

Purchases and Sales of Agricultural Property: An Issues Checklist for Transaction Parties

The following checklist is meant to act as a guide to parties looking to buy or sell agricultural real property. However, each transaction will be specific to the parties involved; accordingly, some of the items addressed below may not be relevant to a given matter. Similarly, the below list does not attempt to address all matters that may need to be addressed in an agricultural land transaction. It is recommended that any seller or buyer of agricultural real property consult with counsel in connection with any such transaction.

1) Define Real Property to be Acquired. The parties should be clear about the real property to be conveyed. Where is the real property asset located? Is there a clear understanding between buyer and seller regarding the rights to be transferred? Are there buildings or other significant improvements on the property? Will the seller be retaining any of the real estate historically used on the farm (e.g., a home site or agricultural facility)?

2) Water Rights. Water rights are a key component in many agricultural real estate transactions. A review of water rights that are available for use on the property is necessary to determine if the property can be used for the buyer's purposes. Often, water rights consultants are engaged to determine the sufficiency of the seller's "paper" water rights and "wet" water rights. Depending on jurisdiction, additional closing deliverables may be necessary to properly convey water rights for the property.

3) Water as a Separate Asset. Especially in the West, water rights can have significant value separate and apart from the "dirt." If there is excess water on the property, the parties should determine who obtains the benefit of the extra water. Sellers can transfer water to other land or into a state-sanctioned water bank prior to closing. Alternatively, a buyer can take all of the water and monetize it post-closing. If water transfers are a component of the transaction, the closing timeline may be affected by the regulatory review periods.

4) Seller Retained Property. A seller might wish to retain some rights or assets that were historically used in connection with the property being conveyed. For example, a seller might wish to carve-out a home site and retain title to it. The seller may own neighboring property and would like to maintain access or water sharing agreements. The parties may desire that the seller "lease back" the property at closing. The parties should be thoughtful at the beginning of a transaction regarding the series of steps that may be required to ensure that the division of rights is completed by the closing.

5) Ancillary Rights. Aside from the real property, water rights, and infrastructure, what other assets are being included in the sale? Are there contracts that will be assigned by the seller and assumed by the buyer? Is there a current lease for the property, or will the property be leased back to the seller? Are there permits that need to be acquired by the buyer at closing to operate the property? A thorough review of such rights is important to determine pre or post-closing actions to be undertaken such that the buyer can use the property as it intends. Care should be taken in drafting ancillary closing documents to ensure buyer and seller are aligned.

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6) Seller's Data Room - How is the seller going to provide documents to the buyer for its due diligence of the real estate? In simple transactions, this might involve email exchanges of the relevant documents. For more complicated properties, the seller should consider setting up an online data room, where documents and records can be uploaded for the buyer's review. When setting up the data room, create files for different types of due diligence (title, environmental, contracts, cropping, etc.) and establish agreed-upon naming conventions for documents; set these rooms up from the beginning, so that all parties involved know where to look for a given type of diligence. The seller may want to identify one or two people that are charged with uploading documents to the data room - this way the seller can better ensure that the right materials are uploaded, and that there are not any duplicates. Note - even if materials are sent via email between the buyer and seller business contacts, the materials should be uploaded to the data room; this way you have one site that is comprehensive, provides an objective standard for a sale agreement representation regarding completeness, and is the 'official' delivery mechanism between the buyer and seller.

7) Buyer's Due Diligence Access - The buyer may need access to certain government or quasi-government files (e.g., FSA files, and/or water district records). However, these records may not be available to anyone other than the seller (as the owner/operator of the subject property). While the seller could accompany the buyer to these agency offices, that can prove cumbersome in practice. Another option is for the seller to sign a letter of authority granting the buyer access rights to the seller's files, naming the individual buyer representatives that can access the files and the expiration of the review right. The buyer can then take this letter of authority with them when requesting to access the agency files.

8) Purchase Price; Holdbacks - How is the purchase price being structured? Is it based on gross acres or net acres (to be determined by a new or existing survey), or is it an agreed-upon all-inclusive purchase price? If issues are discovered during the buyer's due diligence, is there a mechanism to hold back funds to resolve matters on a post-closing basis?

9) Due Diligence Process. What due diligence period will the buyer have to determine if the property will meet its needs? The purchase and sale agreement should clearly lay out time-periods for diligence items, rights to extend, and the seller's obligations with respect to resolving any matters that arise in the buyer's diligence process. The amount of diligence may differ depending on the transaction (e.g., a tenant who is purchasing the leased land may require significantly less diligence than an institutional buyer with no history with the property). From a buyer's perspective, the due diligence period must be sufficiently long to allow for third party consultants to prepare reports. Common diligence items include: (a) a new survey, (b) preparation of a Phase I (and Phase II, if needed) environmental assessment, (c) water rights consultant's reports, (d) infrastructure evaluations and (e) soil and agronomy evaluations. Depending on the nature of the property, additional consultants may need to be engaged, their reports reviewed, and the issues resolved.

10) Title and Survey Matters. When real estate is the primary asset acquired in a transaction, the buyer should be particularly focused on ensuring that it will obtain good title to the land at closing. The parties should agree on the form of deed in the purchase agreement. The purchase agreement should indicate who is responsible for providing a preliminary commitment or preliminary report from the title company. The buyer should carefully review title matters affecting the property in connection with a review of the survey -- ideally, a new survey commissioned as part of the buyer's diligence activities. The buyer should note the location of material easements and other title matters affecting the property, and make sure that off-site appurtenant rights are included in the insured legal

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description if possible. The purchase agreement should provide a mechanism for the buyer to notify seller of objectionable title matters and for the seller to respond. As the buyer's diligence progresses, easements, well use agreements, and other documents may be added as closing conditions to resolve issues.

11) Title and Survey Matters Unique to Agricultural Transactions. Farmland transactions often involve unique title issues, including (a) virgin title policies (i.e., title has never been obtained before), (b) virgin surveys, (c) complicated family ownership structures, and (d) prescriptive or customary rights that are applicable to rural farmland. Depending on the sophistication of the buyer, the seller may be required to resolve issues that the seller does not feel are material. These matters can be surprising to commercial real estate attorneys that are newcomers to agricultural real estate. Further, if there is a difference in sophistication between the buyer and seller, these can be a significant cultural issues to overcome.

12) Closing Date. When do the parties intend to close the transaction? Given farming cycles, closing a transaction mid-season may involve additional complexity. For example, will the seller receive the economic benefit of the year's crops? If not, will the seller be entitled to a credit for its pre-closing inputs? The closing date may also affect other allocations, including property taxes, outstanding payments for previous seasons' crops, etc. Given the extra complexity involved in mid-season closings, many parties schedule closings post-harvest.

13) Equipment. Even though many agricultural real estate transactions are primarily concerned with the land, equipment is commonly included. This can include irrigation infrastructure, storage (e.g., fruit bins), vehicles, trailers, or even mobile homes. The parties should clearly define what is included and what is excluded in the purchase agreement (and related bill sale). When preparing a list of equipment included in the transaction, the seller should make note of any equipment leases or other liens that might attach to the equipment; the seller then should determine if the equipment liens or financing agreements will be paid off or settled at closing, or if the buyer will need to assume these agreements at closing.

14) Mobile Homes. Mobile homes and trailers are a subset of equipment that require extra attention. Agricultural real property often contains mobile homes used for employee housing or leased to third parties. Depending on the jurisdiction and the title status of the mobile home, the actual transfer to the buyer can require paperwork that neither party anticipates. This is often a lead time item which can interfere with the parties' closing timeline (or may have to be resolved on a post-closing basis).

15) Oral Contracts - In the event the seller's operations include verbal contracts or leases, the buyer will likely require that those oral contracts are memorialized prior to closing. As noted above, oral and informal agreements may be common in rural areas, but sophisticated buyers will generally require all agreements to be in writing. As with title and survey matters, this can lead to friction between the parties.

This material is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

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