

Considerations When Buying Farmland

by Prof. Roger A. McEowen

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Taxation (CALT), which he founded. Before joining Iowa State in 2004, he was an associate professor of agricultural law and extension specialist in agricultural law and policy at Kansas State. From 1991-1993, McEowen was in the full-time practice of law with Kelley, Scritsmier and Byrne in North Platte, NE. He is the author of *Principles of Agricultural Law*, an 850-page textbook/casebook that is updated twice annually, and a second 300-page book on agricultural law. His *Agricultural Law and Taxation Blog* is the most widely read agricultural law and taxation blog online. Prof. McEowen conducts approximately 80-100 seminars annually across the U.S. for farmers, agricultural business professionals, lawyers, and other tax professionals. He also conducts two radio programs each airing twice monthly heard across the Midwest and on the web. In addition, his two-minute radio program, *The Agricultural Law and Tax Report*, is heard each weekday by over 2 million listeners on farm radio stations from NY to CA as well as SiriusXM 147. He also can be seen as a weekly guest on RFD-TV where he discusses various agricultural law and tax topics. He is a member of the Iowa and Kansas Bar Associations and is admitted to practice in Nebraska.

Overview

The most important asset for a farming or ranching operation is the land on which the business will be operated. Therefore, the acquisition of farm or ranch land is critical. As a legal transaction, many issues and considerations arise. What are some of the major concerns for land acquisition transactions? What are the “must know” concepts in land transactions?

Acquiring farm or ranch land, the key concepts and issues—it’s the topic of this article.

Environmental Issues

Agricultural production has become subject to many environmental-related laws over the last 50 years. As a result, a buyer of farmland must be aware of potential liability upon acquiring farm or ranch land that might have environmental issues as a result of a prior owner’s conduct. That makes it imperative that a buyer has full information about any tract that might be acquired.

Comprehensive Response Compensation & Liability Act. Perhaps the most significant federal environmental rule that can come into play in this regard is the Comprehensive Environmental Response Compensation & Liability Act (CERCLA).¹ CERCLA focuses on hazardous waste sites, but it can have significant ramifications for agricultural operations because the term “hazardous waste” has been defined to include most pesticides, fertilizers, and other chemicals commonly used on farms and ranches. Its presence can lead to huge liability—but there are defenses to liability.

Perhaps the most important CERCLA defense for farmland buyers is the “innocent purchaser” defense. This defense



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can apply if the defendant purchased land not known at the time of purchase to contain hazardous substances but which is later determined to have some environmental contamination at the time of the purchase or is contiguous to land not known at the time of the purchase to be contaminated. A buyer attempting to utilize this defense must establish that the real estate was purchased after the disposal or placement of the hazardous substance and that they didn't know, or had no reason to know, at the time of purchase that a hazardous substance existed on the property. To utilize the defense, the buyer, as of the purchase date, must undertake "all appropriate inquiry" into the previous ownership and uses of the property in an effort to minimize liability. The phrase "all appropriate inquiry" generally depends upon the existence or nonexistence of five factors: (1) the buyer's knowledge or experience about the property; (2) the relationship of the purchase price to the value of the property if it was uncontaminated; (3) commonly known or reasonably ascertainable information about the property; (4) the obviousness of the presence or likely presence of contamination of the property; and (5) the ability to detect such contamination by appropriate inspection.

Note: Some states have statutes requiring a seller of agricultural land to complete an environmental disclosure form as a condition of sale. This form can be helpful to the buyer as constituting the undertaking of "all appropriate inquiry" as to the environmental status of the land.

A buyer of farm land can take several common-sense steps to help satisfy the appropriate inquiry obligation. Certainly, a title search should be made of the property. Any indication of previous owners that may have conducted operations that might lead to contamination should be investigated. Aerial photographs of the property should be viewed and historical records examined. Likewise, investigation should be made of any government regulatory files concerning the property. A visual observation of the premises should be made, soil and well tests conducted, and neighbors questioned. However, the execution of an environmental audit may be the best method to satisfy the "all appropriate inquiry" requirement. Some states have enacted legislation requiring the completion of an environmental audit upon the sale of agricultural real estate. Today, many real estate brokers, banks, and other lenders utilize environmental audits to protect against cleanup liability and lawsuits filed under CERCLA.

Publicly Available Information

County records. There's more than just CERCLA to be concerned about when buying a farm. As previously noted, much information about a tract of farmland can be obtained publicly. In the Midwest, checking drainage records on file at the County Auditor's office (at least in some states) is a good

place to discover drainage information. Those records may not be in the County Register of Deeds' (Recorder's) records and probably won't show up in an abstract. Also, there may be private drainage agreements and/or easements (such as manure easements) that exist. Those agreements will likely be recorded and appear in the County Recorder's office records for the property.

USDA (and subagency) records. Also, USDA records about the land should be examined. This includes Farm Service Agency (FSA) and Natural Resources Conservation Service. Many sellers will choose to make all of these records open concerning a particular farm. So, that can be a good way to get access to USDA maps and documents. This will also allow the buyer to determine if there are any government contracts or easements on the property involving such government programs as the Conservation Reserve Program and the Wetlands Reserve Program. Also, the USDA information will allow the buyer to determine if any of the land is highly erodible or has wetland status. Those designations can impact value substantially.

Leases

A buyer of farmland will also want to know whether the land is leased to a tenant. In some states, long-term farm leases must be recorded. In that situation, check the publicly filed records. However, most farm leases are short-term leases—often oral leases that automatically renew each year on the same terms and conditions. Having the seller sign a disclosure statement concerning the existence or non-existence of a crop lease, mineral lease, hunting lease, or other type of land use agreement is a good practice. Also, FSA records may reveal if government payments are being shared between the owner and a tenant or whether the payments attributable to the farm are being paid to someone other than the owner.

Relatedly, for farmland purchases from an individual (or entity) seller or an estate, an important question is whether an existing lease will continue (and, if so, for how long) or whether it has been *properly* terminated in accordance with state law. The mere sale of the land, absent some written agreement, will *not* terminate any existing lease.

Miscellaneous

Other things to consider include getting all appropriate signatures (including the seller's spouse, when applicable), and determining whether the sale is part of a family settlement agreement. Also, it is important to make sure that the legal description matches what is being purchased. On this point, when an abstract is used, it is important to have legal counsel bring it up to date before the purchase and carefully examine it for accuracy and defects in title.

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Sometimes a tract of land won't consist of precisely the acreage that the buyer thinks it has—a half-section, for example, may not actually contain 320 acres. That's especially likely if the tract lies on the edge of a township, county, or a state border. Because of the Earth's curvature, range lines on a survey will converge the further north. To keep those lines as parallel as possible (and six miles apart) the lines are laid out for about 24 miles. Then a correction line occurs so that the lines return to the six-mile separation so as to retain the square shape of the township. Other irregularities may also be present. Even with these irregularities, a legal description is sufficient if it either identifies the location of the land on the ground to the exclusion of all other land or furnishes a means by which the location can be obtained from other sources.

From a practical standpoint, walking the property is a good idea. Look at the fences. Are they on the actual, intended location or boundary? If not, had the adjoining landowners mutually recognized the existing fence location for a long-enough period of time (determined by state law) so that it is the actual dividing line irrespective of what a survey shows? Is a written fence agreement recorded at the County Register of Deeds office? Examine the land for paths that might be

evidence of easements. Relatedly, are existing paths wide enough to allow equipment into fields and locations where planting is desired? How much of the land is consumed by ditches and roads? The seller will try to sell in accordance with deeded acres, but a buyer that plans on farming the property is interested in paying only for tillable ground. Not much, if any, value is assigned to non-tillable ground other than pasture.

Check local newspaper archives for announcements concerning potential wind and solar farm planned development that could impact future value.

Conclusion

There are many things to think about and get clarified when buying farmland. While some information is publicly available, getting signed disclosures can be very important. From the seller's perspective, failure to disclose key information can serve as the basis for cancelling a farm sale before it takes place if the failure pertains to information that serves as the basis of the bargain. 

Endnote

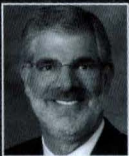
¹ 42 U.S.C. § 9601 et seq.



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