Hunting Use Agreements and Recreational Entrants – Legal Issues

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September 2023
Agricultural Law and Taxation Blog, by Roger McEowen: https://lawprofessors.typepad.com/agriculturallaw/
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Overview

A farm or ranch is a business much like any other. Every day people may come to a farm to buy, sell, visit, hunt, fish, or to do any number of activities. With respect to people coming on a farm or ranch to hunt, some do it by oral permission, but other landowners may take the step executing a written agreement to avoid misunderstandings and minimize future legal issues. So, what are the elements of a good hunting use agreement?

Building a solid hunting use agreement – it's the topic of today's post.

The Property Interest Involved

All wildlife, whether animal, fish, or fowl not privately owned belongs to the state. *See, e.g., Kan. Stat. Ann. §32-107.* But this does not allow hunters or fishermen to enter land at will and take what belongs to the state. Outdoorsmen have no right to enter another person's land to hunt or fish without first getting permission. Doing so could subject the person to either a civil action for trespass; prosecution under a criminal trespass statute; or prosecution under an unlawful hunting statute.

Note: In Kansas (and most other states), licensed hunters are allowed to pursue wounded game upon the land of others without permission in order to capture the game. But such persons must leave the premises upon the landowner's request. In these situations, the best approach for the landowner is to call the Sheriff and never personally try to force the trespasser off the land with threats of physical violence or at gunpoint.

Engaging in a hunting activity on someone else's property involves the property law concept of that of a license. A license is a term that covers a wide range of permissive land uses which, unless permitted, would be trespasses. Thus, a hunter who is on the premises with permission is a licensee. The license can be terminated at any time by the person who created the license (the landowner) by denying permission to hunt. A license is only a privilege. It is not an interest in the land itself and can be granted orally.

As for a farm tenancy, without a specification in a written lease, the tenant has the right to hunt the leased ground. The hunting rights follow the possession of the ground. Thus, the landlord does not have a right to hunt the leased premises during the term of the lease unless the lease is in writing and the landlord reserves the right in the written lease.

Elements of a Hunting Use Agreement

When permission to hunt is obtained in writing, what makes for a good agreement?

Legal description and map. It is essential to include a description of the property that the "hunting operator" may hunt. Provide the number of acres and give a general description of the property, and then provide a precise legal description attached as an "Exhibit" to the agreement. Also, it is generally a good idea to provide a map showing any areas where hunting is *not* allowed and attach the map as an Exhibit to the agreement.

Hunting rights. The agreement should clearly specify the rights of the hunting operator. Because the agreement is a hunting use agreement, the document should clearly state that the "hunting operator" has the right to use the property solely for the purpose of hunting wild game that is specifically described in the agreement. That specific game should not only be listed, but bag limits, species, sex, size and antler/horn limitations should be noted as appropriate.

The agreement should also clearly specify whether the hunting operator's right to use the property for hunting game are exclusive or non-exclusive. If the hunting operator is granted an exclusive hunting right, the landowner is *not* entitled to use the property for game hunting purposes during the term of the agreement. If the hunting operator's right is non-exclusive, the landowner (and/or any designees) is entitled to use the property for game hunting purposes. With non-exclusive rights, it may be desirable to denote any limitations to the landowner's retained hunting rights.

On the hunting rights issue, it is usually desirable on the landowner's part to include a clause in the agreement specifying that the landowner and the landowner's family, agents, employees, guests and assigns retain the right to use and control the property for all purposes. Those purposes should be listed, with the common "including but not limited to" language. Such uses as livestock grazing; growing crops and orchards; mineral exploration; drilling and mining; irrigation, timber harvesting; granting of easements and similar rights to third parties; fishing; horseback riding; hiking; and other recreational activities, etc., may want to be listed.

Specification of the beginning and ending date of the hunting operator's right to use the property should be included. It is suggested to denote that the property may be used for game hunting purposes limited to legal hunting seasons and hours tied to the particular wild game at issue. The agreement should not extend the hunting operator's rights beyond the applicable hunting season(s).

Consideration. What is a "fair" rate to charge for the granting of hunting rights? The answer to that question will depend upon rates charged for similar properties and game in the area. That could be difficult to determine, but data might be available for comparison. Check your state's land grant university Extension Service for any information that might be available. County Extension agents may be a good place to start.

The agreement should describe how payment is to me made and when it is due. In addition, give thought to including clause language noting that the landowner might have lien rights under state law and state whether a security deposit is required and/or security agreement is or has been executed to secure payment.

Think through whether and to what extent (if any) payment is required if the property (or a part thereof) becomes unavailable to hunting because of unanticipated events such as flood; fire; government taking or condemnation; drilling, mining or logging operations, etc. Is payment to be adjusted? If so, how?

Improvements. Is the hunting operator to be given the right to construct improvements on the property? If so, the right needs to be detailed. Is the landowner obligated to construct any improvements? For larger hunting operations the landowner commonly constructs certain improvements such as new roads; fences; gates; hunting camps; wildlife crops and feeding facilities; water facilities; blinds; tree stands, and similar structures. List a completion date for constructed improvements. Also, give thought to including a provision in the agreement for the cleaning, repair and maintenance of improvements. Which party does what, and which party pays?

Prohibited uses. Clearly state what uses on the property are *not allowed*. Are campfires allowed? What about the use of dogs? What about camping overnight on the property? Are pack animals to be used? If so, specify that the animals must be in compliance with any applicable branding or other identification requirements. If pack animals are allowed, that might mean that corrals will be needed and feeding requirements will have to be met. Also, with respect to pack animals, make sure the document requires that the hunting operator complies with inspection, inoculation, vaccine and health requirements. The landowner should be provided with reports and certificates, etc.

The driving of vehicles should be restricted to particular areas and if gates are to be driven through, include a provision requiring the hunting operator to be responsible for leaving the gates in the condition found (locked, unlocked, etc.).

Insurance coverage. An important aspect of any fee-based activity on the premises is insurance. The agreement should specify whether which party (or both) is to maintain liability insurance coverage and in what amount. Make sure the insurance covers any improvements on the property. Also, for landowners, don't rely on coverage under an existing comprehensive liability policy for the farm or ranch. That policy likely has an exclusion for non-farm (or ranch) business pursuits of the insured. Being compensated for hunting on the property would likely fall within the exclusion.

Miscellaneous. There may be numerous miscellaneous provisions that might apply. These can include provisions for the landowner's warranty of ownership; whether the agreement is to be recorded; and the maintenance of trade association memberships and licenses and permits.

Liability Issues

Numerous states have enacted agritourism legislation designed to limit landowner liability to those persons engaging in an "agritourism activity." Typically, such legislation protects the landowner (commonly defined as a "person who is engaged in the business of farming or ranching and provides one or more agritourism activities, whether or not for compensation") from liability for injuries to participants or spectators associated with the inherent risks of a covered activity. The statutes tend to be written very broadly and can apply to such things as corn mazes, hayrides and even hunting and fishing activities.

Recognizing the potential liability of owners and occupiers of real estate for injuries that occur to others using their land under the common law rules, the Council of State Governments in 1965 proposed the adoption of a Model Act to limit an owner or occupier's liability for injury occurring on the owner's property. The Council noted that if private owners were willing to make their land available to the general public without charge, every reasonable encouragement should be given to them. The stated purpose of the Model Act was to encourage owners to make land and water areas available to the public for recreational purposes by limiting their liability toward persons who enter the property for such purposes. Liability protection was extended to holders of a fee ownership interest, tenants, lessees, occupants, and persons in control of the premises. Land which receives the benefit of the act include roads, waters, water courses, private ways and buildings, structures and machinery or equipment when attached to the realty. Recreational activities within the purview of the act include hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, water sports, and viewing or enjoying historical, archeological, scenic or scientific sites. Most states have enacted some version of the 1965 Model legislation.

Note: The point is to check state law with respect to both agritourism statutes and recreational use statues. Generally, they will provide liability protections to the landowner for hunting activities on the premises if the landowner does not act willfully or wantonly (with reckless disregard to the safety of the hunting operator). State laws vary on the protection of the statutes if a fee is charged. Also, it is a good idea to check with an insurance agent to see if coverage is extended if you charge a fee for hunting. The statutes don't remove the possibility of a suit being brought and the landowner being required to defend. Instead, a recreational use statute is typically used as an affirmative defense.

Conclusion

Allowing hunting activities to be engaged in on farming or ranching property can provide an additional source of income. But it's important to enter into properly drafted written agreements with hunters (and others on the premises for recreational purposes) and ensure that appropriate insurance coverage applies.