

Overview of Common Agriculture Contracts

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I. AGRICULTURE PRODUCTION CONTRACTS

A. Overview

1. *Applicability* – It is an agreement under which a producer agrees to raise a commodity in a manner established by the contractor and to deliver the commodity to the contractor while the contractor agrees to pay the producer in return.
2. *Definitions* –
 - a. A "*commodity*" can include livestock, raw milk, and crops.
 - b. "*Livestock*" may include beef cattle, dairy cattle, sheep, and swine.
 - c. "*Crops*" typically include plants used for food, animal feed, fiber, or oil, if the plant is classified as a forage or cereal plant.¹

B. Types – A production contract can be established in a variety of ways, including:

1. *Sales Contract*

- a. Often used for the sale of crops.
- b. Producer owns crop until it is sold to the contractor.
- c. Generally subject to the Uniform Commercial Code (“UCC”).

2. *Personal Service Contract*

- a. Producer provides services rather than supplying the commodity.

¹ CARI B. RINCKER AND PATRICK B. DILLON, FIELD MANUAL: LEGAL GUIDE FOR NEW YORK FARMERS & FOOD ENTREPRENEURS (2013) at 90-91 (hereinafter “**Field Manual**”).

- b. Contractor supplies commodity and retains full ownership interest in the commodity throughout the duration of the contract.
- c. Generally subject to applicable state common law governing contracts rather than the UCC.²

3. *Bailment*

- a. Producer has possession of the commodity, but the contractor retains title to the commodity and any resulting crop. Producer must exercise care in safeguarding the commodity and protecting the contractor's intellectual property interests.
- b. Often used in seed production contracts (i.e., "Seedman's Contract") and grain storage arrangements.
 - i. Example – Farmer agrees to plant and cultivate contractor's seeds, and deliver resulting crop to the contractor in exchange for a fee. The farmer has no ownership interest in the seed or its crop, and he/she must use reasonable efforts to prevent third party access to the seed.³
- c. Generally subject to the UCC.

C. Potential Advantages – Agricultural production contracts provide the following potential advantages:

² Neil D. Hamilton, "Farmer's Legal Guide to Production Contracts" (January 1995), available at <http://nationalaglawcenter.org/publication/hamilton-a-farmers-legal-guide-to-production-contracts-174-pp-farm-journal-inc-1995/> (last visited June 24, 2016).

³ Id.

1. **For Producers:**

- a. **Income Stability** – A reduction in marketing risks, insulation from price swings, and a guaranteed market provide producers with a more stable income stream.⁴
- b. **Improved Efficiency and Expertise** – A producer may benefit from access to the contractor’s increased managerial, marketing, and technological resources.⁵
- c. **Greater Access to Capital** – Increased income stability may increase the producer’s credit rating, thus making him a more favorable loan applicant. Additionally, because the contractor provides most of the production inputs, the producer can increase his business volume without large increases in capital requirements.⁶
- d. **New Market Access** – A producer may be able to expand into new markets more easily by entering into a production contract with a contractor that is already established in that market.⁷

2. **For Contractors:**

- a. **Production and Quality Control** – A production contract establishes uniformity, which increases quality control and regulates production costs.⁸
- b. **Supply Management** – By controlling production, contractors can respond more efficiently to fluctuating

⁴ Id.

⁵ Economic Research Service/USDA, “Farmers’ Use of Marketing and Production Contracts/AER-747” (December 1996), available at http://www.ers.usda.gov/media/523263/aer747a_1_.pdf (last visited June 24, 2016).

⁶ Id.

⁷ Neil D. Hamilton, “Farmer’s Legal Guide to Production Contracts” (January 1995), available at <http://nationalaglawcenter.org/publication/hamilton-a-farmers-legal-guide-to-production-contracts-174-pp-farm-journal-inc-1995/> (last visited June 24, 2016).

⁸ Phillip L. Kunkel, Jeffrey A. Peterson, and Jessica A. Mitchel, “Agricultural Production Contracts” (June 2009), available at http://blog.uvm.edu/farmvia/files/2013/05/DF7302_Minn-Ext-Ag-Production-Contracts.pdf (last visited June 24, 2016).

market demands. Production contracts may also limit a contractor's risk of acquiring oversupplies that exceed customer demand.⁹

- c. **Expansion and Diversification** – Production contracts allow contractors to increase business volume and to expand into more diverse markets without the expense of acquiring the necessary land, machinery, and labor.¹⁰
- d. **Intellectual Property Protection** – A production contract dictates how a contractor's intellectual property is to be handled and protected to ensure its value is preserved.¹¹

D. Potential Disadvantages

1. ***Loss of Entrepreneurial Independence*** – The increase in quality control and uniformity that production contracts are designed to limit a producer's freedom to explore alternative practices.¹²
2. ***Assignment of Risks*** – Both parties must thoroughly evaluate the risk associated with a potential production contract. The assignment of risks should be balanced between the contractor and the producer. Issues of ownership and responsibility for loss should be clearly specified.¹³
3. ***Concentrated Production*** – Because contractors design production contracts to create uniformity and control production, they may also thwart diversity and lead to product homogeneity. That in

⁹ Neil D. Hamilton, "Farmer's Legal Guide to Production Contracts" (January 1995), available at <http://nationalaglawcenter.org/publication/hamilton-a-farmers-legal-guide-to-production-contracts-174-pp-farm-journal-inc-1995/> (last visited June 24, 2016).

¹⁰ Economic Research Service/USDA, "Farmers' Use of Marketing and Production Contracts/AER-747" (December 1996), available at http://www.ers.usda.gov/media/523263/aer747a_1_.pdf (last visited June 24, 2016).

¹¹ Neil D. Hamilton, "Farmer's Legal Guide to Production Contracts" (January 1995), available at <http://nationalaglawcenter.org/publication/hamilton-a-farmers-legal-guide-to-production-contracts-174-pp-farm-journal-inc-1995/> (last visited June 24, 2016).

¹² Economic Research Service/USDA, "Farmers' Use of Marketing and Production Contracts/AER-747" (December 1996), available at http://www.ers.usda.gov/media/523263/aer747a_1_.pdf (last visited June 24, 2016).

¹³ Id.

turn may severely limit the degree of influence producers have in the agricultural community. Furthermore, control of food production is becoming more concentrated with a small handful of contractors dominating the market. Some fear that agricultural education, research, and environmental concerns will increasingly echo the interests of those large contractors, furthering primarily their corporate agendas.¹⁴

4. ***Limited Natural Disaster Relief*** – Most disaster relief programs compensate the owner of the commodity for its loss with no provisions for the producer. Therefore, producers working under personal service contracts or bailment contracts may assume serious financial liability in the event of a natural disaster.¹⁵

E. State Regulations of Production Contracts

1. ***Arkansas*** – Arkansas Livestock and Poultry Contract Protection Act, Arkansas Code § 2-32-201
 - a. The Act, passed in 2005, only has regulations in place for contracts associated with ***livestock and poultry***, not crops.
 - b. **Provisions of Statute:**
 - i. Readability and disclosure requirements for production contracts, including disclosure of a list of “material risks” such as contract duration, termination provisions, and provisions affecting calculation of a grower’s compensation;
 - ii. Prohibition of unfair or deceptive trade practices or other violations of the law;
 - iii. Prohibition of any terms that would inhibit growers from associating and comparing contract terms, i.e. confidentiality clauses;

¹⁴ Id.

¹⁵ Scott Marlow, “Disaster Programs and the Changing Face of Agriculture in North Carolina” (2007), available at <http://rafiusa.org/docs/disasterprograms.pdf> (last visited June 24, 2016).

- iv. Prohibition of any terms that would inhibit growers from seeking professional, legal, financial, or agricultural advice relating to the contract; and,
- v. Guarantee of the right to file suit in court.

2. **Georgia** – Georgia Code §2-22-1 – §2-22-5

- a. Only provides protection for *poultry* contract growers with limited regulation of the bargaining process and compensation determinations.
- b. **Provisions of Statute:**
 - i. Requires that grower be permitted to review the contract with advisors for three days prior to execution, and, with limited exceptions, be entitled to cancel the contract for three days after execution;
 - ii. Regulates the contractor's actions under the law by providing that the grower has a right to statistical information affecting compensation under the contract;
 - iii. Right for growers to be present during weighing that affects compensation under the contract; and,
 - iv. Provides for private right of action for violations, consistent with Georgia laws regarding unfair or deceptive business practices.

3. **Illinois** – Agricultural Production Control Code, § 505-17-1 – § 505-17-99

- a. Provides protection for *grain, seed, livestock and other commodity* production contracts
- b. **Provisions of Statute:**

- i. Readability and indexing of the contract to ensure equal understanding of the contract's terms by producers and contractors;
- ii. Allows for confidentiality clauses, but requires that producers be permitted to discuss the contract with certain advisors, business partners, and family members;
- iii. Requires complete disclosure and explanations of special provisions, such as disease protocols or grain identity preservation, to ensure that producer is aware of terms and requirement to adhere to them;
- iv. Prohibits contract terms that allow contractor to unilaterally terminate the contract;
- v. Allows for cancellation of contract if: (i) termination is the result of a legitimate unexpected or uncontrollable event applied to the contractor; or (ii) the producer breaches a material term of the contract or voluntarily abandons the contractual relationship;
- vi. Requires that contractor give notice and compensate producer for any capital investments required in contract if contractor terminates contract;
- vii. Gives Illinois Attorney General enforcement authority for violations relating to production contracts with fines of up to \$10,000; and,
- viii. Provides producers private right of action relating to contractor's performance of contract.

4. *Iowa*

a. **Iowa Code** – Chapter 202

- i. Prohibits use of confidentiality clauses in contracts for the production of *livestock, raw milk, or a crop*; and,
- ii. A Contractor who executes a production contract with a confidentiality clause is guilty of a “fraudulent practice,” an aggravated misdemeanor under Iowa criminal law.

b. **Iowa Code** – Chapter 579B

- i. Creates an agricultural lien for producers of livestock, raw milk, or crops under a production contract;
- ii. Applies to the commodity or if sold, to the proceeds of the commodity; and,
- iii. Lien is perfected by filing a financing statement with the Secretary of State and terminates one year from the date the commodity is no longer under the authority of the producer.

c. **Iowa Code** – Chapter 654B

- i. Provides a mediation process for disputes arising out of livestock care and feeding contracts;
- ii. Voluntary mediation may be requested by producer for any dispute;
- iii. Mediation is mandatory before a producer may file suit in court; and,

- iv. Judicial review limited to whether mediator's decision was abuse of discretion (clear and convincing standard).

5. *Kansas*

a. **Swine Production Contracts** – Kansas Statutes §16-1501 – §16-1506

- i. Implied promise of good faith is applied to all production contracts;
- ii. Parent companies are liable for claims against subsidiaries;
- iii. Contracts with capital investments of at least \$100,000 and life of at least five years, may not be canceled without notice and time to cure for producer, except in instances of voluntary abandonment, material breach, or conviction of a related offense;
- iv. Contractors must “pay a fair price” and “make all payments promptly;” and,
- v. Contract must provide for disputes to be submitted to mediation or arbitration.

b. **Poultry Production Contracts** – Kansas Statutes §16-1701

- i. Requires setting forth the nature of material risks faced by the producer;
- ii. Expressly protects contractors from disclosure of trade secrets;
- iii. Prohibits contractors from terminating contractors with producers that have performed all of their obligations under the contract;

iv. Prohibits denying producer ability to address a dispute in court.

6. *Minnesota* – Minnesota Statutes § 17.90 – § 17.98

a. Applies to *crops, livestock, and poultry*.

b. **Provisions of Statute:**

i. Provides for mandatory cover sheet to all contracts alerting producers of potential legal rights and obligations associated with the contract and indexing its provisions;

ii. Contract must contain written disclosures of risks to producers;

iii. Prohibits confidentiality clauses;

iv. Grant of right to producer to cancel contract within three days, or such other period designated by contract;

v. Contractors must reimburse producers for capital investments required by the contract, with limited exceptions;

vi. Contractors may not terminate contracts for a producer's failure to perform the contract without providing producer with notice and time to cure the breach;

vii. Provides a right to a letter of credit for producer pre-payments for agricultural inputs;

viii. Parent companies are liable for debts of subsidiaries;

- ix. A covenant of good faith is implied in all production contracts;
 - x. Provides for oversight by Department of Agriculture; and,
 - xi. Provides for a process by which Commissioner of Agriculture reviews the contract.
7. **Wisconsin** – Wisconsin Administrative Code § 101.01 – § 101.07; § 100.04
- a. Applicable to *vegetable* procurement contracts and *livestock*, which includes *poultry*.
 - b. **Mandatory Provisions:**
 - i. Contracts must be in writing;
 - ii. 72-hour cancellation period for producers;
 - iii. Clear and conspicuous disclosure of terms, such as payment amounts and formulas;
 - iv. Disclosures relating to requirements not to harvest some acreage;
 - v. Identification of harvesting responsibilities; and,
 - vi. Arbitration of disputes at request of producer.
 - c. **Prohibited Provisions and Practices:**
 - i. Charging producer more than fair market value of seeds or services;
 - ii. Relieving contractor for liability for its negligence or shifting contractor liability to producer;
 - iii. Failing to pay producer according to contract terms;

- iv. Misrepresenting contract terms as inducement to producer to sign agreement;
- v. Conspiring to fix prices or restrict trade;
- vi. Refusing to contract with producer in retaliation for certain actions by producer, such as filing complaint with government, seeking arbitration for dispute, or associating with or organizing other producers; and,
- vii. Charging a producer for defective seeds for which the contractor has been reimbursed.

F. New York Agricultural Production Contracts –

1. Production contracts are used by a limited number of farms in New York.
2. The 2012 US Census revealed that of the 914 farms in New York that sold broilers and other meat-type chickens, only two farms raised and delivered them under production contracts.¹⁶

G. Illinois Agricultural Production Contracts –

1. Similar to New York, Illinois does not have a large use of production contracts on its farms.
2. Of the nearly \$17 billion in value of commodities from farms in Illinois, only \$715,000 accounts for commodities related to production contracts.¹⁷

¹⁶ “New York State and County Data,” 2012 Census of Agriculture, United States Department of Agriculture (May 2014), available at https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/New_York/nyv1.pdf (last visited June 24, 2016).

¹⁷ “Illinois State and County Data,” 2012 Census of Agriculture, United States Department of Agriculture (May 2014), available at https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Illinois/ilv1.pdf (last visited June 24, 2016).

H. Statistics Regarding Use of Production Contracts in the US –

1. In 2008, agricultural contracts covered 39% of U.S. agricultural production.¹⁸
2. There is a great difference in the commodities that use contract production contracts. More than 90% of broiler, sugar beet, and tobacco production is through contracts whereas less than 30% is used for corn, soybean, and wheat production.¹⁹

II. PURCHASE AGREEMENTS

A. Land

1. ***Inspecting the Property.*** It is important to inspect the land before agreeing to purchase it or signing any agreements. Some things that should be kept in mind when inspecting the property are:
 - a. **Zoning.** It is important that purchaser know that the intended purpose for which property is being acquired meet the zoning specifications of that area.
 - b. **Ownership.** Along with determining the zoning of the property, it is important to learn the ownership of property to ensure that there are no interests held by third parties, such as mortgages, liens, judgments, easements, and any deed restrictions. There should be a title search done on the property.
 - c. **Boundaries of Property.** It is important to know the boundaries of the property when inspecting it to ensure that purchaser knows how much property is being bought as well as ensuring that all of the property fits the zoning requirements for the intended purpose. In some farm

¹⁸ MacDonald, James M., and Penni Korb. *Agricultural Contracting Update: Contracts in 2008*. EIB-72. U.S. Dept. of Agriculture, Econ. Res. Serv. (February 2011), available at <http://www.ers.usda.gov/media/104365/eib72.pdf> (last visited June 24, 2016).

¹⁹ Id.

purchases, consider hiring a surveyor to confirm the boundaries. It is sometimes useful for the purchaser to do a walk-along with the surveyor so the purchaser gets to know the boundaries.

- d. **Water Rights.** Depending on what the intended use for the property is, the purchaser should know what water rights are associated with the property. This can generally be learned from the Water Authority in the county where the property is located.
- e. **Minerals Rights.** The purchaser should investigate that there are not any issues regarding minerals rights with the property before its purchase.
- f. **Buildings.** It is important to inspect the buildings currently located on the property to determine if any improvements or repairs are required in order to determine the cost of repair and who should be responsible for it.
- g. **Terrain.** Visiting the property before purchase will give the purchaser a chance to inspect the terrain to ensure it is suitable for his or her intended purpose.
- h. **Previous Use of Land.** An inspection will also allow purchaser to see how land was previously used. This will provide insight into whether or not the land is suitable for purpose of purchaser.
- i. **Environmental Contamination.** In order to be protected from liability under either federal or state law for environmental contamination by the seller, the buyer should consider performing a Phase I assessment to create a defense of the innocent purchaser. This involves a visual inspection of the land, a public records review, and interviews with past owners, neighbors, or others who would know about the past uses of the property. This is particularly important if the land was previously used as a garage, fueling area, or dump.

2. **Terms of Agreement.** The following are a few terms to consider with a farm purchase agreement:
- a. **Description of Property.** The agreement should clearly state the boundaries of the property.
 - b. **Payment.** The method of payment and schedule of payment should be clearly detailed in the agreement.
 - c. **Title Insurance.** The agreement should include the purchase of a title insurance policy by the purchaser, which will protect him or her in the event that there are defects in the title.
 - d. **Property Taxes.** Agreement should state who will be responsible for property taxes upon purchase of agreement, especially if there is more than one buyer. Agreement should also state who is responsible for any taxes associated with a deed transfer. Agreement may require seller to pay for them or have provision where buyer can deduct from total price if he pays for taxes.
 - e. **Changes to Property.** The seller might want to limit the types of changes that can be made to the property therefore, those should be indicated clearly in the agreement.
 - f. **Condition of Property.** Agreement should state whether any improvements or repairs need to be made to the property and who will be the responsible party for such improvements. If no improvements are to be made, agreement should indicate that land is being sold “as is.”
 - g. **Easements/Access.** The purchaser should determine whether any easement rights are required for the use of the land and should have such easement included in the agreement.
 - h. **Water Rights.** The water rights that are attached to the property should be specifically stated in the agreement.

- i. **Mineral Rights.** If there are any mineral rights associated with the property, they should be indicated in the purchase agreement including what the rights are and who owns them.

B. Animals

1. *Commercial Livestock*

- a. **Terms of Agreement.** Here are some terms to consider for purchase agreements relating to commercial livestock:
 - i. Description of Animals. The type of animal to be purchased and description of the animals should be included in the agreement.
 - ii. Livestock Health. Buyer may want assurances about the health of the animals being purchased and therefore should include representations that the seller makes about health of animals, including breed and fertility.
 - iii. Payment. The purchase price, method of payment, and schedule of payment should all be clearly stated.
 - iv. Delivery. The method of delivery of the purchased animals shall be stated clearly, including who is going to be liable for animals during the delivery process and who will be responsible for transportation costs.
 - v. Inspection of Animals. Buyer should include a clause that allows him or her to inspect the animals upon delivery to ensure the animals match the description as stated in agreement and whether or not the animals are in good health.

- vi. Insurance. If the livestock will be transferred to buyer in batches rather than all at once, the buyer can require seller to maintain insurance for the livestock in the event of death, natural disaster, act of god, accident, injury, or disease.
- vii. Confidentiality Clause. Parties may exchange confidential information about breeding of livestock that may require including a confidentiality clause.

2. *Seedstock Livestock*

a. **Using “Suggested Sale Terms” From Livestock Breed Associations Seedstock Sales²⁰**

i. Background.

1. Some livestock breed associations have now posted “Suggested Sales Terms” on their breed association website.

2. These terms are sometimes silent on important issues. Moreover, livestock producers are oftentimes confused on whether these terms apply to a livestock sale.

ii. Contractually, These Terms are not Binding unless the Parties Make Them.

1. There are many livestock breed associations that are developing “suggested sale terms” (e.g., American Simmental Association's (“ASA”) Suggested Sale Terms and Conditions).

2. It’s great that livestock breed associations are giving members some suggested guidelines that memorialize important terms

²⁰ Field Manual at 95-96.

such as choice of law, health requirements, registration, identification, pedigree, guarantees for fertility/breeding, embryo transfer history, disclosure of genetic defects and other material information, genetic testing, return of animal, and other guarantees such as the development of scurs; however, it is important to note that these terms are simply "suggested" and are not necessarily legally binding. Both parties have to agree to the terms in order for them to be legally binding in a contract.

3. UCC Statute of Frauds applies to sales over \$500, which requires that contracts for livestock over \$500 be in writing in order to be enforceable.

iii. What Isn't Included?

1. Pay attention to material terms that are not included into the suggested terms.

2. For example, the ASA Suggested Sale Terms and Conditions are silent about a guarantee for the bull's semen's ability to freeze.

iv. Practical Pointers.

1. If a seller would like to abide by the suggested terms of the breed association, he/she should have a copy of the breed association's suggested sale terms available for all potential buyers and/or have a link on the sale website.

2. Seller should conspicuously note in the sale catalog that the sale abides by the suggested terms and conditions set forth by the breed

association and state any other “tweaks” or additional terms that are applicable.

3. Finally, Seller should have Buyer agree to these terms, any other terms in writing upon registration at the sale.

4. From a cultural standpoint, this is almost never done and livestock clients will be reluctant to add this step. However, it should nonetheless be suggested to avoid potential issues in court.

C. Farm Machinery/Equipment

1. There can be multiple type of sales²¹ of farm machinery or equipment:
 - a. **Outright Sale.** An outright sale occurs when the ownership is transferred to the buyer and the seller is paid in full at one time.
 - b. **Installment Sale.** The buyer obtains immediate possession and use of machinery, but seller obtains payment on a set schedule.
 - c. **Gradual Sale.** This type of sale is when a line of machinery is being sold one or two items at a time.
 - d. **Lease with Option to Buy.** This option allows a party to lease the equipment for a set term and then purchase the equipment upon completion of the lease.
 - e. **Lease with Gradual Sale.** This option is for parties that are leasing multiple pieces of equipment and wish to purchase them during the terms of the lease.

²¹ Don Hofstrand, “Transferring Ownership of Farm Machinery,” Iowa State University Extension and Outreach (August 2013), available at <https://www.extension.iastate.edu/agdm/crops/pdf/a3-32.pdf> (last visited June 27, 2016).

- f. **Rollover Purchase.**²² This type of agreement allows the purchaser to acquire new or nearly new equipment each year. The purchaser pays the difference between the price of the new model and the trade-in allowance for the old one. This allows the purchaser to have new machine that is generally still under warranty, thus eliminating cost of repairs. This type of purchase can also be used to purchase equipment that is one or two years older rather than brand new to save on costs.

2. *Benefits of Purchasing Over Leasing.*

- a. Owner has more control over how much the machine is used and for how long.
- b. Builds equity for the owner as machinery can hold its value for many years and can serve as collateral to obtain funds for other ventures.

3. *Terms of Agreement.*

- a. **Description of Machinery.** The agreement should identify each piece of machinery including the make, model, and serial numbers.
- b. **Delivery.** The agreement should specify how delivery will be made, when, and where, including who will be responsible for any damage or loss during delivery. Buyer can also require that acceptance not occur until buyer has had a chance to inspect the machinery for damage.
- c. **Title.** A clause should be inserted where the seller represents that he owns the equipment that is defined in the agreement and being sold to buyer and that such equipment is free of any liens.

²² “Purchasing and Leasing Farm Equipment,” North Central Farm Management Extension Committee (February 2014), available at <http://aglease101.org/DocLib/docs/NCFMEC-05.pdf> (last visited June 24, 2016).

- d. **Maintenance and Repair.** The party that will bear the responsibility for maintenance and repair of the machinery should be clearly indicated. If parties will be sharing the responsibility, who will perform which services for the machinery.
- e. **Insurance.** If the seller is being paid on a schedule rather than all at once, he can require the buyer to maintain insurance on the equipment until buyer has fully paid the purchase price.
- f. **Default by Buyer.** If the buyer is to pay the purchase price in installments, a clause should be inserted to determine what happens if there is a default by the buyer.

III. LEASES

A. Leases for Land

1. *Farm Leases*

a. **Type of Farm Leases**²³

i. Cash-Rent Lease:

1. This is where the tenant usually pays a fixed dollar amount in rent (either on a per acre or whole farm basis).

2. These types of leases may be modified depending on crop yield (i.e., increase in good years and decrease in bad years). In this scenario, the landlord is not as involved in crop production giving the tenant more autonomy.

²³ Field Manual at 108.

3. As a caveat, because the landlord is not "actively engaged in farming" he/she may not be able to participate in some federal programs. Furthermore, the income is not subject to self-employment tax and is not considered to be earned income for the purposes of determining how social security may be modified if the farmer has previously retired.

ii. Crop-Share Lease:

1. Typically, in these arrangements, the landlord will share input costs (including but not limited to seed, fertilizer, fuel) while the tenant provides all of the labor and remaining input costs.

2. Once harvested, proceeds will be divided according to the agreement (normally ranging from 25/75 to 50/50). In this scenario, the farmers both share the risk with the other person and the landlord will typically satisfy the "actively engaged in farming" requirement of federal programs.

3. The downside (or upside - depending on one's view) for the tenant is that he/she loses autonomy because the landlord is involved in the decisions of the operation.

4. Rental income will be subject to self-employment taxes.

iii. Hybrid Leases:

1. In this type of lease, the landlord will receive a minimum fixed rent payment while sharing in some of the profits, losses, and decision-making.

2. It is especially important to memorialize the rights and responsibilities of each party in this agreement.

2. *Important Lease Terms*²⁴

- a. **Parties:** Ensure that all intended parties to the lease are named and adequately identified by the inclusion of their addresses or other unique identifying information.
- b. **Purpose:** It is recommended that farm leases note the purpose of the lease (e.g., corn production).
- c. **Property Description:** Ensure an accurate description of the leased ground is included. This should include a list of buildings and structures the tenant has access to.
- d. **Lease Term:** The length of the lease term should be clearly stated.
 - i. Under New York law, a real estate lease can be for as long as the parties wish; however, if the terms are longer than three (3) years then the lease must be recorded, just like a deed or a mortgage would in the property records office.
- e. **Renewal Terms:** Include provisions allowing for any renewal of the lease and for notice of intent to renew (or not renew). A good farm property lease should also establish agreed-upon compensation for any fall fieldwork completion, in the event of nonrenewal of the lease.
- f. **Lease Price & Payment Terms:** Whether the agreement involves crop sharing, fixed-cash, flex-cash, or some other arrangement, the lease price should be spelled out in writing. Additionally, payment terms should be memorialized (including when payment is due, where it

²⁴ Field Manual at 109-111

should be sent, and how rent can be paid). Furthermore, the lease should clearly state who is responsible for property taxes, farm insurance, and utilities.

- g. **Duties and Prohibitions:** The lease should clearly state the duties and prohibitions of both the landlord and the tenant in the farm lease. For example, it might be the landlord's duty to perform all repairs and maintenance for the property.
- h. **Rights to Natural Resources:** The lease should state whether the tenant or landlord will retain rights to natural resources on the property including, but not limited to: wind rights, solar rights, mineral rights, timber rights, fishing rights and/or hunting rights. It might be appropriate to also describe recreational rights such as camping.
- i. **Reporting Requirements:** Landowner should also discuss and include any reporting requirements, such as what must be reported, along with when and how the tenant must make those reports. For example, does the tenant have to provide grid sampling, yield monitor data, weigh wagon results or test plot results to the landowner? Can the landowner ask the cooperative how many bushels of grain were delivered?
- j. **Default:** The lease may include a list of actions that count as defaults in the terms of the lease, specifying whether part or all of the listed defaults can be cured or waived by the other party.
- k. **Ability to Assign or Sublease:** The lease should state whether the tenant can assign or sublease its obligation to another farmer.
- l. **Notice:** Include notice provisions, to specify how and when to give notice of default, notice of intent to terminate the lease, or any other notice needed to make the terms of the lease work.

- m. **Termination:** The lease should include procedures for terminating the lease, either voluntarily or involuntarily (for example, in case of a default).
 - n. **Miscellaneous Provisions:** With farm tenants, common provisions include indemnity clauses or hold-harmless agreements, requiring the tenant to pay any damages that are assessed against the landlord, if someone sues the landlord or the landlord is cited by the government, based on something the tenant has done on the land. They may also include a choice of law, choice of forum for disputes, Alternative Dispute Resolution clause (e.g., requiring non-binding mediation and then binding arbitration), confidentiality clause, and severability clause. In many cases, it is beneficial for the lease to state that the landlord and tenant are not in a partnership or joint venture.
3. ***Termination of the Farm Lease.*** When terminating a farm lease, landlords must give proper notice under the terms of the lease and state law.
4. ***Liability for Tenant Activities***
- a. When is a landowner legally liable for harm that is caused to others by a tenant's activity on leased farmland?
 - i. For example, a tenant who spreads manure or pesticides on the property might create a nuisance that affects a neighbor, who then wants to sue the landlord because the landlord has more assets or better insurance against which to collect. Will the landlord have to pay? What can the landlord do to protect himself from liability?
 - b. The general principle is that everyone who creates a nuisance or participates in maintaining the nuisance is liable.
 - i. This means that landowners cannot avoid liability simply by leasing their land to tenants – what

matters is whether the landowner knew about how the tenant was likely to use the property when the lease was signed or renewed.

c. Practical Pointer:

- i. Review leases with an eye towards seeking indemnification and hold harmless agreements from any tenant who accepts manure under a manure-management plan or manure-easement arrangement, because the landlord faces at least the potential for legal liability to third parties for any nuisance created, when a tenant uses manure as part of the operation.

5. Grazing Leases

- a. **Definition.** A grazing lease is an agreement in which a landowner allows a tenant to graze livestock on the landowner's property. The livestock can be of any species and of any class.
- b. **Lease Terms.** Here are some provisions to consider:
 - i. Parties. The lease should identify the parties by name and include home addresses, mailing addresses, and phone numbers for both parties.
 - ii. Term. The term for which the lease will be in effect must be specified in the lease so that the tenant is aware when his livestock are allowed to graze on the land.
 - iii. Description of Land. The grazing lease should include a specific description of the land where the animals will be allowed to forage.
 - iv. Record Keeping. The lease can also require the tenant to keep record of the number of livestock grazing the property and each date when the grazing

occurred. The tenant would turn over these records to the property owner at the end of each grazing season.

- v. Services Provided by Landowner. The lease should specifically state which services, if any, the landowner will provide. Some of these services may be building or repairing fences to keep the livestock on the specified land, maintaining the water supply, providing seeding, fertilization and weed control, and maintaining corrals or sheds for the livestock.
- vi. Water Supply. The lease should indicate whether water will be supplied by the landowner or if the tenant must haul his own water. The lease should state who is responsible for maintaining the quality of the water, fixing the pump and what happens if the water supply goes dry.
- vii. Lease Rate. The lease should state how much the rent will be for the tenant to graze his livestock. Here are three example methods²⁵ that can be used to estimate the rate:

1. The Market Value Approach. This approach requires knowing the local rental rates for grazing. Average local rates can be increased or decreased based on size of land, forage quality, availability of stock water, presence of poisonous plants, and responsibility of making or maintaining improvements.

2. The Anticipated Income Approach. This approach looks at the expected returns for

²⁵ Kate Binzen Fuller and Jeff Mosley, "Grazing Leases," Montana State University Extension MontGuide (January 2016), available at <http://store.msuextension.org/publications/AgandNaturalResources/MT201601HR.pdf> (last visited June 24, 2016).

both the landowner and the tenant. The landowner wants the grazing lease to cover property taxes, the opportunity cost on the value of the land (what income landowner would have earned if he used the land for another purpose), the depreciation of improvements and operating costs. The tenant wants to be assured of reasonable economic return for grazing, which takes into consideration livestock production costs and expected price of livestock.

3. Alternative Feed Approach. This method estimates the value of the grazing land by comparing it to an alternative feed source, such as hay or stubble aftermath. This approach is most helpful when both sources, the grazing and alternative feed source, provide the livestock with similar nutritive value. Price of the alternative feed should be compared at the local level.

viii. Expressing Lease Rates. Lease should also include how the rate shall be charged, i.e. per acre, whole tract, animal unit month (“AUM”), head, share of grain, or variable basis.

1. Per Acre. These rates differ based on the productivity of the grazing resource and lease conditions. The landowner generally uses the same rental rate each year for the duration of the lease while the tenant assumes the risk of annual fluctuations in forage production due to weather.

2. Per Whole Tract. These rates are for leasing a block of land or ranch for a specified annual fee. This type of lease rate is typical when leasing an entire ranch for a multiple years or if there is a mixture of land types

(rangeland, seeded pasture, crop aftermath forest) in the unit being leased.

3. Per Animal Unit Mouth (AUM). This type of rate allows for multiple types of animals to graze the land using the AUM as a common denominator for determining the rate at which the lease will be charged. To calculate this properly, the stocking rate must be determined for each type of animal that will be grazing on the land. The local stocking rate for the state should be consulted when making determination to charge lease based on this standard.

4. Per Head or Per Pair. This lease rate is usually charged per month or season and varies based on type of livestock.

5. Per Share of Gain. Applies to seasonally-grazed, weight-gaining animals, such as stocker cattle, replacement heifers, and lambs. These charges can be based on pre-determined amount for each pound the animal gains during the grazing season or a share of the total weight gained during the season.

Ex: Steers grazing from June 1 to August 30.

Initial weight: 600 lbs.

Final weight: 900 lbs.

Total gain and price: 300 lbs. x \$0.50 = \$150.00/steer

6. Variable Lease. Variable leases use a base rate that is fixed for the term of the lease and a variable rate that allows the lease rate to vary annually based on livestock prices.

- ix. Stocking Limitations. The grazing lease should include limitations on the number of head, species, and breed of animal permitted under this lease.
- x. Care of Livestock. Lease should be specific about whether or not landowner is willing to provide care for the livestock, especially if livestock owner lives at a great distance from the grazing land. If landowner does agree, lease should be clear about what duties he has in taking care of the livestock, including the type of feed the animals should receive and who will be responsible for health care, such as vaccinations and veterinary care.
- xi. Maintenance and Improvement. If the landowner won't be responsible for the maintenance and improvements, the lease should state how and when the tenant will be compensated for making such repairs.
- xii. Insurance. The tenant can be required to maintain liability insurance for the livestock that will graze the leased property. Landowner can require the tenant to add him as an additional insured.
- xiii. Security Deposit. A security deposit can be required from the tenant to cover any damage caused to the property, improvements, fences, crops, or livestock while the tenant is in possession of the property.
- xiv. Landowner's Rights to Property. The lease should include a clause for any rights that the landowner wishes to retain to the property for the duration of the lease. Unless specifically stated, the tenant will be granted exclusive possession of the property for the length of the lease so it is important that the landowner's rights are specified if he wishes to use or enter the land for any purpose, including inspection of premises and caring for crops.

xv. Vehicles. The lease should state where tenant's vehicles can travel on the land, i.e. on established roads and trails unless required by emergency or to enable weed control.

xvi. Termination Terms. Grazing leases should include a clause that allows for the lease to be terminated in the event of fire, drought, flood, and other emergencies. The lease should also state other reasons which will cause the termination of the lease, including breaching other terms of the lease.

c. Other Clauses to Consider.

i. Confidentiality Clause. Landowner may not want the terms of the lease released in the event that he wishes to use different terms for another grazing lease.

ii. Dispute Resolution. In every contract, it's prudent to consider how the parties would like to resolve any disputes that may arise between them (e.g., non-binding mediation, binding arbitration, and/or choice of court forum) and whether a prevailing party should pay for attorneys' fees. If the parties select a method of Alternative Dispute Resolution such as mediation or arbitration, the parties should still be able to get to court in an emergency.

iii. Liability and Indemnification. Landowner may want to include a liability and indemnification clause to protect himself should there be a claim that arises from the action or inaction of the tenant, his agents, or employees.

B. Animal Leases

1. *Bull Leases*

- a. **Provisions for a Bull Lease.** Here are some provisions to consider:
 - i. **Term:** The term of the breeding season should be listed (e.g., March 1 to June 30, July 1 to September 1).
 - ii. **Number of Bulls:** Note the number of bulls leased from the lessor plus any other bulls leased from other cattlemen during the breeding season. If the bull is registered with a breed association, it is recommended that the breed registration number and a copy of the registration paper be included. Cattlemen should consider putting the approximate weight and body condition score of the bull at the time of delivery.
 - iii. **Payment:** The lease should note the amount owed, due date, payment instructions, type of payment accepts, interest and/or penalties for late payments. In some cases, the bull owner may request a deposit be made on the bull that will be returned upon the safe return of the animal to his/her farm or ranch.
 - iv. **Bull Owner Representations:** The lessee may request that certain representations be made such as bull health, body condition score, fertility, breed registration, pedigree, structural soundness, libido, genetic DNA markers, strength with Expected Progeny Differences (“**EPDs**”). If genetic DNA markers are relied upon by the lessor, there should be clause indicating that the bull owner is not liable if the genetic testing company made a mistake.
 - v. **Lessee Representations on Cow Herd:** The lessor may request the certain representations be made

such as herd health, fertility (especially if there is a penalty for low conception rates), and number of cows that the bull(s) can breed with. The lessor may also choose to represent about certain nutrition programs that the cows follow and that animal handling practices used on the cattle operation are in compliance with federal and state animal welfare laws.

- vi. Health: It might be appropriate to add more detail about the health of the bull and the cow herd of the lessee including health certification from a licensed veterinarian or special tests that need to be performed.
- vii. Delivery of Bull to Cow Herd: Who will pick-up and/or drop-off the bull(s) and payment for same? Will there be a penalty for late pick-up or drop off after the breeding season? How will the bulls be transported?
- viii. Movement of Bull from Lessee's Farm: Will the lessee farmer or rancher be allowed to move the bull during the lease term?
- ix. Death, Injury or Illness of the Bull: who will be liable for the death or injury of the bull (i) before the lease date, (ii) during transportation or (iii) during the breeding season term? The bull owner should be promptly notified in these instances, including if the bull is missing.
- x. Injuries to People: The lease should discuss potential liability (and indemnification) from an injury to a family member, farm employee, farm visitor or child from the bull.
- xi. Insurance: Will either party be required to carry insurance?

- xii. Performance: The lessee farmer or rancher may wish to be compensated if the bull has a breeding rate under a predetermined level. If this provision is added, it is important that the lessor have a provision relating to conditions such as a drought, weather extremes or deficient grazing that may affect the bull's performance.
- xiii. Management: The lessee should promise to use good management practices, proper animal handling techniques. The lease should also address issue of veterinary care for the bulls. It is recommended that the breeder be required to immediately call the bull owner if the bull is in need of medical attention. Lease should also include specifics about which veterinarian may be used and who is to pay for expenses.
- xiv. Feed and Nutrition: The lessee cattlemen should provide the bull(s) with adequate feed and dietary supplements. Any special feed or nutrition requirements should be memorialized. The bull(s) should not be allowed to be returned to the owner in state of malnutrition. In this instance, the lease should explain what the lessee's responsibility or liability would be (e.g., payment for veterinary expenses and or feed during the recovery period).
- xv. Right of Inspection: Will the bull owner have the right to inspect the bull during the breeding term at the lessee's farm or ranch? The lease should also include if there will be a penalty if the bull is malnourished or has experienced a significant loss in weight.
- xvi. Ownership of Bull: The lease should specifically state that the title and registration papers, if applicable, will remain with the bull owner to prevent a later dispute about ownership.

- xvii. Option to Purchase: On that note, the lease may provide an option for the lessee to purchase the bull at the end of the term at a mutually agreed upon price. Perhaps the lessee is only given the option of first refusal to purchase the bull for 30 days after the termination of the lease.
- xviii. Title of Progeny: The lease should specifically state that the lessee owns the progeny sired by the bull and that no profits are to be shared from their sale.
- xix. Relationship of the Parties: The bull lease should specifically state that the parties are not forming a partnership, joint venture, agency, or any other formal business association. As an exception, if the bull lease includes a provision that the parties will sell the progeny from the bull and split the proceeds, then this *is* a partnership – instead of a “bull lease” the parties should have a “general partnership agreement”.
- xx. Termination: The lease should include a provision allowing either party to terminate the bull lease with adequate notice with certain conditions. Many bull leases allow for termination of the lease if either party materially breaches the contract.
- xxi. Confidentiality: In every contract between cattlemen, including bull leases, the parties should ask themselves whether there is any information that they may wish to remain secret (e.g., payment terms).
- xxii. Choice of Law: Contract law is state law so it is especially important to address this if the contract is between cattlemen across state or country lines.
- xxiii. Dispute Resolution: In every contract, it’s prudent to consider how the parties would like to resolve any disputes that may arise between them (e.g., non-binding mediation, binding arbitration, and/or choice

of court forum) and whether a prevailing party should pay for attorneys' fees. If the parties select a method of Alternative Dispute Resolution such as mediation or arbitration, the parties should still be able to get to court in an emergency.

2. *Horse Leases*

- a. **Generally** – There are many different types of leases for mares, geldings, and stallions.
- b. **Provisions to Consider** –
 - i. Consider enumerating payment/fee information for shoeing, using the horse's farrier, or training expenses.
 - ii. It may also be important to have a provision stated that the lessee does not have the right to sub-lease the horse and that no other riders are authorized to ride the horse unless expressly agreed upon in writing.
 - iii. Provisions pertaining to the care of the horse, especially hoof care, are important to memorialize in the contract. It's recommended that the horse lease specify that the horse is to stay at the stable location or farm absent express written permission.
 - iv. Insurance is particularly important in the horse industry so the lease should specify the burden to have mortality insurance, major medical insurance or loss of use insurance.
 - v. Additionally, the lessor may also request a provision indicating that he or she is not responsible for injuries resulting from elements of nature that can scare a horse such as thunder, lightning, rain, wind, wild and domestic animals, insects and reptiles.

- vi. If the horse will be used for horse-back riding, perhaps the lessor should be responsible for injuries resulting from irregular footing on particularly rough terrain.

3. *Ram Leases*

a. **Specific Lease Terms.**

- i. Description of Animals. The lease agreement should have clear description of the animal, including description of a permanent identification mark, such as an ear tag or tattoo. The lease should also include information about the breeding of the ram, including ownership of offspring.
- ii. Animal Health. The lease should require the ram to be vaccinated, specifying who shall be responsible for vaccinating the rams and who shall be responsible for the costs associated with veterinary fees.
- iii. Feeding. The type of feed, source of feed, and cost of feed should be specified in the lease.
- iv. Housing. The lease should specify the type of housing that the ram shall be placed in during the term of the lease.
- v. Ownership. Lease should state that the ownership rights shall remain with the owner of the ram and that this agreement does not allow the leasee to mark, brand, or identify the rams so that they would be confused as the leasee's rams.

4. *Boar Leases*

a. **Specific Lease Terms**

- i. Term and Pricing. The lease should indicate the length of the lease, the rental fee, when the fee is to be paid, and the method.
- ii. Description of Animal. The description of the boar should include name of boar, date of birth, name of sire, name of dam, registry/breed, registry number, identification of ear tags, and any significant marks on the boar itself.
- iii. Health of Animal. The lease should include warranties about the health of the boar, including information on fertility and previous breeding. Additionally, lease should state who will be the responsible party for assuring boar is properly vaccinated and any other veterinary fees associated with maintenance of the boar.
- iv. Care of Animal. The lease should indicate the type of feed that the boar should be given including who will pay for it. The lease should indicate the type of housing that the boar should be kept in.
- v. Delivery. Delivery method, location, and dates should be specified in the lease to ensure that the proper methods of transportation are used in transferring boar from owner to lessee.
- vi. Title. The title of the boar shall remain with the owner. The lease agreement should clearly state that this lease agreement does not transfer title of the animals to the lessee.
- vii. Insurance. Lease can require the lessee to maintain insurance for the term of the lease in case of an

event that causes injury or death to the leased animal.

- viii. Assignment of Agreement. Lease should state whether or not assigning the rights in the contract to a third party is allowed, either with or without permission from the owner of the boar.

C. Farm Machinery Leases²⁶

1. *Background*

- a. Farmers lag behind other industries in renting equipment instead of owning it, in spite of the many benefits of leasing equipment, which include tax deductibility of the payment, cash flow, keeping up with the latest technology, and not clouding the balance sheet with another asset and liability. Many modern farm operations are catching on to the fact that leasing equipment can make sense under the right circumstances.
- b. Equipment leases may be the best option for farm operations in situations like these:
 - i. When the farmer only needs the equipment for a *short period of time* or it will be obsolete in a few years;
 - ii. When the farmer has the ability to *deduct the cost of purchase* is limited by income and other deduction rules; or
 - iii. When at the end of a projected use period, the equipment will have *low residual value*.

²⁶ Field Manual at 124-125.

2. *Contract Terms for Machinery Lease*

- a. **Parties.** The names and contact information for the both parties should be listed.
- b. **Description of Machinery.** Contract should explicitly state a description of the machinery being leased, including type, make, model, size, the condition of the machinery, and approximate value.
- c. **Rental Terms.** This includes the rental period, the price for the rent, how and when payments should be made, requirement for security deposit, who is responsible for payment for operation of equipment (i.e., fuels, lubricants) and the allowed uses for the equipment.
- d. **Repairs.** The contract should state which party is responsible for repairs of the equipment. Contract should also include responsibility of leasing party to notify owner in case of major damage to equipment.
- e. **Insurance.** The contract should state whether the leasing party is required to carry personal and/or business liability insurance that will compensate for any actions committed while using the equipment.
- f. **Dispute Resolution.** Contract should state whether mediation or arbitration shall be used to resolve any disputes.

3. *Lease-to-Own Contracts*

- a. If, at the end of the term, the piece of equipment can be bought for little to no cost or can be bought for a set price that is not related to its residual value, it may be treated as a disguised sale by the IRS.
- b. Other warning signs include having a lease period that exceeds 75 percent of the useful life of the item or having the lease payments equal nearly the cost of acquisition.

- c. **20/20 Test:** The IRS has a rule called the 20/20 Test to help it determine if the lease is truly a sale.
 - i. The 20/20 Test comes from ensuring that 20 percent value remains in the equipment at the end of the lease and at least 20 percent of the useful life of the equipment remains at the end of the lease. Having the IRS determine how an item is treated for taxes is rarely a good thing for the tax filer.

IV. SPECIALIZED CONTRACTS

A. Custom Feeding Arrangements²⁷

- 1. **Applicability.** This is a contract between a livestock owner and a livestock feeder with market animals.
- 2. **Contract Provisions.** Here are a few provisions to think about in a custom feeding arrangement contract:

a. Identification of Livestock

- i. Type
- ii. Weight
- iii. Sex
- iv. Breed/coloring

b. Feeding and Nutrition

- i. Feeding regime
- ii. Expenses/ Finances
 - 1. Some feedyards will finance the feed bill for the owner.
 - 2. Is a deposit required?

²⁷ Field Manual at 92-94.

c. Division of Profit or Loss

d. Marketing of the Livestock

- i. Approximate timeline for marketing
- ii. Desired stage of finish

e. Delivery

- i. Approximate date of delivery
- ii. Deadline for delivery
- iii. Shipping/transportation costs

f. Shrink

- i. This is especially important if rate of gain is used to determine any type of payment.

g. Management practices

- i. Animal handling techniques
- ii. Feeding times
- iii. Access to water
- iv. Compliances with livestock animal welfare law

h. Repossession of livestock

- i. It should include a provision for the repossession of livestock if the livestock are not cared for properly.
- ii. Owner should be able to retrieve low-performing animals.

i. Manure handling

- i. Feeder is usually responsible for proper manure handling and storage.

- ii. Feeder usually takes on any liability associated with manure handling, including compliance with environmental laws.

j. **Veterinary Care**

k. **Risk of Loss**

- i. When cattle are fed under contract, the owner retains title to the cattle. The risk of loss due to death is usually borne by the owner, except for those death losses caused by negligence of the feeder. Death losses will usually be borne by the owner.
- ii. The parties also have the option of agreeing to share losses, above a certain percentage of dead livestock. This is problematic as only one party will be around to verify the death loss. Both parties need to determine whose insurance company will cover losses due to catastrophe, such as fire, wind and lightning.

3. **Feeding.** Feeding is central to the operation. Don't forget to consider the following aspects of any contract feed arrangement:

- a. **Ration composition.** The feedlot should provide cattle owners with a report of the ration composition. This report should include not only the amounts of each feedstuff but also note the total ration's energy, protein and major vitamins and minerals. A list of feed additives should also be included. Knowing where the feedlot gets its feeding program and whether they pay timely is often a key to understanding the nature of the operation one is dealing with.
- b. **Cost of feed charged by the feedlot.** Feed may be marked up to cover overhead costs. Some agreements mark up the feed a little and do not charge "yardage." Others may charge a little more for yardage and not mark up the feed.

Find out how both parties think this is going to work. The yardage fee will vary from lot to lot. Some charge a yardage fee and some don't. The important thing is to ask.

4. **Money.**

- a. **The two most common ways of charging for services are** (1) yardage or (2) yardage plus feed markup. Yardage is usually charged on a dollar/head/day basis. In yards that have a higher yardage charge, the feed markup is generally less.
- b. **Cost of arrival** treatments usually includes cost of vaccination, dewormer, implants, etc.
- c. **Labor** cost may or may not be included in the yardage charge. The feedlot operator should send a complete record of the delivered feed and its cost.
- d. **Billings** should reflect changes in **ration ingredient cost**. The bill should contain an itemized list of any other costs billed to the cattle owner. The first bill should state the cost of processing. If the feed is financed through the feedlot, look for a statement of interest on the bill. It is a good idea to specify with the feedlot the exact time when interest charges for feed begin to accrue.
- e. Because feed prices can change, some feedlots allow customers to prepay for some or all of the feed. The key point to keep in mind is that IRS regulations do not allow one to pay a true feed bill in advance of its purchase and take a deduction, but the IRS allows the purchase of commodities such as grain, silage, or hay for future use to be deducted. Parties to such agreements should check with their tax preparer about prepaying commodities if they are feeding cattle into the next year.

A. Embryo Transfer Contracts

1. General *Contract Provisions in an ET Contract*. There are also some general provisions that should be included in all ET contracts.

a. General Provisions

- i. Legal name of parties (including D/B/As or state where incorporated);
- ii. Contact information of the parties;
- iii. Choice of law (especially important if across state lines or international transaction);
- iv. Alternative Dispute Resolution (e.g., mediation or arbitration) or forum selection clause;
- v. Attorneys' fees for the prevailing party in a dispute;
- vi. Binding to heirs, successors, and assigns;
- vii. Whether credit card information is accepted (or used as security for late payment);
- viii. Payment instructions;
- ix. Stating the relationship between the parties (i.e., not forming a partnership or joint venture);
- x. Severability (i.e., if a provision in the contract was not enforceable that the other provisions of a contract will be enforceable); and
- xi. Compliance with all federal, state, and local laws including but not limited to livestock animal cruelty laws.

b. General Advice for Practitioners Drafting ET Contracts

- i. Remember that this is a conservation culture who widely does business on a “handshake” not involving attorneys.
 1. Important to add value to the transaction.
 2. Don’t make this an overly complicated contract full of “legalese.”
- ii. Recommend drafting ET Contracts on a “flat fee,” including minimal negotiations (if necessary).
- iii. Create an ET Contract form for the farm/ranch that can be used by an operation over and over again for similar transactions. Have that operation come back for an ET Contract(s) review on an annual or bi-annual basis.

B. ET Contracts for Cattle

1. **Applicability:** ET is primarily performed with cattle (beef and dairy), although it can be utilized with goats and sheep using surgical methods.
 - a. **Recipient Agreement.**²⁸
 - i. **Applicability:** where the cattle producer is selling a bred embryo transfer recipient cow to another cattle producer
 1. **Example:** Farmer Rincker enters into a contract with Farmer Smith. Farmer Smith is either:
 1. Non-certified embryologist and therefore takes the recipient to an embryologist (e.g., Transova)

²⁸ Field Manual at 93-94.

2. Certified embryologist and then conducts the ET themselves.

i. Colorado State University is one example of an institution that certifies embryologist. Some veterinary schools offer certification. One does not have to be a veterinarian to be an embryologist.

ii. It is not typical for a recipient owner to be an embryologist.

3. The embryologist needs embryos to transfer into the Recipient Cow.

i. Frozen embryos can be shipped from a cattle operation of choice (e.g., Hudson Pines Simmental cattle operation) or a donor female is at the embryologist site where she was recently flushed (7 day embryos) (could be from Rincker's Donor Cow).

ii. Fresh embryos or frozen embryos are transferred into the recipient cow.

4. Recipient Owner needs to now confirm the pregnancy.

i. He/she takes the recipient cow home and waits 2-3 weeks to see if she is bred (waits to see if she has an estrus cycle and is in standing heat).

ii. Performs a pregnancy check at 45 days. If pregnant, then Farmer Smith notifies Farmer Rincker.

iii. Farmer Smith performs another pregnancy check (either by palpation or ultrasound) at 60 days. Ultrasound necessary to determine the sex. At this point, the pregnancy is confirmed.

iv. Farmer Smith typically pays for labor and costs associated with prognosticating; however, Farmer Smith could charge Farmer Rincker \$5-10 per cow.

v. During this holding pattern Farmer Rincker does not typically owe money during this time. Payment not due until pregnancy is confirmed at 60 days.

vi. Farmer Rincker will pay Farmer Smith \$X per cow that is confirmed pregnant.

vii. In this hypothetical, Farmer Smith informs Farmer Rincker that he has 5 confirmed pregnant cows.

5. Pick-up Recipient Cow and Calf or ET Calf Only – what kind of agreement is it?

i. Option One: Farmer Rincker will pickup the 5 pregnant Recipient Cows within 70 days and pay \$X for the cow who is confirmed pregnant (\$1800-\$2200).

a. If Farmer Rincker does not pick up the cow-calf on time then late fees pay apply.

b. Could be assessed a late fee plus daily boarding and maintenance fees (feed and/or pasture).

ii. Option Two: Alternatively, Farmer Smith will care for the pregnant Recipient Cow through weaning (paying for feed and labor). Weaning is typically done between 4-6 months of age (could be specified in the ET Contract).

a. Typically, Farmer Rincker will only get the ET calf (no cow) and will pay upon receipt of the calf (\$1100-\$1500).

6. Farmer Rincker takes the ET (Cow and) Calf home to the Rincker Ranch

i. If Farmer Rincker uses an embryo that he does not own (i.e, purchased from another producer with the use Flush Agreement), then most cattle breed associations (e.g., American Simmental Association, American Angus Association) require verification of the parentage of both the dam and sire before registration will be allowed (e.g., genetic test on hair sample). Please note that Farmer Rincker is the person applying for the registration- not Farmer Smith.

a. Some breed associations are requiring 50K testing for a gene marker for birth weight, weaning weight, yearling weight, etc. to increase the accuracy of the

genetic information. Farmer Rincker is (typically) paying for the expense of genetic testing.

ii. However, if Farmer Rincker does not pay his fee to Farmer Smith then the ET Contract may ask for Farmer Rincker to assign the ET calf's registration paper to Farmer Smith as security.

- ii. Provisions to Consider: Attorneys drafting a recipient agreement for cattle producers should make sure that the following terms are included in the written contract:
1. Purchase/lease price of Recipient Cow and management;
 2. Payment terms including penalties for late payments;
 3. Instructions for the receipt or shipment of frozen embryos;
 4. Embryo transfer fees for "open cows" (e.g., \$50/cow);
 5. Dates/procedures/costs associated with pregnancy checks (e.g., palpation, ultrasound);
 6. Duration that recipient will stay under the care of owner and any daily boarding/maintenance fees (e.g., feed, pasture);
 7. If necessary, reimbursement for routine veterinary care and transportation;
 8. Limitation of liability for congenital birth defects or reasonable birthing difficulties; and,

9. If appropriate, security on the embryo transfer progeny and the assignment of necessary registration papers.

iii. Genetic Testing. The recipient owner may request additional fees for genetic testing or marketing services.

b. Breeder Agreement.²⁹

i. Applicability: A cattle breeder can have his/her agreement to be signed or these provisions can be implemented into the Recipient Agreement.

1. These are rarely used in the industry (although they should be used more often)

ii. Provisions to Consider:

1. Shift the Burden to Recipient Owner. Breeders should make sure that the recipient owner agrees to bear the burden that the Recipient Cow is:

1. in good health and obtains necessary vaccinations;

2. within the appropriate age range;

3. has an acceptable body condition score;

4. if appropriate, a certain breed or color pattern (*e.g.*, solid black/red hided); and,

5. is structurally sound.

²⁹ Field Manual at 94.

2. Tort Liability. The breeder may want to hold the recipient owner liable for gross negligence or intentional misconduct relating to the care of the recipient and the progeny including but not limited to birthing complications. Additionally, the cattle breeder should require that the recipient owner use best management practices.
3. Management. If the recipient owner will be raising the progeny until weaning and retaining ownership of the recipient, the breeder may want to list special management terms (*e.g.*, early weaning, vaccinations, creep feeding, DNA testing).

c. **Flush Agreement.**³⁰

- i. Applicability. This should be used if a cattle producer is purchasing an embryo transfer flush from another cattle owner.

1. Example: Farmer Rincker buys an ET flush from Hudson Pines in Sleepy Hollow, New York.

- ii. Provisions to Consider.

1. *Side of the Purchaser*

1. Minimum number of transferable embryos from the flush (*e.g.*, five embryos)

- i. Growing Trend: Minimum guarantee and split after that amount.

- a. Example: 6 guaranteed. If cow has 20 embryos then Farmer Rincker will get 13 embryos and Hudson Pines will keep 6 embryos.

³⁰ Field Manual at 94-95.

ii. Grade of the embryos

a. *Example:* Six (6) Number 1 Grade Embryos

2. Date/procedures for the receipt of frozen embryos

3. Guarantee that the flush is what was ordered (e.g., free of certain genetic defects, use of sexed semen, use of a particular bull's semen)

i. Note liquidated damages in case of an error

2. *Side of the Seller*

1. Enumerate the payment terms, including shipping expenses

2. Ensure that he/she is not responsible for the transfer of the embryos to the Recipient Cow or birthing problems that may occur

C. **Stocker Cattle Contracts**³¹

1. **Applicability.** A cattle producer may hire someone to feed out the progeny through weaning. In “cow speak”, this is referred to as a stocker cattle contract.
2. **Terms.** There are several issues to consider when a cattle producer hires a stocker feeder after the progeny are weaned. Besides the payment terms and term, example issues include the following:
 - a. **Feed and nutrition** (including pasture quality and supplemental vitamins and nutrients);

³¹ Field Manual at 93.

- b. **Animal health** (including vaccinations, veterinary care, deworming for internal parasites);
- c. **Control of pests** (e.g., insecticides, fly control); and
- d. Promises regarding **average daily gain** (“ADG”).

D. Non-Disclosure Agreements

a. Types of NDAs

- i. **Mutual or Bilateral** – Where both parties will be supplying information that is intended to remain secret.
- ii. **One-sided or Unilateral** – Where one party wants to disclose information to another party and needs that information to stay secret.

b. Terms of Agreement.

- i. **Who Will Exchange Information.** The parties who will be exchanging information, whether both or just one, should be identified by legal name, address, and state of incorporation (if applicable).
- ii. **Purpose for Exchanging Information.** The purpose of the NDA can narrow down which information is considered confidential. The agreement should also include the usage of the confidential information to the limited purpose.
- iii. **Identification of Confidential Information.** The definition of what is considered confidential information should be carefully considered to ensure that it properly includes every disclosure. Some examples are ideas, concepts, know-how, trade secrets, intellectual property, business plans, and financial information. It is also important to state that disclosures may be oral or written.
- iv. **Exceptions to Confidential Information.** NDAs should have carve-outs for information that is not confidential, such as information that was known prior to disclosure, in the public

domain, or information that is required to be disclosed by law, such as a court order or subpoena.

- v. **How Information Will Be Used and by Whom.** Provision of NDA should include who are the permitted parties to which information may be disclosed and the relationship of the parties. NDA should also state what is the permitted use for the information and that the receiver has an affirmative obligation to not disclose the information.
- vi. **Methods for Maintaining Confidence.** The NDA should require that parties take reasonable safeguards to protect the confidential information and that the disclosing party should be immediately notified of any possible breach.
- vii. **Length of Agreement.** Typical term for NDAs is between three and five years. Term can be measured from the date of disclosure rather than date agreement is signed. A procedure for what happens upon termination of agreement should also be detailed, including returning of documents and/or shredding of copies.
- viii. **Ownership of Confidential Information.** The discloser shall retain ownership of all information provided to the receiving party. The NDA will not give ownership rights to the receiver. However, in bilateral agreements where suggestions maybe provided to improve the confidential information, the agreement should state that the disclosing party may use the information freely.
- ix. **Consequences of Breach.** This clause should address how disputes will be settled, which state's laws will the agreement be interpreted under, and whether attorneys' fees and costs will be recovered by prevailing party.

V. PARTNERSHIP AGREEMENTS

A. Background

1. *Definition of Partnership*

- a. A partnership arises when two or more people agree to share in the profits and losses of a business.

2. *Types of Partnerships*

- a. **General Partnership (“GP”).** A general partnership is two or more people carrying out a business purpose where the partners share equal rights and responsibilities for managing the business. Each individual bears full responsibility for the business’s debts and obligations.
- b. **Limited Partnership (“LP”).** A limited partnership allows each partner to restrict his or her personal responsibility to the amount of his or her investment in the business. This partnership requires that at least one partner assume general partnership status.
- c. **Limited Liability Partnership (“LLP”).** Individual partners in a limited liability partnership are not personally liable for the debts or obligations of the business or for the wrongful acts of other partners. Limited liability partnerships are often used by professionals, such as lawyers or accountants, and in some states are only available to professionals.

B. General Partnership Agreements

1. ***Provisions to Consider.*** Some provisions that should be considered in the partnership agreement include the following:
 - a. **Names and Addresses of the Partners.** This section in the partnership agreement should include the names of any formal business organizations (e.g., Curt Rincker d/b/a Rincker Simmentals and Blackacre Ranch, LLC). If this is a limited partnership agreement, then the general and limited partners should be identified.

- b. **Name of the Partnership.** A name of a partnership is always encouraged. Before deciding on a partnership name, make sure the name is not infringing any trademarks. Run a quick Google and trademark search to see if anyone else is using that name. Any restrictions for use of the name for any other activities should be noted. For example, a farm family may decide to draft a formal partnership agreement under the name of Rincker Cattle Co. for raising seedstock agriculture but prohibit the use of the name for agri-tourism efforts (e.g., hay rides).
- c. **Purpose of the Partnership.** It is important to include the purpose and scope of the partnership agreement and enumerate authorized business activities. For example, the purpose of the partnership may be to produce show pigs out of thirty designated sows while authorized business activities may include advertising and marketing.
- d. **Term of the Partnership.** The term of the partnership should be narrowly defined. For example, will the partnership agreement last for certain number of years, until a certain stallion dies or is sold, or until one of the partners dies? The partnership could also end when one party is in default for a certain period of time (e.g., failure to pay maintenance or operating expenses for 90 days).
- e. **Initial Contribution from Each of the Partners.** The partnership agreement should clearly define the amount of capital each partner should contribute initially and list instructions on how and when that payment should be delivered. The initial contribution could be in the form of cash, property or services.
- f. **Additional Contribution Requirement.** After the initial contribution, any other required maintenance or required payments or services should be provided in the partnership agreement. The partnership agreement should also discuss any interest owed for outstanding payments or services promised, give directions for the timing and delivery of

payment, and note any notice requirement for unanticipated expenses.

- g. **Assets of the Partnerships.** Understandably, enumerating a complete list of partnership assets may be onerous for some large food and agriculture operations but it is important to itemize and accurately describe the assets of the partnership in the agreement itself. This not only assists in the valuation of a partner's contribution but also mitigates future disputes during the winding up stage.
- h. **Liability of the Partnership.** The agreement should include the liability that the other partners have to one another. For example, will partners indemnify each other for their own negligent acts that have harmed the partnership's property and/or third parties?
- i. **Allocation of Profits and Losses.** Unless agreed upon differently, under the "default rules" profits and losses will be shared evenly among the partners. If there is a salaried partner who does not share in losses, this should be specifically addressed in this section. Perhaps a partner who fronts all maintenance and marketing expenses on a show bull will want to keep 60% of the profits from semen sales and 100% of show winnings. Whatever the agreement is, allocation of profits and losses should be clearly memorialized to avoid a possible dispute.
- j. **Distribution of Profits.** Distribution and allocation of profits are different concepts. Typically, some profits may go back into the partnership to help with operating expenses or growth. "Distribution" is identified as the actual payout of the profits. The agreement should memorialize procedures for making the distribution, ability to receive advance payments or draws from anticipated earnings, identification of person(s) that will declare the distributions, and timing of distributions. Furthermore, any limitation on distributions should be noted.

- k. **Duties of the Partners.** The partnership agreement should not only specifically address the responsibilities of each partner but also prohibition of activities. For example, one partner may be in charge of the care and maintenance of a flush cow while the other partner makes all management decisions in regard to artificial insemination and marketing. Alternatively, one partner may be in charge of customer development, relations and marketing with a CSA while two other partners may be farmers charged with the day-to-day responsibility of growing and harvesting food.
- l. **Confidentiality.** If a Non-Disclosure Agreement (“NDA”) was not entered into separately, confidentiality should be addressed in the partnership agreement. For example, Livestock Producer A might not want Livestock Producer B to disclose to third parties his/her feed rations, business relationships, or actual sale price of embryos made known through the partnership. Alternatively, a food entrepreneur may wish to keep his/her family recipes confidential. The partnership agreement may also prohibit all partners from discussing finances with third parties.
- m. **Salaries and Other Benefits of the Partners.** Not only should the salaries be properly memorialized, but vacations, holidays, retirement, health insurance and other benefits should also be discussed in the partnership agreement. If a farmer goes on a family vacation for a week after the All East Livestock Exposition, is it okay for the neighbor kid to feed and care for the livestock owned by the partnership? Should one partner owe another partner any type of notice before such taking time off? These types of issues should be explicitly discussed and memorialized.
- n. **Expenses of Partnership.** It is important to enumerate all the anticipated expenses of the partnership. To illustrate, perhaps an expensive show heifer was purchased by the partnership to be flushed for embryo transplants. Even though each partner initially contributed 50% of her sale price, there are other potential expenses in maintaining this

female including feed, veterinary care, shelter, embryo flush expenses, semen, travel and advertising costs. Even though each partner may informally decide to pay 50% of all these expenses, these costs should be enumerated in the partnership agreement in case one partner later decides that he/she cannot afford his/her share of the fees.

- o. **Management of the Business.** If a particular partnership is to be managed by less than all the partners, the agreement should identify the managing partners.
- p. **Effect of a Default.** The partnership agreement should discuss what would happen if one or more partners is in default after a certain period of time (e.g., 30 days, 60 days). If one partner fails to pay his/her half of the rent to a horse stable, will that partner then forfeit his right to make management decisions? Should the partner(s) give the defaulting partner some kind of notice and time to cure a default before management rights are affected? Is there a penalty?
- q. **Amendments to Partnership Agreement.** For both long and short-term business ventures, it is unrealistic to think that partnership agreements will not need to be amended. Family operations grow, life has unexpected twists, and business plans change. The partnership agreement should allow for amendments to be made in writing agreed by a certain percentage of the votes from the partners.
- r. **Partner Changes.** The partnership agreement should discuss the process for voting on any additional or substitute partners and any redistribution of assets in such an occurrence. The partnership agreement should include procedures for the removal of a partner and any limitations on a voluntarily withdraw of a partner. Buy-out prices should be noted in the partnership agreement in addition to the consequences of a partner's death.
- s. **Assignability.** The agreement should enumerate any limitations on the ability to sell his/her ownership interest

to another. For example, the partnership agreement could give the other partner(s) first right of refusal or limit the pool of buyers in some way (e.g., restrict the sale to a competitor).

- t. **Alternative Dispute Resolution (“ADR”).** Arbitration and mediation can be less costly and faster than the traditional court system. For example, the partnership agreement can have a mediation clause requiring the parties to participate in non-binding mediation with a qualified private agriculture mediator. If futile, then the partnership could still require binding arbitration. However, the partnership agreement should always allow the parties to seek court intervention in an emergency. For example, one party may need to obtain a Temporary Restraining Order (“TRO”) on cash in a bank or assets in a safe deposit box.
- u. **Forum Selection.** The partnership agreement may identify a particular court in which disputes must be tried.
- v. **Choice of Law.** If a partnership is created among partners of more than one state then the agreement should identify whose state law applies to enforce the partnership agreement and “fill in the gaps” where the agreement is silent.
- w. **Attorneys’ Fees.** Should a dispute arise between partners, it is recommended that the losing partner be obligated to pay the other partner(s) for reasonable attorneys’ fees. However, some people prefer not to award a partner for litigation and want each partner to take the financial risk of litigation.
- x. **Dissolution and Winding Up.** The partnership agreement should enumerate facts and circumstances that may lead to the dissolution of the partnership (e.g., death of a partner, death/sale of livestock, withdrawal of a partner, insolvency) and procedures for winding up the business including distribution of assets.

C. Limited Partnership Agreements

1. ***Certificate of Limited Partnership.*** In most states, in order to create a limited partnership, a partnership agreement must be executed along with a Certificate of Limited Partnership.
2. ***Provisions to Consider.***
 - a. **Name.** Along with considerations similar to a general partnership, a limited partnership must include “limited partnership” or “L.P.” in its name. The surname of limited partners cannot appear in the name of the limited partnership unless it is the surname of the general partner. Having a limited partner’s surname to the name of the LP may expose him to personal liability for the corporation.
 - b. **Rights and Responsibilities of Limited Partners.** The agreement should state whether any of the limited partners have priority over the other limited partners in regards to contributions and/or compensation, and what the nature of that priority is.
 - c. **Additional Limited Partners.** The agreement should discuss how additional limited partners will be added, including which limited partners have the right to admit additional partners and what the rights and responsibilities of those additional partners would be.
 - d. **Other Forms of Compensation.** The agreement should state whether a limited partner can demand and receive property rather than cash in return for his or her contribution.

D. Limited Liability Partnership Agreements

1. ***Limited to Professionals.*** In some states, including New York, California, Oregon, and Nevada, limited liability partnerships are only available to professionals. New York has a list of specific professions that may create LLPs, but in general limit it to professions that require a license.
2. ***Provisions to Consider.***
 - a. **Name.** The name of the LLP must contain “Registered Limited Liability Company,” “Limited Liability Company,” “RLLP,” or “LLP.”

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