiring future maintenance. Fences must be adequate to keep Surface Owner's cattle away from dangerous locations.
9. Lessee should have strict liability for maintaining the quality of water wells.
10. All well sites must be cleaned and restored to a neat and orderly condition. They must be maintained in such manner during the entire Lease term.
11. Surface Owner should consider whether they want all pipeline and casing of the drill hole removed after operations cease.
12. Surface Owner should require Lessee to plug and abandon all wells in accordance with applicable governmental regulations.
13. Pipelines must be buried to not interfere with the surface use. Typically, that requires they be buried "below plow depth" (i.e., at least 36" or more). They should also be buried below water courses and roads so as not to interfere with water flow or vehicular traffic.
14. Surface Owner should consider whether a survey of all pipelines should be required so that future damage to such lines or Surface Owner's farming or excavation equipment can be avoided. Future development may be impacted by the location of such lines.
15. Lessee should expressly waive the right of condemnation or eminent domain to minimize costs to Surface Owner and future clouds on Surface Owner's title. The Surface Use Agreement will be adequate to give Lessee what rights it needs to install gathering lines.
16. Surface Owner should require the right to approve the location of roads, drill sites, pipelines. This approval right should not be unreasonably withheld if Surface Owner's surface use is not materially disturbed and he or she can still graze cattle or harvest crops.
17. Surface Owner may also want to negotiate for "surface damages", i.e., a per drill site payment for the permanent destruction of the value of two or three acres that surround a permanent well. This land will never have any future value and thus a "purchase" of such acreage is advisable.
18. Absent an express provision in the Surface Use Agreement or an oil, gas and mineral lease, *Texas* law does not obligate Lessee to pay any surface damages arising from reasonable and necessary activity exploring and producing the minerals. Operators will generally, however, agree to some negotiated damages provision.

19. Non-production or exploration-related activities should be prohibited. This would include no hunting, fishing, alcohol consumption, etc. No housing of employees or contractors on site should be allowed.
20. A clause requiring Lessee to notify its employees and contractors of the terms of the Surface Lease Agreement should be included, particularly those directly applicable to them.
21. Surface Owner should have the right to remove trespassers or other undesirable persons from the Leased Premises.
22. Surface Owner should consider how much protection he or she should require around equipment, valves, tanks, etc. Surface Owner should expect, at a minimum, to have adequate fences installed, but Surface Owner may also want trenching and “firewalls” to be installed around equipment and tanks to prevent possible fires or leaks and spills.
23. Surface Owner should have certain express remedies in the event of Lessee’s default under the Surface Use Agreement.
24. An initial form of an oil, gas and mineral lease or a proposed Surface Use Agreement seldom, if ever, gives Surface Owner the right to terminate the Surface Use Agreement in the event of a default, especially as to the timely payment of royalties. Thus, Surface Owner may only sue to recover unpaid damages, unless the right to terminate the Surface Use Agreement is included in the Surface Use Agreement. Surface Owner may have to give Lessee notice of such default and the right to cure such default prior to terminating the Surface Use Agreement. (Surface Owner should consider whether to negotiate for these remedies for other events of Lessee’s default or non-performance.)
25. Use of water from surface resources (tanks and streams) and drilled water wells should be limited to what is required for operations on the Leased Premises. Absent a separate agreement, Lessee should not be able to sell water “off-site” to other operators without compensating the landowner.
26. Lessee should be obligated to clean-up saltwater spills and other substances which may leak out or run out over the Leased Premises.
27. Lessee should not be permitted to turn any well of any kind into a saltwater disposal facility. Construction of improvements on the Leased Premises should be limited to those approved by the landowner. (Absent an express limitation on the construction of a saltwater disposal well, a lease may be implied to grant such a right to an operator. This should be clearly negated.)
28. Lessee should be held strictly accountable for any damages, losses or accidents occurring on the Leased Premises.
29. Lessee should provide landowner and all Surface Owners with insurance protection against all claims and losses. Several types of required insurance should be specified.
30. Surface Owner should also require a strict adherence by Lessee to all state and federal laws dealing with operational issues (such as rules and regulations promulgated by the **Texas Railroad Commission**) and environmental issues (such as those promulgated by the U.S. Environmental Protection Agency, the **Texas Commission on Environmental Quality** and local city and county ordinances relating to land use and safety).
31. Once the Surface Use Agreement terminates, for whatever reason, Lessee must be obligated to execute any documents required to remove the Surface Use Agreement from the title of the Leased Premises.

32. If the oil, gas and mineral lease is assigned, Lessee must notify Surface Owner in a timely manner so that Surface Owner knows who may be entering on to Surface Owner's property or who is otherwise responsible for the obligations under the Surface Use Agreement and/or the lease.
33. It is advisable that Lessee properly "badge" its employees and contractors or otherwise have them carry written permission for access and Surface Owner should be able to ask for such identification when he or she encounters anyone on their property.
34. Surface Owner may want to require that Lessee and Surface Owner jointly conduct an inspection of all operations at least once a year and identify any required repairs or areas needing remedial action.
35. For defaults of Lessee under the Surface Use Agreement, a specific provision should be included giving Surface Owner explicit remedies including (i) the right of Surface Owner to cure such breaches and be reimbursed, (ii) the right of Surface Owner to sue Lessee to enforce specific performance and (iii) the right to sue Lessee for damages.

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Appendix - Tab 3, James Eggleston: 3.21

Mineral Deeds – Practice Guide

This document transfers the grantor's rights (in whole or in part) in either one of two things: (a) the mineral rights under a parcel of real property, or (b) the royalty interests under the real property. "Mineral rights" and "Royalty" have two distinct and important definitions. Generally, "Royalty" is the right to receive royalty payments based on production from the sale of minerals, oil and gas from under a property. "Mineral Rights" includes the right to receive royalties as well as the right of ingress and egress, the right to use the surface as reasonably necessary, the rights to use surface water and other rights incidental to the exploration, development and production of oil, gas and other minerals. Both terms, when they are part of a conveyance or reservation document, can be qualified in numerous ways and attorneys frequently use language in deeds (as reservations) and mineral deeds or leases (as conveyance documents) which do not accomplish what their client intends.

Fundamentals:

Minerals and mineral rights are part of the real property until severed. Once oil and gas have been "severed" (produced) from the soil, they are then classified as personal property. Unless specifically excepted or reserved, a conveyance of real property in *Texas* will include all minerals and mineral rights relating to such property. It is general said that these minerals, specifically oil and gas, are "in and under" the property. If the mineral estate is subsequently conveyed, all interests are transferred unless there is a specific reservation by the grantor. The "mineral estate" (defined more fully below) includes the right to receive royalties from the development and production of such rights. However, the mineral rights and the royalty interests are seldom precisely equal in terms of how much of the total is owned as to such minerals. One can be larger than the other and each frequently end up in the hands of several unrelated parties.

What does a lease "give" to the lessee (i.e., an oil and gas operator): The execution and delivery of an oil, gas and mineral lease is not a mere option or executory contract, but it operates as a present conveyance of the oil and gas under the property described in the lease. It gives the lessee a "determinable" fee in the oil and gas in place which may terminate upon the passage of time, the cessation of production or other events and contingencies which may cause the lease to end. When "in place," the minerals are realty or real property subject to ownership, severance and sale. When "severed," they become personal property. Generally, what the lessor retains upon his or her execution of an oil and gas lease is a royalty interest, that is, the right to receive a royalty payment based on production without having to share in the upfront expenses of exploration, drilling, development, production and transportation.

What does the conveyance of "mineral rights" give to the recipient (whether a lessee, grantee or a grantor who reserves such rights)? A grant (or reservation) of mineral rights, without any stated exception or qualification as to the surface rights grants (or reserves) the right to use as much of the surface as deemed necessary (i.e., ingress, egress, drilling pads, mud pits, etc.). This also includes the right to use water from the surface as is reasonably necessary to the

development of the mineral rights. If a grant or reservation is for less than “all” of the mineral rights (such as the case where some mineral rights were previously reserved), then the recipient must determine its rights to explore, drill, develop and sell the production and whether the joinder of other parties in contracts, leases other agreements re required in order to proceed. In other words, the right to drill on a piece of property may be held by more than one person. Absent an outright conveyance of such rights to or the gathering of all such rights by one individual, this potential conflict should be examined and resolved sooner rather than later.

Partial conveyances – conveying a portion of all the minerals? Or just a portion of what the grantor owns? The answer to this question is much longer than what this space allows, but suffice it to say that great care should be taken in drafting the conveyance language so that (a) what the grantor has the ability to convey is clear and understood, (b) what the grantor intends to convey is clear and understood and (c) what the grantor intends to reserve for itself is clear and understood.

For example, where a fraction designated in a deed is stated to be a royalty interest in the land *described* in the deed, the fraction is to be calculated upon the entire royalty interest. Where the fraction designated is stated to be a royalty interest in the land *conveyed* by the deed, the fraction is to be calculated upon the grantors’ fractional interest.

What words indicate that a “mineral interest” or a “royalty” is being conveyed:

- a. When the conveyance includes words like “an undivided 1/8th interest in and to all the oil, gas and other minerals” and “rights of ingress and egress at all times,” it indicates the recipient will receive mineral interests. The first phrase is a common broad description of minerals and the access rights are required for one to develop and produce the oil and gas connected to the property. A royalty owner owns the right to a stream of income when it begins. There is no need to access the surface of the property if one is only a royalty owner.
- b. When the conveyance includes the words “in, on and under” indicate a mineral interest. The royalty owner does not own anything in, on or under the real property where the minerals lie.
- c. When a conveyance reserves to the grantor an “undivided interest in and to all oil, gas and other minerals in and under the property” and reserves the “leasing rights, bonuses and delay rentals” it indicates a conveyance of mineral interests rather than royalty interest. The rationale is that the reservation of various rights would have been unnecessary if the grantor were reserving all the mineral interests and conveying only royalty interests since it a conveyance of only royalty rights would make words or reservation redundant. In other words, a royalty owner does not have rights to those items by definition and by using those words as words of reservation, it is argued that they are being held out of a conveyance of something larger, i.e., the mineral interests. Otherwise, the reservation words would be unnecessary. .

- d. If the conveyance reserves the “executive rights” and the “right to receive delay rentals,” it indicates that that mineral interests are being conveyed (as in paragraph c above) since if only royalty interests were being conveyed, such a reservation would be unnecessary since holders of royalty interests only do not have executive rights. Executive rights are the right to negotiate and sign leases, to receive the upfront bonus checks for signing a lease, the right to receive surface damages, delay rentals and other types of payment which are paid whether or not there is production. Royalty payments are only tied to production revenue, not other types of revenue unless specifically provided for in writing.
- e. When the words “that may be produced” are added to the end of the text as to what is conveyed, i.e., “1/2 of oil, gas and other minerals that may be produced,” it will be construed as a conveyance of royalty only since it indicates an interest that is specifically tied to production.
- f. When the oil and gas lease reserves for the lessor only a “royalty interest,” the lessee acquires 100% of the mineral interest that lessor owners, and lessor owns no further interest in the minerals in place.

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Appendix - Tab 3, James Eggleston: 3.22

Water Production Leases – Practice Guide

Water leases, production agreements and other similarly title documents cover the production of the every-increasingly valuable resource of water. It is also an increasingly regulated resource and those landowners with abundant sources of water may enter into these agreements and realize significant revenues from the production of water, whether it be for oil and gas production or other industrial and commercial uses, including transmission to more developed areas.

Payments for water and water production leases are similar to oil and gas leases in that up front bonuses are often paid along with royalties on water actually produced as well as fees per well drilled.

The Water Production Lease covers the basic relationship between the landowner and the water production company (the “Lessee”) and will cover the following topics:

1. Compensation issues.
2. Limitations on drilling locations.
3. Construction standards
4. Protection of livestock, trees, and wildlife.
5. Operational responsibilities.
6. Indemnification and hold harmless provisions for environmental issues and damages.
7. Allocation of liabilities and the express indemnification of landowners.

*Note: The attached form does NOT expressly cover or grant an easement a water company operator may require in connection with the laying of water pipelines.

Differences with an Oil and Gas Lease:

The major differences between the two types of leases and revenue opportunities are shown in the following chart:

	<u>Oil and Gas Leases</u>	<u>Water Lease and Production Agreements</u>
Documents:	Oil, gas and mineral lease with “addendum” clauses	Water Production Lease
Conveyance of:	Fee interest in the land (the mineral estate) subject to defeasance upon the occurrence of a condition, e.g., cessation of production; many implied rights.	Lessee only acquiring a leasehold estate; subject to termination per terms of lease; few implied rights.
Initial phase is called:	“Primary Term”	“Initial Term”
Length of initial phase:	3 to 5 years	5 years
Purpose of initial phase:	Lessee make-ready, geophysical studies, arrange equipment; labor	Drilling and commencement of water production.
Secondary phase:	If production occurs	NA
Second phase begins when?	If production occurs, lease will then be “HBP” (Held by production)	NA
Automatic renewals?	No, not required if HBP	Try to avoid automatic renewal, should require election to renew by lessee, new bonus payments, update terms.

Production depends on:	Geophysical studies, adequate market prices	Water availability and demand
Production phase	5 to 50 years, perhaps perpetual if production continues.	5 to 10 years or longer, if renewed.
First landowner payment:	Up front per acre bonus Per acre bonus payment “Signing bonus”	Up front bonus plus monthly base rent. (Maybe applicable to royalty payment.)
Other landowner payments:	See royalty below.	Installation fee per well drilled. Minimum base/monthly rent.
Royalty to landowner:	12.5% to 25% of gross Protected by statute	Based on cents per barrel produced; location of wells will determine rate.
Computed on:	All sales of petrocarbons	Volume of production.
Landowner share in costs:	Costs after production leaves site, transmission	NA
Increases in royalty	Not common	Must be negotiated.
Area covered by lease:	Should be limited by negotiations, shrink to minimum size provided by law; may be impacted by pooling agreements or creation of units. Note “Pugh” clauses or “Freestone Rider.”	NA, but may limit number of wells.
Horizontal limitations	Yes, in “depth clauses”	NA
Right to use surface:	Very broad rights in lessee	As reasonably necessary to drill and produce water.
Grantor’s rights to surface:	Continues outside of work areas and then is pretty well restored since activity continues underground.	Must be specific about landowner’s right to continue to use; generally not a problem.
Sales agreements:	Rare for lessor to see these. (Prices are published.)	Rare for lessor to see. Payment based on produced volume.

Primary considerations for wind energy agreements (other consideration are explored in more detail in the attached forms along with the following issues):

1. Compensation for various uses: landowner/lessor may negotiate for payments as follows:
 - a. Well sites (installation fees) – lump sum payments to lessor for each water well site.
 - b. Road construction – lump sum payment, may be based on length of road.
 - c. Installation of water pipelines – payment based on length of lines.
 - d. Minimum basic or monthly rental.
 - e. Upfront bonus payment.
 - f. For others – see attached agreements.
2. Time of the essence – necessary in order to demand adherence of lessee to deadlines
3. Property taxes and tax roll backs – lessee should be responsible for all ad valorem taxes levied on towers, buildings, and equipment. If the open-space exemption or the “ag-use” exemption is lost for appraisal purposes, the lessee should pay for any rollback and increased annual property taxes during the lease term and so long thereafter as it takes to restore the appraisal status resulting in the lower assessments.
4. Indemnification – lessee should indemnify and hold the lessor harmless from lawsuits, judgments, unpaid bills, environmental claims injuries, etc. Make sure provisions are enforceable in accordance with *Texas* case law and statutory law. Lessor should also look seriously at requiring insurance certificates from the lessee and the obligation of the lessee to name lessor as an additional insured thereunder.
5. Acquisition of water data and results – lessee should share copies of all water samples, data obtained and any soil tests.
6. Assignments – lessee may want the lease to be assignable while the lessor will want to prohibit such assignments without its consent. Lessor will certainly want to prohibit assignments at any time money is owed to the lessor or if there is then an uncured breach under one of the documents. Lessee may want to qualify lessor’s consent by saying such consent “may not be unreasonably withheld.”
7. Minimum royalties – lessor should negotiate for minimum streams of cash flow during the primary term and extended terms. .
8. Defaults, remedies – lessee will want plenty of advance notice and lengthy cure periods prior to the termination of the lease. Lessor will want the ultimate hammer of a termination remedy. Open-ended cure periods are almost certain to create litigation and thus cost on behalf of the parties.
9. Requirements of mediation or arbitration – alternative dispute resolution procedures should be considered.

10. Venue – local venue is preferred particularly when many lessees are not “local.”
11. Requirements for removal of pipe, equipment, clean-up – lessor may want to retain ownership of all wells, pipe and equipment and continue to be able to operate the wells after the lease has expired.
12. Lessor’s retained rights – lessor will want to expressly retain all rights not granted to the lessee, including without limitation, rights to use land for grazing, crops, hunting, ag activities, construct improvements.

Other questions for the landowners/lessors to ask:

1. How much of my land will be tied up and what activities can I continue to pursue?
2. How will the payment amounts look five or ten years from now?
3. Will lessor have audit rights? If audit reveals variances, what are lessor’s remedies?
4. What are the tax consequences to this stream of income? (what if agreement is perpetual – deemed a sale?)
5. Can I transfer this stream of income to a lower tax-bracket heir?
6. May I keep this stream of income even if I sell the property?
7. What are the development plans? How many wells? Over what time period?
8. Will the lessee be able to sell or assign any of its rights? Lessor should avoid this.
9. What are the lessee’s termination rights?
10. What happens to future payments if that happens? Lessor must get all equipment and get to keep wells?
11. What is the lessor’s termination rights?

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Appendix - Tab 3, James Eggleston: 3.23

Wind Energy Easements and Lease Agreements – Practice Guide

Wind energy leases have already provided significant income to owners of farm and ranch land (the lessor) in areas of Texas that otherwise appear to have minimal revenue opportunities beyond livestock grazing. The growth in this opportunity appears to be advancing unabated. Presently the capacity for wind energy transfer to other parts of the state are limited by transmission capacity as production capability is far greater.

The concept of a “lease” for development of wind energy resources may sound like a lease for the exploration and development of oil, gas and other minerals. But other than the use of similar terminology and some common boiler plate provisions, the leases are quite different. The “lessor” is, of course the landowner and occasionally other assigns, heirs, etc. In mineral leases, “lessors” are often completely unrelated to the land involved as the severance of the mineral rights may have occurred long ago. The “lessee” in a wind energy project is likely to be the developer and operator of the wind equipment, turbines, etc. The initial “lessee in a mineral lease may be a lease broker and landman who is accumulating leases for resale to and oil and gas producer.

Agreements

There are commonly three or four agreements that are negotiated in a wind energy arrangement between a landowner and a wind energy or power company including the following:

Option Agreement: This option grants the wind energy company a period within which to conduct due diligence and feasibility/meteorological studies on a piece of property. The option period is usually two years or less with some rights in the hold of the option to extend this feasibility period. Compensation to the landowner is in the form of a “bonus” payment based on a number of dollars per acre owned by the grantor of the option.

Wind Energy Lease: This lease often attached to the Option Agreement and is executed when the feasibility study of the wind energy company persuades it to move forward with the project. The Option Agreement and the Wind Energy Lease are often contained in a single document. They are represented here as two separate documents to highlight the Wind Energy Lease as the cornerstone document of the relationship between the landowner and the wind energy company. It is the controlling document concerning construction issues, operational responsibilities, bonus and royalty payments, and allocation of liabilities. Compensation under the Wind Energy Lease covers many different elements and possibilities. They are described below.

Wind Easement: This easement grants the right to the wind energy company to prohibit the landowner from obstructing the wind flow across the landowner’s property and thereby impacting the full and free use of the wind by the wind energy company. This agreement is set out separately for purposes of this practice guide to illustrate terms that be applicable to a landowner/wind energy company relationship even if no actual generating units are constructed on the property of the grantor of this easement.

Encroachment Agreement: Given the scale of the generating units and other facilities relating to the power generation facilities, it is common for portions of these units, guy wires, turbine blades, and the like extend over property lines and thus these “encroachments” should be covered by contract including the right of the wind energy company to have the ability to access these encroachment items.

Differences with an Oil and Gas Lease:

The major differences between the two types of leases and revenue opportunities are shown in the following chart:

	<u>Oil and Gas Leases</u>	<u>Wind Energy Agreements</u>
Documents:	Oil, gas and mineral lease with “addendum” clauses	Option Agreements Lease Agreements Easement Agreements: *construction, access easement *transmission easement *wind non-obstruction easement *noise easement Encroachment Agreement
Conveyance of:	Fee interest in the land (the mineral estate) subject to defeasance upon the occurrence of a condition, e.g., cessation of production; many implied rights.	Lessee only acquiring a leasehold estate; subject to termination per terms of lease; few implied rights.
Initial phase is called:	“Primary Term”	“Option” or “Testing Period”
Length of initial phase:	3 to 5 years	2 to 4 years
Purpose of initial phase:	Lessee make-ready, geophysical studies, arrange equipment; labor capital, market factors.	Gather data on economic feasibility, determine wind force and speed, determine availability, capacity of transmission lines.
Secondary phase:	If production occurs	Only if wind data and feasibility confirmed, then 30 to 50 years (or perpetual? lessor should avoid) Contained in Wind Energy Lease, becomes the “initial term” of such lease

Second phase begins when?	If production occurs, lease will then be “HBP” (Held by production)	If data reveals commercial viability and transmission capacity exists, construction begins followed by production of “generated power.”
Automatic renewals?	No, not required if HBP	Try to avoid automatic renewal, should require election to renew by wind company, new bonus payments, update terms.
Production depends on:	Geophysical studies, adequate market prices	Environmental studies, surveys, core tests, tax creditors, financing and long-term purchase agreements, heavy governmental subsidies.
Production phase	5 to 50 years, perhaps perpetual if production continues.	20 to 35 years or longer, if renewed.
First landowner payment:	Up front per acre bonus Per acre bonus payment “Signing bonus”	Up front bonus usually much less, see list below of possible payments.
Royalty to landowner:	12.5% to 25% of gross Protected by statute	3% to 8% of gross revenue, not protected by statute; likely won’t cover all value realized by lessee, i.e., tax credits often not included, but try.
Computed on:	All sales of petrocarbons	Sales of energy, carbon credits, perhaps tax credits.
Landowner share in costs:	Costs after production leaves site, transmission	Off-site costs such as transmission.
Increases in royalty	Not common	More common, shoot for every 5 to 10 years, particularly during extension periods.

Area covered by lease:	Should be limited by negotiations, shrink to minimum size provided by law; may be impacted by pooling agreements or creation of units. Note “Pugh” clauses or “Freestone Rider.”	Should be limited by negotiations, establish a “vertical” spacing in lease. Establish a development plan, which releases land where towers are not placed within certain time.
Horizontal limitations	Yes, in “depth clauses”	Yes, in “elevation clauses”
Right to use surface:	Very broad rights in lessee	Lessee does not have automatic right to use surface.
Grantor’s rights to surface:	Continues outside of work areas and then is pretty well restored since activity continues underground.	Must be specific about landowner’s right to continue to use.
Sales agreements:	Rare for lessor to see these. (Prices are published.)	More common, lessor should negotiate to agreements with power companies

Primary considerations for wind energy agreements (other considerations are explored in more detail in the attached forms along with the following issues):

1. Compensation for various uses: landowner/lessor may negotiate for payments as follows:
 - a. Tower sites – lump sum payment to lessor for each site plus annual rentals.
 - b. Construction sites – lump sum payment to lessor plus require restoration (define with construction “commences”).
 - c. Road construction – lump sum payment, may be based on length of road.
 - d. Installation of transmission lines – payment based on length of lines.
 - e. “Guy” wires- lump sum payment based on area impacted, perhaps annual fee
 - f. Substations – payment for each location plus annual fee.
 - g. Operational and maintenance structure – lump sum for area of each structure plus annual rental.
 - h. Consideration for loss of hunting, recreational and agriculture use (pasture rental, operations) – payable annually for revenue loss (less actual loss projected by landowner use will obviously result in a lower offer from the lessee due to less curtailment of use).
 - i. Consideration for loss of above-ground irrigation systems (pivotal systems) – payable annually.
 - j. Loss of ability to construct ranch improvements near towers.
 - k. Use of water during construction.
 - l. Reimbursement to lessor of any increases in costs of insurance, etc. due to lessee’s activities on lessor’s property.

- m. Annual payments during terms of all agreements, particularly the Wind Easement and the Encroachment Agreement (since compensation under Wind Energy Lease is calculated based on revenue).
 - n. Option Agreement usually has an upfront bonus payment and perhaps an annual payment to keep option alive.
 - o. For others – see attached agreements.
- 2. Consent to location of towers, buildings, substations, lines, roads – lessor should require that its consent be obtained, but lessee will not want that consent to be unreasonably withheld.
- 3. Requirement of restoration of land after construction phases – lessee must restore all construction areas to as near their pre-construction condition as possible.
- 4. Time of the essence – necessary in order to demand adherence of lessee to deadlines
- 5. Property taxes and tax roll backs – lessee should be responsible for all ad valorem taxes levied on towers, buildings, and equipment. If the open-space exemption or the “ag-use” exemption is lost for appraisal purposes, the lessee should pay for any rollback and increased annual property taxes during the lease term and so long thereafter as it takes to restore the appraisal status resulting in the lower assessments.
- 6. Indemnification – lessee should indemnify and hold the lessor harmless from lawsuits, judgments, unpaid bills, environmental claims injuries, etc. Make sure provisions are enforceable in accordance with Texas case law and statutory law. Lessor should also look seriously at requiring insurance certificates from the lessee and the obligation of the lessee to name lessor as an additional insured thereunder.
- 7. Acquisition of wind data and results – lessee should share copies of wind data and testing information. Lessor may want to use this information in future lease negotiations or evaluations.
- 8. Water usage and drilling – lessor should identify water sources that lessee may use and should pay fair rates for such water. Future drilling locations should be agreed upon in the initial lease negotiations.
- 9. Assignments – lessee may want the lease to be assignable while the lessor may want to prohibit such assignments without its consent. Lessor may also want to prohibit assignments at any time money is owed to the lessor or if there is then an uncured breach under one of the documents. Lessee may want to qualify lessor’s consent by saying such consent “may not be unreasonably withheld.”
- 10. Minimum royalties – lessor should negotiate for minimum streams of cash flow during the primary term and production phases. It may be calculated on a per tower basis or a per acre basis.

11. Defaults, remedies – lessee will want plenty of advance notice and lengthy cure periods prior to the termination of the lease. Lessor will want the ultimate hammer of a termination remedy. Open-ended cure periods are almost certain to create litigation and thus cost on behalf of the parties.
12. Requirements of mediation or arbitration – alternative dispute resolution procedures should be considered, particularly given the predisposition to local surrounding landowners or citizens to disfavor wind towers or to not identify with the royalty income streams enjoyed by landowners and not others.
13. Venue – local venue is preferred particularly when many lessees are not “local.”
14. Requirements for removal of towers, equipment, clean-up – lessee must be required to remove towers and equipment, to cleanup and restore all surface areas, to leave roads in a condition satisfactory to lessor. Lessor may want to require some type of security from the lessee to insure its performance in this regard, i.e., bonds letters of credit.
15. Possibility of forfeiture of equipment, structures – if these items are not removed, lessor may want the right to take possession of these items thereby gaining some value to cover the costs of restoring lessor’s land.
16. Activity permitted on site – lessee will want to do studies regarding environment, noise, wildlife, release weather balloons, construct meteorological towers, and take soil samples. Lessee will also want to store equipment and components, build structure, foundations, concrete pads, roads, wind turbine unites, support fixtures, fences, transformers, above-ground and below ground transmission lines, and anchors. Lessor should be careful not to permit the “use” clauses to be drafted too broadly. Lessor will want to prohibit use by lessee’s employees of firearms, drugs, alcohol, etc.
17. Lessor’s retained rights – lessor will want to expressly retain all rights not granted to the lessee, including without limitation, rights to use land for grazing, crops, hunting, ag activities, construct improvements.

Other questions for the landowners/lessors to ask:

1. How much of my land will be tied up and what activities can I continue to pursue?
2. How will the payment amounts look five or ten years from now?
3. Will lessor have audit rights? If audit reveals variances, what are lessor’s remedies?
4. What are the tax consequences to this stream of income? (what if agreement is perpetual – deemed a sale?)
5. Can I transfer this stream of income to a lower tax-bracket heir?
6. What the development plans? Over what time period?
7. Will the lessee (the wind company) be able to sell or assign any of its rights?
8. What is the lessee’s termination rights? What happens to future payments if that happens?
9. What is the lessor’s termination rights?

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Appendix - Tab 4, Greg Sampson

Farm & Ranch Family Estate and Succession Planning Checklist

Lifetime Estate Planning Issues:

1. Identify your Client
 - a. Parent(s)
 - b. Children
 - c. Multiple Parties
 - d. Engagement Letter Provisions
2. Get a complete list of assets and liabilities
 - a. Name on title or account
 - b. Community or Separate Property?
 - c. Identify cost basis
 - d. Identify appreciating property for gifts
 - e. Is there need for asset protection?
 - i. Insurance Review/Analysis
 - ii. Spendthrift Trusts and Asset Protection Trusts
 - iii. Charging Order Entities, LLCs and FLPs
 - iv. Inter-family transfers
 - v. Caution: Fraudulent Transfer Rules
3. Is the estate expected to be taxable?
 - a. Are the beneficiaries' estates taxable?
 - b. Current Exemption vs. 2026 Sunset and other changes.
 - c. Generation Skipping Transfer Tax and Exemption issues?
 - d. DSUEA planning done/needed?
 - e. Capital Gain and Basis Planning
 - f. Need for annual gifting plan?
 - g. Need for discount planning to reduce values?
 - i. Undivided interests?
 - ii. FLP or other entity planning?
 - h. Utilize Life Insurance and ILITs?
 - i. Utilize ascendant family planning
4. Transfer of Farm or Ranch Property and Related Business
 - a. Will the farm be sold to third parties?
 - i. Employees?
 - ii. Unrelated parties?
 - b. Will the farm be left to family members?
 - i. Do all want to participate – if not, who does?
 - (A) Equal shares?
 - (B) TIC or Entity?
 - ii. Gifted or Sold?
 - (A) Irrevocable Gift Trust

- (B) Defective Grantor Trust
- (C) Use discounted entity structure?
- (D) Installment Sales?
- c. Valuation Issues
 - i. Hire qualified appraiser for the asset at issue
 - ii. Utilize available discounting methods, if needed
 - iii. Consider step up in basis
- 5. Liquidity Concerns.
 - a. Is income derived from estate assets sufficient to cover the survivors' lifestyles?
 - b. Is there enough access to liquid assets to supplement lifestyle costs and to pay estate expenses and transfer taxes and other costs?
 - c. Loan Resources
 - i. Equity Loans, second liens
 - ii. Reverse Mortgages
 - iii. Inter-family loans (favorable AFR rates)
- 6. Are records in order?
 - a. Entity Documents in good standing? State disclosures, franchise taxes, corp. minutes, officer elections
 - b. Operational/management records accessible and organized.
 - c. Digital Records access and keys/codes written down and stored in a safe place?
 - d. Described location of records or left instructions?
- 7. Have you assembled the team of professionals needed and introduced them to your successors?
 - a. Farm manager/Tenant
 - b. Banker/Loan Officer
 - c. Investment Advisor
 - d. Accountant
 - e. Lawyer(s)
 - i. Farm/Business
 - ii. Estate Planning
 - iii. Tax
 - f. Insurance Agent
 - g. Appraiser
 - i. Appraiser for Property
 - ii. Appraiser for Business Entities
- 8. Disability and Incapacity Planning
 - a. Revocable Living Trusts
 - b. Joint and co-signer accounts
 - c. Durable Powers of Attorney
 - d. Medical Power of Attorney
 - e. Directive to Physician/Living Will
 - f. DNR/ Out of Hospital DNR
 - g. HIPAA Medical Release Authorization
 - h. Guardianship (when necessary)

Post Mortem Planning Issues:

1. Need to file 706? Due in 9 months
 - a. Need 6 month extension to file? (not available to pay)
 - b. Determine if estate values exceed Exemption
 - i. Consider lifetime gifts – get copies of 709s filed
 - ii. Get property and entities valued (some require qualified appraiser)
 - iii. Maximize deductions and credits
 - c. Should spouse file for DSUEA even if not a taxable estate?
2. Take Advantage of Favorable Tax Rules
 - a. Alternate Valuation date (6 months)
 - b. Qualification for 2032A Special Use Valuation? Sub checklist of requirements
 - c. Qualification for 6166 installments?
 - d. Qualification for Code Section 303 Stock Redemption treatment to pay tax?
3. Important Tax Elections and Allocations
 - a. Marital Deduction and Martial Deduction Trust Funding
 - b. Unified Credit (Bypass) Trust Funding
 - c. Disclaimers and Disclaimer Trusts (9 month window)
 - d. Generation Skipping Tax Exemption
4. Other planning tools
 - a. Spousal rights and allowances, election against Will
 - b. Partitions
 - c. Family Settlement Agreements
 - d. Decanting Trusts
 - e. Powers of Appointment
 - f. Trust Protector Clauses

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