

**Some Legal Aspects of Timber Sale Contracts**

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### **Some Legal Aspects of Timber Sale Contracts**

In the South, where nonindustrial, private landowners own most of the timberland, the selling of timber is an important daily activity. Most timber companies have teams of foresters devoted to the procurement of timber. A procurement forester's job is to evaluate a tract of timber, offer a fair price, settle details of the timber contract, and assure that the logging occurs according to the terms of the contract. Many procurement foresters go the extra mile by assisting landowners with road stabilization and forest regeneration.

At the heart of any timber sale or exchange is a timber contract. A contract represents an agreement made by two or more parties and will be used for reference should a question or conflict arise. While selling timber on a gentleman's agreement is possible, such an action would be foolhardy if the amount of timber is significant. Since we are human, disagreements can occur easily, and the courts are unlikely to recognize a gentleman's agreement on timber. All real estate transactions must be written.

Although not generally required by law, all real estate transactions should be recorded at the Clerk of Court in the parish(es) where the property is located. Recording a document does not make it any more legal. It establishes who made the first agreement should a conflict of ownership arise.

Most contracts look very formal and rigid, giving the appearance that only a certain format is acceptable, but the reality is that these documents can be personalized to reflect the desires and attitudes of the parties involved. If the landowner has certain desires concerning the timber harvesting, such as protecting a pristine spot on the property, it should be written into the contract as specifically as possible. Such clauses do not need to be written in "legalese." Leave that for the standard clauses, where the legal language may have specific meaning. Non-standard clauses must be written in a form that everyone can understand. This will help prevent misunderstandings.

To understand the legal aspects of timber harvesting contracts, one must first know something about contracts in general. Timber harvesting contracts have three basic types of clauses: those that afford protection to both the landowner and the harvesting company, those that protect the landowner, and those that protect the interests of the harvesting company. There is also a growing interest to include environmental concerns in contracts, such as requirements to follow forestry best management practices (BMPs). It is necessary to understand what

constitutes a breach and what remedies exist for the breach of a contract. In a well-organized timber harvesting contract both parties will be sufficiently protected. No matter which party you may be, understanding the nature of your contract to take advantage of your protection is important and helps avoid unnecessary risk.

#### WHAT IS A CONTRACT?

A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. Contracts consist of an offer of consideration and the acceptance of that offer. Offers are made up of three specific components. The first component is intent, or the desire to cause the consequences of an act, or the knowledge that the consequences are substantially certain to result from the act. Second, the intent must be communicated. The purpose of communication is to let the other party know your intentions and to work out specific details. These specific details are the third component of an offer, and they are called definite terms. Definite terms are usually manifested in a written contract as clauses, affording protection and guidelines for the execution of the promises.

The offer made is of some sort of consideration, or something of legal value bargained for in return for a promise, which is a benefit to the promisor or a detriment to the promisee. This something can be anything of economic value or any legal right. Consideration will manifest itself in one of two ways, a unilateral or a bilateral contract. A unilateral contract consists of a promise being exchanged for an act. For example, John promises to pay Mike for painting his house. A bilateral contract, on the other hand, is an exchange of promises that makes each party a promisor and a promisee. For example, John promises to sell timber to Mike, and Mike promises to pay John for that timber. The specific details of felling, transporting, and paying for the timber would be worked out in the clauses of the contract.

#### DUAL-INTEREST CLAUSES

Timber contracts are bilateral in nature. The clauses of a timber contract afford protection for both parties by making guidelines for the execution of the promises. Property description, timber description, price, easement clause, indemnification, seller's reservations, assignee clauses and release clauses make up the portion of a timber contract that protects a duality of interests.

The property description can be a short, crude, brief description or a detailed *metes and*

*bounds* description written by a professional registered surveyor. Either way, its purpose is to protect the parties from the consequences of cutting someone else's trees. The timber description usually lists the types of trees to be cut by species, marking paint or diameter limits.

The price clause outlines what will be paid and how it will be paid. Usually, timber is paid for in a lump sum, in which the buyer pays for the timber at the time the contract is signed and assumes ownership of the timber from then until the termination of the contract. Sometimes it is handled on a pay-as-cut basis, in which the timber is paid for after it is delivered to the mill.

An easements clause gives the purchaser the right-of-way to reach the timber and the right to build roads, bridges or other structures needed to get there. If more than one job is being performed on the property, the seller may need to insist on including a clause stating that the purchaser will allow others necessary easement. The purchaser can be required to leave what structures he builds, and he customarily pays for any necessary permits for those structures. If those structures include purchased items such as metal culverts or bridges, it is customary practice to have the seller (landowner) pay for those items.

An indemnification clause may be stated two ways so that neither party will be held liable for the actions of the other. The purchaser will not hold the landowner liable for any damage or injury caused by the purchaser's crew. Likewise, the landowner will not hold the purchaser liable for any damage caused by anyone for whom the owner may be vicariously responsible. Vicarious responsibility is an indirect legal responsibility or liability of an employer for the acts of an employee. Simply stated, an indemnification clause ensures that both parties take responsibility only for those people whom they bring to the job site. This keeps the landowner from being liable for the logging crew and keeps the harvester from being liable for any other persons with whom the landowner has contracted. These other persons are usually addressed in a seller's reservations clause, giving the landowner the right to lease the land for trapping, hunting, oil, gas, minerals or geophysical operations. If the use needs to be exclusive, the seller's rights reserved are paramount to any rights conveyed, but the seller must pay the buyer for the timber lost by reservation.

A release clause may be needed stating that the buyer will release sections of the conveyance when he moves on to another section.

The last dual-interest clause is an assignee clause. In case of death or transferral of ownership, the obligations of the agreement shall be binding on the heirs and assigns of both buyer and seller.

#### SELLER'S CLAUSES

There are five basic clauses that consistently appear to protect the interests of the landowner. A notification clause may require the harvester to give prior warning of the start or finish of operations. This gives the owner a chance to be present when the job starts, to ensure that the harvester understands the terms of the contract and to inspect the finished job before the harvester removes his equipment.

A duration clause states a specific amount of time that the buyer has to complete the contract. Typically ranging from twelve to twenty-four months, the time can be extended only by the owner, unless extension clauses are included in the original contract. If the logger is not finished, the buyer could lose the timber even if he has already paid for it.

The damage clause specifies penalties in case the wrong trees are cut or damaged. The amount of penalty can vary greatly. The most important legal consideration to remember when dealing with a damage clause is that the amount charged for felling the wrong trees can be more than the standard price but cannot be considered injurious in nature. Simply stated, the fine must fit the crime. Penalties up to three times market value are common.

A fire clause is common on lump-sum contracts. It is standard for the buyer to accept responsibility for containing, extinguishing and paying for any damage or help retained by the fire. A fire clause is uncommon in pay-as-cut contracts, as the landowner retains ownership of the timber until it enters the mill yard.

Finally, it should be the responsibility of the harvester to pay for and provide proof of insurance and a tax receipt for the removal of the timber.

A growing trend is for owners to include environmental supplements (BMPs) in the contract. These practices improve aesthetics, water quality and residual tree stands, but they require some effort. The added care taken to implement these practices may reduce the short-term profit for the landowner somewhat. However some companies are absorbing the extra costs themselves in an attempt to conserve the resource on which they depend for future profits.

#### BUYER'S CLAUSES

The last consideration protects the harvester, and, although few, these clauses can make the difference between a profit or loss for the harvesting company. The harvester should require a warranty of ownership clause, which states that the seller indeed owns the timber and has the right to sell it.

Since title to land is often confusing, it is a good idea for the buyer to require title insurance. That way, if someone else ends up owning the timber, the insurance company will be responsible for reimbursing the buyer. Which party normally pays for the title insurance is a custom that varies by region and could even be a point of negotiation.

A default clause will exonerate the harvester of any duty in case of a material breach by the owner. A limitations clause will protect the harvester from unnecessary interference by the owner. This will aid the harvester in finishing on time and help prevent him from losing the contract through defaulting the duration clause.

One last concern is that the buyer require a resolution of power when dealing with corporations or groups of people. Simply stated, in this clause, the seller guarantees that the person offering the contract is a legal agent of the owner of the timber. An agent is defined as a person authorized to act on another's behalf.

#### BREACH OF CONTRACT

After the contract is signed, if a party does not follow the guidelines set forth, this is termed a breach. A breach is the unexcused failure of a party to perform its promise. It can always give rise to a cause of action for damages, and, in case of a material breach, can discharge the aggrieved party fully of his duty of performance.

In case of a breach, the law provides specific remedies to aid the aggrieved party. Some instances of nonmaterial breach are covered in the contract itself. For example, most timber contracts contain a damage clause that sets forth the specific remedies for felling the wrong trees. If a nonmaterial breach is not addressed in the contract, the law provides that an arbitrator or non-interested third party can provide a remedy, or the question can be brought to court.

Unfortunately, not all breaches are correctable. Sometimes a party breaches the contract to such an extent that the contract must be voided. When this occurs, the aggrieved party is discharged from his duty to perform and may be awarded any expense he has already incurred in the contract. For example, if a landowner decides not to allow the harvester to cut after the harvester has already set up, he must reimburse the harvester for his expenses to date and would

relieve the harvester of any further duty.

#### COMMUNICATE

It is very important, no matter which party you are, to read and understand every clause of any contract to which you are a party. The definitions supplied in this paper can be found in a legal dictionary along with other terms you may need to understand business transactions.

Anyone who intends to be party to a timber contract should address the clauses listed in this paper and add more when the situation requires it. The more detailed the contract is, the better each party will understand each other and avert problems.

While a good contract is important, it is no substitute for being present at the work site. The landowner should walk the tract with the logger before commencement of the operations and visit the site often during harvesting. This way, problems can be prevented, and both parties will be much more satisfied.