

Grazing Lease Checklist



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Leasing land to another person for grazing purposes can benefit both the landowner and lessee by allowing an additional source of income for the landowner and by permitting the lessee to run livestock on land without incurring the long-term debt associated with purchasing property.

Although it has been common throughout rural America for business to be done between neighbors on nothing more than a handshake, it is advisable for all agricultural leases to be put into writing. This ensures that the leases are enforceable, memorialize the parties' understanding, and helps to protect both parties' rights.

The following items are intended to provide a checklist of many of the most common terms found in grazing leases. The list is certainly not exhaustive, and it is possible that not all of these terms are necessary in every lease. This list was written from the landowner's point of view, but may also be useful to a lessee in the negotiation process.

Importantly, **this list is not a substitute for legal advice.** All parties—landowners and lessees—should consult with their own attorney when entering into a grazing lease to ensure that the lease is complete, legally binding, and protects their interest.

Names of the parties: The lease should include the name and address of the parties, both the landowner and the lessee.

Duration of lease: The length of the lease should be specified with particularity and may range from a matter of weeks to several years. It is important to note that leases of certain durations may be required to be in writing in order to be enforceable. For example, pursuant to the Statute of Frauds, many states will require a lease of real property lasting for more than 1 year to be in writing. Generally, grazing leases are classified either as a “tenancy for a term of years” or a “periodic tenancy.” A tenancy for term of years simply refers to any set lease term (whether months or years) that terminates upon the conclusion of the term. Conversely, under a periodic tenancy, the lease will automatically renew at the end of the initial term unless a specific notice of the intent not to renew is given by either party. In this instance, it is important to determine the amount of notice that will be required. It is likely in the best interest of both the landowner and tenant to require a lengthy notice period so that in the event the lease will not be renewed the landowner has time to secure a new tenant and the lessee has time to find alternative arrangements for his or her livestock. It is advisable that notice be given in writing.

Description of the land: The land need be described so that both parties (and a judge or jury if there ever were to be a dispute over the lease) can understand exactly what land was being leased. This can be done by legal metes-and-bounds descriptions, a photograph or diagram showing the specific location, or simply by words if a specific description can be conveyed. Further, if there are any areas that are to be excluded from the lease, this limitation must be

included in detail in the lease agreement. For example, if there is an apple orchard in the back corner of the property and the landowner does not want the lessee's cattle in that area, this must be addressed in the lease.

Stocking limitations: A grazing lease should set forth stocking limitations that address the number of head, breed, and species of animal permitted. For example, the stocking rate may differ if the lessee intends to run 1,000 pound Angus cattle on the land versus if he or she intends to run 1,600 pound Charolais cattle on the land. A landowner may want to address this issue and specify the breed or size of cattle permitted. Further, it should be addressed if the lessee can keep other animals on the property, such as a horse with the cattle or a llama with the sheep.

Price: The price for grazing leases varies based upon a number of factors including the number of acres of land, the available forage, the number of livestock that may be grazed per acre, the type of livestock to be grazed, etc. Price may be based upon any formula that the parties desire, although most commonly, grazing leases are priced either per acre, per head, or per animal unit. Additionally, although less common in grazing leases than farming leases, the parties could agree to a sort of "crop share" lease based upon a percentage of the calf crop sold.

Payment method: Payments may be made in any manner agreed upon by the parties. Frequently, payments are set up in a month-to-month format. A landowner should consider including details on exactly how and when rent is due and including penalties and interest for late payments.

Failure to pay: In addition to imposing penalties and interest on late payments, a landowner may want to provide that once the total amount owed in late payments, interest, and fees reaches a certain amount, the landowner has the right to terminate the lease. Further, landowners should be aware of any statutory lien rights available to unpaid landowners in their state, including understanding any action that must be taken by the landowner for such rights to be enforced.

Security deposit: A landowner may want to consider requiring a security deposit to cover any damage caused to the property, improvements, fences, crops, or livestock while the lessee is in possession of the property.

Access to land: The lease should provide how the lessee is to access the property, including designating the points at which the lessee may enter the property, any gates that the lessee may utilize, and the roads on the property the lessee is permitted to use.

Use of vehicles or ATVs: The lease should state whether the lessee is permitted to use vehicles or ATVs on the property and, if so, whether there are any areas where such vehicles are prohibited.

Requirement gates be kept closed: A landowner will likely require that all gates be kept closed at all times. Additionally, if other livestock is present or in adjacent pastures, a landowner may

also include a requirement that the lessee is liable for the death or injury of any livestock or damages to a third party caused by any livestock that escape due to a gate being left open by the lessee.

Use and repair of facilities on property: The lease should discuss the right of the lessee to use any facilities on the property including corrals, buildings, barns, and houses. If any repairs are necessary, the lease should describe who will be responsible for undertaking repairs and paying for both parts and labor.

Inspection of fences: It is important that a lease address who will be responsible to inspect and repair fences, particularly where the leased property abuts a highway. The lease should set forth which party will make these inspections and the frequency at which they should be made.

Right to erect improvements on property: The lease should address whether the lessee has the right to erect any improvements on the property during the lease. Generally, permanent improvements will stay on the land after the termination of the lease. Consequently, the landowner may want to have an input on the location and building specifications for any such improvements. Some leases require the lessee to obtain written permission from the landowner before taking any such action. In order to avoid confusion or conflict, the lease should specify whether the lessee has the right to remove any improvements at the end of the lease and set a deadline for such removal.

Landowner's rights to the property: Unless reserved, the landowner grants exclusive possession of the property to the lessee, meaning that the landowner may not enter the property. The landowner may want to reserve the right to enter the property for various reasons during the lease, including to care for crops and to inspect the premises. Importantly, a landowner should discuss this issue with his or her attorney to determine if the right to inspection might be outweighed by liability concerns that such right might impose. Further, if the landowner wants to retain rights as to the property, including the right to hunt, this should be expressly set forth in the lease agreement.

Other surface uses: There may be other surface users of the property during the lease term. Examples include oil and gas companies who may have a mineral estate lease, hunters that may have a hunting lease with the landowner, and the landowner himself. The lease should expressly identify all such surface users so the lessee is aware of these uses and should require that the lessee will act in good faith to accommodate and cooperate with these other surface owners. With regard to a potential mineral lessee, it is important to understand the law in your state regarding mineral rights versus surface rights and how this could potentially impact a grazing lessee.

Care of livestock: Oftentimes, especially during drought, a landlord may not only offer grazing land, but may also agree to provide care for the livestock. In this event, it is extremely important that the landowner and lessee be specific with regard to their expectations for care. For example,

requiring “adequate hay” is insufficient as it is almost a certainty that the landlord’s definition of “adequate” differs from the livestock owner’s definition of the same term. In order to avoid this type of dispute, a lease should spell out the expectations of the landowner providing care of livestock, including the type and amount of hay and feed to be provided, the type of mineral that should be available, the frequency with which the livestock should be checked by the landowner, etc. Finally, an interesting term found in some of these types of leases provides an incentive for a landowner who provides superior care for the livestock. For example, the lease might provide that if calves reach a certain average daily gain or a set weaning weight goal, the landowner receives a bonus from the lessee. Similarly, there could be a provision if the landowner is set to care for first-calf heifers that would include a bonus if there was a low death loss percentage. This type of incentive may help to ensure better care for livestock.

Proof of vaccination: Some leases require that the lessee provide the landowner with a health certificate declaring that cattle have received certain vaccinations, such as blackleg shots for calves or Bang’s vaccinations for cows and bulls.

Breachy livestock: Many grazing leases involving cattle include a provision whereby any animal known to be “breachy” (i.e. frequently escaping the pasture by jumping or breaking through fences), must be removed from the premises.

Disaster contingencies: The parties should consider how disasters such as drought or fire may impact the landlord/lessee relationship. In the event that all or some of the grazing land is destroyed, how will a determination regarding the lease be made? Who will determine if it is necessary to lower the number of livestock permitted to be on the property, or whether it is necessary to terminate the lease all together? Parties may want to consider agreeing on a neutral third party, such as a county extension agent, or another livestock operator in the area, to help with this determination. In the event that the lease is limited or cancelled, the lease agreement should address whether a refund of any pre-paid rent will be made.

Transferability: The lease should address the rights of the parties as to assignment or sublease. May the lessee sublease or assign his rights to a third party without the landowner’s permission? What happens to the lease if the landowner dies or sells the property? The parties may want to provide a clause stating that the lease shall be binding upon heirs or assigns, or, conversely, that the lease shall terminate upon the death of either of the parties. Laws vary by state on this issue, so it is important to know the law in your state and address this in the lease agreement.

Lease does not create a partnership: Unless the landowner and lessee intend to create a partnership, the lease should expressly state that it does not do so. This provision is important because generally, one partner is liable for the obligations and debts of the other partner. Although this type of provision, alone, will not prevent a partnership from being created in all circumstances, it does provide evidence that the parties did not intend to create a partnership arrangement.

Effect of breach: Many leases include a clause stating that the violation of any term, covenant, or condition of the lease agreement by the lessee allows for the landowner, at his option, to terminate the lease upon notice to the lessee. This provision allows the landowner the option of terminating the lease if any term is violated, rather than merely having the right to sue the lessee for damages. If included, this clause should address the type of notice required to the lessee and whether any refund of payment or security deposit will be available.

Damages to property: The lease should prohibit damage to the property and require the lessee to repair or pay for any damage caused including the destruction of crops, death or injury to livestock, harm to fences, gates or improvements, and trash or other debris left on the premises.

Liquidated damages: A lease may provide for certain liquidated damages, which essentially mean contractually agreed upon damage amounts. These damages are often used in situations where the calculation of actual damages might be difficult. Instead, the parties agree up front to a set amount of damages for certain actions.

Attorney's Fees: Generally, a successful litigant is not entitled to recover his or her attorney fees from the other party absent a contractual agreement or a statute so authorizing. A landowner should consider including a provision providing that if the landowner is successful in a dispute (whether in arbitration or in court) with the lessee, the lessee will be responsible for the landowner's reasonable costs and attorney's fees. The lessee will likely request a reciprocal clause requiring payment of his or her attorney fees if the lessee is successful.

Lessee Insurance: A landowner may require the lessee to acquire liability insurance that will be maintained throughout the lease term. If so, the landowner should also require that the lessee include the landowner as an "additional insured." This should offer insurance coverage to the landowner pursuant to the lessee's policy in the event of a claim made by a third party against the lessee and landowner. The landowner may also want to require a specific minimum level of coverage.

Liability and Indemnification: A landowner should consider including liability and indemnification clauses in case the landowner is sued as a result of the lessee's conduct. These terms simply provide that the landowner is not liable for any action or inaction of the lessee, his agents, or employees and that, in the event the landowner is sued for the lessee's actions or inactions, the lessee will hold the landowner harmless as to any attorney's fees or judgment.

Choice of law: A choice of law provision in a lease allows the parties to determine which state's law will govern the lease in the event of a dispute. Generally choice of law clauses are enforced by a court so long as they are not against public policy and are reasonably related to the contract. Because many laws vary by state and a choice of law provision could significantly impact rights under a lease, a landowner should consult with an attorney with regard to this provision to determine the potential options available and to determine which would be most advantageous to the landowner.

Forum clause: A forum clause provides that a dispute over a lease will be heard in a particular location or court. For example, a lease could require that any dispute over the lease be filed in the county where the land is located. This clause may be important for a landowner by requiring suit to be filed in his or her county, particularly if the lessee lives some distance away.

Dispute resolution: A landowner should consider the inclusion of a dispute resolution clause. The purpose of these types of clauses is to limit the time and expenses of a court action in the event of a dispute. There are two primary types of dispute resolution: arbitration and mediation. In arbitration, a third party arbitrator (usually an attorney) will hear evidence and render a decision. If the arbitration is “binding” that judgment is final on the parties absent evidence of fraud by the arbitrator. Mediation, on the other hand, involves a neutral third party who will work with the landowner and lessee to attempt to reach a mutually-acceptable resolution. If both parties refuse to agree to settle, the case will then proceed on to court. A dispute resolution clause should identify how the arbitrator or mediator will be selected. It is important to understand the difference between these options and determine which option is best in consultation with an attorney.

Confidentiality clause: The landowner may want to consider the use of a confidentiality clause if there is any information that he or she does not want made public. For example, a landowner may not want the fee charged to one party disclosed if the landowner intends to charge an increased fee to another party or in the future.

Sample Leases: There are numerous sample lease forms available online that may be useful in preparing an initial draft of a grazing lease. Here are links to a few examples:

<https://www.extension.purdue.edu/extmedia/EC/EC-623.html>

http://ohioline.osu.edu/fr-fact/pdf/0008_Lease.pdf

<http://aglease101.org/DocLib/docs/NCFMEC-03A.pdf>