

Marketing Your Timber: The Timber Sales Agreement

For years, landowners and timber buyers bought and sold timber with only a handshake. Just as the world has become more complex, so has buying and selling timber. One of the most dangerous things you can do as a landowner is sell your timber on a handshake basis, even to someone you have known and done business with for years. Many landowners and timber buyers have made transactions that left them dissatisfied due to differing expectations.

The best way to help prevent misunderstandings is to establish good communication before sales and document what has been communicated in a written timber sales agreement. This way, everyone knows their responsibilities and what is expected. A well-written contract will save the buyer and seller time and money by eliminating problems that can result in legal action. It will also preserve goodwill between everyone.

The two most common timber sales agreements used in the South are the sales contract and the warranty timber deed. A sales contract typically gives the buyer the right to cut standing timber. The actual title to the timber passes to the buyer when timber is scaled. When a timber deed is properly executed, delivered, and recorded, the title to the timber passes to the buyer.

A timber sale, regardless of type or size, should have a written, legally binding, and mutually agreed upon arrangement. This agreement, or contract, protects everyone involved in the transaction. The written timber sales agreement may be long and complex or short and simple but always expresses the expectations, wishes, and responsibilities of each person involved. It states what each person can and cannot do and serves as a way to resolve any disputes.

Each timber sales agreement is different since each timber sale is different; however, some common provisions should be included in every sales agreement. It is important for the landowner to get professional help from a forestry consultant and an attorney when the sales agreement is being developed.

Identify Everyone

The first item in a contract is identification of everyone involved, including the complete name and address of each person in the agreement. The “Parties involved” section includes the buyer and all the owners of the timber that is being bought and sold. Also included are the date the agreement was signed and the place, including the city, county, and state where it was executed.

How to Pay

The most important part of a contract involves payment for timber sold. In most contracts, this is stated as “x amount of timber was bought and sold for ten dollars and other consideration.” This is used for various reasons; it is mainly used to keep the exact purchase price confidential, since the document, once registered with a chancery clerk’s office, becomes public information.

One aspect that is often overlooked, but may be even more important than the exact amount paid, is the method and terms of payment. This may be less important in a “lump sum sale,” since the seller receives the entire amount paid at contract closing. In an installment sale or “pay-as-cut sale,” this is extremely important to ensure that the buyer pays per the seller’s preference.

For tax reasons, in an installment sale, it is vital to include interest on unpaid balances according to IRS regulations.

Otherwise, advantages of an installment sale may not be allowed by the IRS. For a pay-as-cut sale, the contract must provide clear and concise instructions on how the buyer will pay and how they will provide verification of timber quantity cut and paid for.

Description of Timber Sold

This section should provide a detailed, complete description of timber to be sold. In many contracts, timber to be sold is designated by a provision that states “all merchantable, standing timber on the area is to be cut.” This description could likely include all standing timber on the designated cutting area. It is a broad description of the timber to be sold and leaves a lot of room for misunderstandings if the buyer and seller have different ideas of what is harvestable.

Be specific when writing the description of timber to be sold. The description should include at least an estimated volume by species of what is being sold, how it was measured, and for a partial sale, what products are being offered for sale. Include how trees to be cut are marked or designated and who will do the marking. If the contract extends over a period of years, include a provision stating how to account for trees that grow into a merchantable, harvestable size during the contract period and how payment for these trees shall be made.

In the description of timber, include an exact location and legal description of the sale area. Outline in detail how property corners and boundaries are marked or designated or note who pays to locate them. If the boundaries of the cutting area differ from property boundaries, describe exactly how they are marked. Also, have a clear description of adjacent ownerships and any existing or potential problems or disputes with these ownerships.

Care of Property

This section of the sales agreement should address care of the property and/or improvements. Detail and adequately describe each item of property or improvement that would be subject to damage, such

as fences, roads, and bridges. Verify property conditions at time of the sales agreement and designate what conditions these items are to be left in at the end of timber harvest. Regarding selective harvesting or thinning, state specifications or requirements for the amount of damage allowable to the residual timber stand. Make provisions for assessment and evaluation of damages. Consider setting forth provisions for repair or payment for damage(s).

Arbitration

While providing provisions for damage compensation, specify some method for settling disputes between the buyer and seller. One accepted method is to have arbitration procedures established for everyone involved. The provision can explain how to select an arbitration panel and outline its duties and authority.

Guarantee of Ownership

In this section, rights of ownership should be established. There are cases every year of landowners visiting their timberland only to find it cut and sold by unknown persons. In the past, cases existed where a buyer bought and paid for timber, cut it, and then was confronted by the actual timber owner. To prevent such happenings, most buyers require at least a title search and an abstract. In some situations, buyers may request that title insurance be purchased.

Right of Ingress and Egress

In this section, provide ingress (entering) and egress (exiting) instructions for the buyer—that is, the right to come and go to remove the timber. This clause will cover where and which entrances and exits the buyer and logger can use, which roads are to be used and which are restricted, and who shall pay for any road construction and/or repair. If rights-of-way across adjoining landowners are required, state who shall acquire and pay for them. Best management practices for rehabilitating roads and skid trails may be specified here.

Method of Harvest

The next section of a timber sales contract must establish how timber harvest will occur. It should define planning and layout of logging decks, log roads, and areas to be cut. Restrictions on equipment use and wet season logging or hunting seasons are appropriate items for inclusion. Have provisions for the buyer and seller (and/or their representatives) to supervise logging crew(s) and to perform inspections before, during, and after logging.

This clause also includes provisions for using forestry best management practices (BMPs), which are recommended for prevention of water pollution and site degradation. The landowner is responsible for requiring compliance with BMPs. The seller must reserve the right to inspect the logging site. A seller who does not reserve this right may find that they have no legal rights to halt improper logging practices.

Penalties for Nonperformance

This section goes along with the clauses for arbitration and protection of the property. This clause details penalties for not performing contract terms (e.g., cutting non-designated timber on a thinning). It provides penalties for stand damage that happens during harvesting operations. It also outlines penalties for damages caused to permanent improvements, such as roads, culverts, or bridges. This clause should form guidelines for payment of penalties and the establishment of an escrow account or performance bond to enforce these provisions.

Length of Agreement

This section of the agreement covers agreement duration. It specifies length of the agreement as well as beginning and ending dates. It may address provisions for or against contract renewal in the event that it expires before timber is harvested. Steps the buyer must take to be released from the contract once harvesting is complete should also be detailed.

In the event that problems develop during the contract period, have provisions for extending or ending the agreement. In some cases, where weather or other factors prevent the buyer from cutting, the contract period may be extended. Situations may occur where either person may wish to terminate the agreement. Outline why and how the contract can be terminated and have provisions for damages and/or buyouts.

Assumption of Risk

Specify who will bear the loss in case timber is destroyed or stolen during the contract period. This is not as important to landowners in a timber deed situation, where buyer is actually paying for the standing timber. In a pay-as-cut sale, it could be crucial where the buyer usually only pays for timber delivered to the woodyard or mill.

Signatures

The last items in any contract are signatures of everyone involved, dates the contract was signed, a notarization of the agreement, and registration of the agreement at the local chancery clerk's office. Omitting any of these items may affect the validity of your agreement.

Optional Clauses

The above items address only clauses essential to timber sales contracts. A number of other points such as fire protection can be included. Many older contracts included a clause that indicated who should bear loss or who had responsibility for preventing and controlling any wildfires that broke out during logging.

Another option can provide for notifying the seller when cutting starts and stops, so that pre- and post-harvesting inspections can be made. This clause can require a preharvest conference by everyone involved in the contract. In this meeting, the logger and landowner can meet face-to-face. This provision is optional but can prevent misunderstandings, because it helps each person fully understand the contract and its requirements.

In Mississippi, the owner of timber is required to pay state severance tax at the time of cutting. Dependent upon actual ownership of timber at this time, either the seller or buyer are responsible (pay-as-cut and lump sales differ here). In some instances, mills pay this tax to streamline the process and avoid confusion. Make sure the assignment is detailed in the agreement. This will protect the landowner in the event a dispute arises over payment of these taxes.

Another provision that can prevent problems is one that provides for or against assigning the contract to a third person. In many cases, when an independent timber buyer purchases timber, they resell it to a manufacturer. If the seller has no control on assignment or reassignment, the contract between the buyer and mill may be quite different from the original agreement. In this situation, landowners find themselves with little of the control set forth in the original agreement.

For a pay-as-cut sale, inclusion of a clause detailing specifications and requirements for scaling and measuring timber to be sold could be useful. This may include designating log rule, volume table, or weight conversion factors to be used, and where, when, and how timber is scaled or weighed.

Summary

While it may not cover every situation that can occur, a well written, thought-out timber sales agreement can serve as a vehicle to solve problems mutually. The suggestions in this publication do not cover all situations. Each timber sales agreement must be tailored to fit the needs of a particular set of circumstances.

Buyers will hesitate to sign a contract they feel is too restrictive. Yet, as professionals, they will readily agree to a contract that helps them supply timber to their mills efficiently with minimal problems. It is in the interest of everyone involved to develop and nurture a straightforward, friendly working relationship.

By using a forestry consultant and attorney, a landowner can have an arrangement that is agreeable and protects everyone involved. This is the key to a productive and profitable business relationship and ensures the landowner walks away from a timber sale satisfied.

Publication 1855 (POD-05-24)

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Extension Service of Mississippi State University, cooperating with U.S. Department of Agriculture. Published in furtherance of Acts of Congress, May 8 and June 30, 1914. ANGUS L. CATCHOT JR., Director