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The sale of farm or ranch land is almost always also the sale of a business. Preparing the sales contract is likely to involve a number of areas of the law. The contract will certainly involve real estate and may cover various types of personal property, one or more categories of leases, governmental permits, water rights, tax matters and choice of entity issues. In many cases, the ancillary interests (such as water rights or recreational capacity) will be major or deciding factors in the transaction.

This article describes and discusses a number of these issues.[1] It assumes that the land will continue to be used for agriculture-related purposes, omitting consideration of zoning and other development issues.[2]

CONTRACT FORMAT

Virtually no farm or ranch land contract is prepared from scratch. All practitioners rely to some extent on past work product (theirs, others', or a blend of the best elements of both) or form book boilerplate for some provisions of such an agreement. One of the more rewarding professional accomplishments for a transactional attorney practicing in any area of the law is the creation of a thorough contract for a complex transaction. Some advantages of a transaction-specific custom contract include provisions tailored to the unique aspects of the particular transaction, ease of modification and error correction with word processor capabilities and a professional-looking product. Disadvantages include increased drafting time, potential for inadvertent omission of basic provisions and increased difficulty of review by the non-drafting party. This difficulty increases with length and complexity of the document, but may be minimized in multiple draft negotiations with proper use of word processing capability to create "redline" drafts highlighting changes from one version to the next.

The Colorado Real Estate Commission Vacant Land/Farm and Ranch Contract to Buy and Sell Real Estate ("Commission Contract") is widely used as a basis for farm and ranch sales contracts of all magnitudes. Advantages are that it provides standard basic provisions, is short in length, is readily accepted by the public and other practitioners and is easy to review. On the other hand, it may be difficult to modify to fit unique aspects of a particular transaction and, if not carefully completed, there is a potential for error, ambiguity or dispute.

The disadvantages of the preprinted contract form are associated with the practitioner's misuse or over-reliance on it to the detriment of adequate consideration of the details of a specific transaction. The practitioner must be careful to avoid such over-reliance as a substitute for careful consideration of the specifics of each transaction.[3] Despite this pitfall, lawyers and clients involved in even the largest and most complex transactions are often more comfortable when a preprinted form is used because they are familiar with its basic provisions or because of the implied completeness that is imparted by Real Estate Commission approval of the basic form.[4]

REAL PROPERTY TITLE ISSUES

Abstract or Title Commitment

Use of an abstract shifts a substantial portion of the expense of title assurance from seller to buyer. The Commission Contract gives seller the option to provide either an abstract certified to date or a current title commitment. Buyer may incur substantial cost to obtain a lawyer's opinion of title if this provision is not amended and seller provides an abstract. Buyer generally will want to modify this provision to require seller to provide a title insurance commitment.

One additional factor in favor of title insurance is the expected long-term solvency of the title company issuing the policy. Some experienced attorneys still prefer an abstract because it gives more complete historical information, such as the names of prior owners and, sometimes, information on water rights and mineral rights and activities.

Use of an abstract also may create an ethical problem for buyer's attorney. While the lawyer may realize additional

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fees for the abstract review and opinion letter, buyer's counsel must then provide an opinion letter to the client which may contain complex limitations and disclaimers. This lawyer may then not be in a position to advise the client independently of the significance of, and potential pitfalls inherent in, the limitations and qualifications inevitably included in his or her title opinion letter. For example, issues of marketability of title and the significance of the difference between office examination and record title examination are likely to be meaningless to the client without an attorney's explanation and unbiased advice.

If a commitment is obtained, it is crucial that buyer's counsel obtain and review complete copies of all documents referred to in the commitment. Particularly in an agricultural real property transaction, the existing exceptions to title are likely to affect the owner's property rights significantly. Counsel should be certain to exclude those portions of the contract purchase price allocated to water rights and personal property from the amount of title insurance coverage to reduce seller's premium cost. If there are to be endorsements or deletion of the standard exceptions, the contract should state which party will pay the additional premium and any costs of meeting the title company's requirements for the added coverage.

Whether an abstract or title commitment is used, it is in seller's best interest to obtain title evidence as soon as the decision to sell the property has been made. This allows early detection of potential title problems. It also may enable seller's counsel to avoid the time for review and approval of the status of title by buyer specified in the Commission Contract by providing (with or without attaching the commitment to the contract) that the status of title as shown in the commitment is accepted by buyer, or listing specifically in the contract's additional provisions what exceptions to title will be permissible. This is particularly valuable if the Commission Contract is used, as buyer's right to reject title for unsatisfactory title condition under the preprinted provisions is virtually unlimited and not restricted to material conditions or exceptions.

Minerals

Counsel for both parties need to pay particular attention to the status of mineral title. It is important to determine what interests are to be granted to buyer in the present transaction, those (if any) reserved to seller and those which are held by third parties by prior reservation. In addition, it is important to assess the prospects of mineral development of the property, particularly where such potential development would hinder or prevent buyer's intended use of the property.[5]

Unrecorded Interests

A thorough physical inspection of the property is crucial, either prior to signing a contract or during the due diligence period (if the provisions of the contract permit termination in the event of an unsatisfactory inspection).

Fences, Boundaries and Surveys

In most instanees, boundary fences were historically located based on topographical or similar considerations (such as the location of rivers, roads or canyon rims and walls) rather than established to fit the artificial and often unrealistic constraints of the quadrangular survey system. The passage of time (an eighteen-year statute of limitations, including tacking back to add on consistent use by prior owners) can result in the change of legal boundary lines to match the historical fence lines constructed and maintained by the property owner.[6]

Assessors, treasurers and title companies generally do not take notice of these unrecorded changes in ownership in the absence of a quiet title decree. The result is that the property actually owned by seller may differ in significant respects from the legal description disclosed by record title documents, often both surrendering acreage to the encroachment of neighbors and, at the same time, obtainiug portions of the same or other neighbors' property.

Counsel should check for any recorded boundary agreement which will change the legal boundaries of the property from that shown in the deed and title commitment legal description.[7] Counsel also should inquire concerning the existence of recorded or unrecorded license or use agreements by which adjoining owners have agreed to use fence lines as boundaries.

A survey can disclose and provide descriptions of fence encroachments by and against seller. Different types of surveys are available.[8] A monumented land survey determines the boundaries and warrants the corners of a parcel.[9] An improvement survey plat also shows the location of all structures, visible utilities, fences, hedges, walls and recorded easements, plus conflicting boundary evidence or visible encroachments.[10]

If a survey is undertaken and discloses discrepancies between the recorded and actual boundaries of the property, the problem may be handled in a number of ways. One extreme solution is to require seller to quiet title to the land he or she has acquired by adverse possession or to defend the record title by a quiet title action against third-party encroachments, or both. This is unlikely to be practical because of the time and money involved and because it is entirely possible that seller will not be able to prevail in such an action.

Another extreme solution is to have seller warrant title to the metes and bounds description of the property that is both within the fence lines and the record title description, while conveying by bargain and sale deed or quitclaim deed (neither of which contains warranties of title) both the property outside the fences, but within the record legal description, and the property within the fences, but outside the record title legal description. Although this will be acceptable to seller to avoid potential breach of warranty of title claims, the potential loss of acreage may require a change in the purchase price or may be unacceptable to buyer if excessive or vital land is involved.

Many possibilities exist other than these two rather extreme solutions. Subjects for negotiation may include allocation of the costs of a survey, price adjustment for acreage shortages and limitation on acreage shortages beyond which buyer will be entitled to terminate the contract. The course of negotiations in a particular transaction may require that a partial or complete survey be undertaken prior to contract or closing, and that survey costs be allocated between the parties or to one of them. However, with the time constraints involved in most transactions, it is more likely that counsel will be asked to foresee all possible future outcomes in drafting the contract documents.

If the cost and time required to obtain such a survey is prohibitive, sellers must take steps to protect themselves against claims based on boundary problems, such as breach of warranty of title or for recovery of part of the purchase price.[11] A

simple contract provision shifting to buyer the risk of boundary problems which would otherwise be described by a survey is as follows:

> The parties have entered into this contract without a survey. All related risk of loss is allocated solely to buyer (for example, any mistake concerning the acreage of the property being sold; the physical location of the boundaries of the property being sold; or any particular improvements or amenities being located upon the property described in this contract). No claim shall be made against seller, before or after closing, based upon a deficiency in acreage, the location of any boundary lines of the property or the loss of any amenities believed by buyer to be located upon the property or any other fact or condition which would be disclosed by an improvement survey plat of the property. By signing this contract buyer acknowledges that it has had a full opportunity to inspect the property and has relied solely upon its own investigation as to the location of the boundaries of the property described in this contract and the acreage of the property.

If this type of provision is used, seller's counsel also needs to include in the deed (and contract language governing the contents of the deed) an appropriate corresponding exception to the warranties of title. This provision might state that seller's warranty of title excepts any claim by an adjoining landowner based on adverse possession. The contract should expressly state the agreed upon language of the deed exception (*see* "Form of Deed" below).

Easements, Rights-of-Way and Parties in Possession

Easements may arise in several ways in addition to an express grant.[12] One of the most important purposes of a physical inspection of the property is to ascertain the possible existence of these unrecorded interests. Ditch easements, stock driveways and the rights of others to travel over existing private roads crossing the property are some of the most commonly found unrecorded easements. Talking to neighbors and holders of recorded easements over the properties can be a valuable source for information about unrecorded interests. This is one of many subjects which should be discussed with any occupants of the property.[13]

Buyer's counsel must carefully review the proposed warranty of title exception in the contract to determine if it is broad enough to except such unwanted easements.[14] Buyer's attorney should attempt to have the contract limit the interests that may be excepted in the deed to those interests that have been expressly disclosed by seller and those specified in the title evidence and contract. Seller will want a broader exception, discussed below under "Form of Deed."

Buyer should inquire concerning the rights of parties in possession of any portion of the property. This should include a thorough investigation of the nature and details of any such possessory rights. Buyer should insist on an express warranty that no unrecorded possessory rights exist, or specifying such interests.

Like title work, inspection of the property is an area in which the drafters of the Commission Contract assumed that seller would have greater knowledge and better assistance because the traditional buyer/broker relationship was that the selling broker was legally an agent of seller. For that reason, the Commission Contract language permits buyer to terminate the contract for *any* unsatisfactory physical condition, subject to a right of seller to cure.

This provision is overly broad from seller's perspective in a transaction as complex as a farm or ranch sale, where buyer will normally have visited the property one or more times, and may have done other due diligence, prior to entering into a contract. Seller should seek to have the contract language modified to state specifically a limited number of material items that will constitute unsatisfactory conditions entitling buyer to terminate under the provisions of the inspection provision of the Commission Contract.[15]

Leases

Leases may be recorded or unrecorded, written or oral.[16] They also may involve several different types of interests in the property.

Buyer should determine if there are existing leases of hunting rights on the property. The hunting lease is likely to be a source of substantial income from the property. In addition, an unfavorable hunting lease can impose hardships on the owner's use of his or her land for other purposes. The lease provisions should be reviewed for potential interference with grazing, farming or recreational uses planned for the property by buyer.

Buyer also should be particularly interested in the presence or absence of provisions concerning limitations on the number of hunters and animals taken, use of vehicles, repair of damage to roads, use of improvements on the property by the lessee, requirements that guides accompany hunters, hunter and outfitter licensing and safety assurances, hunter/guide ratios, liability insurance and indemnification provisions, habitat preservation provisions, cleanup obligations and provisions for compliance with all applicable governmental requirements.[17]

Counsel for buyer should carefully review all outstanding leases of any portion of the property, which frequently include crop, grazing, mineral and residential leases. In each instance, buyer should pay particular attention to length of term, rentals, obligations of the parties to the lease and potential interference with buyer's intended use of the property. In any residential lease, seller must comply with the statutory requirements to terminate his or her potential liability on any subsequent failure of buyer to refund a security deposit transferred by seller to buyer under the sales contract.[18]

The existence of a lease may not be obvious. Seller may continue to have possession of the property after closing, as is frequently the case in order to permit harvesting, calving, completing a grazing season or the unhurried removal of equipment and personal property. Buyer may take possession prior to closing for similar reasons. In either case, the situation amounts to a tenancy. The parties should consider whether rent is to be paid (or taken into account in setting the purchase price). Counsel must be particularly careful to provide for issues such as the existence of, and payment for, proper insurance (both casualty and liability) and allocating risk of loss to improvements, crops and personal property.

In every situation where leases are present, buyer's counsel should consider obtaining at closing a written assignment of landlord/seller's lease rights and obligations. Seller will wish to transfer all obligations to buyer and obtain buyer's indemnification for any claims against the lessor/seller arising from the lease. Buyer will want to limit indemnification to the time period after closing and will want seller's indemnification for occurrences relating to the lease prior to closing. Seller also will want a disclaimer of any obligation for seller to collect past or future rentals and to limit, as much as

possible, warranties contained in both the lease assignment and any estoppel affidavit.

The sales contract should require the execution of estoppel affidavits by seller and tenant before closing. The estoppel affidavit might include assurances that neither party is in default, the material provisions of the original lease are unchanged (or all modifications are specified), no rents have been prepaid (particularly important in hunting leases where significant prepayments are likely and buyer will want them paid over to him or her), no right exists to offset against future rents, the amount of any security deposit is confirmed and the rentals, term and any renewal options are disclosed.

Estoppel affidavits should be made available during the due diligence period to give buyer the opportunity to assess the impact of the leases on the property's value and usefulness. Unsatisfactory disclosures should enable buyer to terminate the contract. Seller will want to limit this right carefully. Buyer also should consider requiring an updated estoppel affidavit just before closing to confirm that there has been no material change in circumstances.

Where buyer requires termination of existing leases, potential pitfalls associated with statutorily required notice to quit[19] may entrap either party if existing leases are not carefully reviewed. Seller may find that the required notice to quit cannot be given in time to assure surrender of possession prior to closing by an existing tenant unwanted by buyer. This may expose seller to significant damages.[20] Buyer may discover an existing tenancy cannot be terminated for a lengthy period because of the extensive notice required in advance of termination of an existing tenancy or the existence of renewal or extension provisions in a lease.

Seller should consider requiring nonrefundable earnest money or specific performance language (or both) if valuable leases will be terminated prior to closing. Between the two, this author recommends increased earnest money. The specific performance provision merely gives seller the right to spend more money paying for a lawsuit. Buyer may be judgment-proof or file bankruptcy if a large judgment is entered. In any case, seller will have the trauma and out-of-pocket expense of the lawsuit for an extended period. Money in the bank is clearly preferable. If earnest money is nonrefundable, be sure to include a provision

authorizing the broker to release the funds to seller. That provision might state:

> Buyer acknowledges and agrees that, once the earnest money becomes nonrefundable under section _____, the earnest money will be released by Listing Company to Seller (subject to the terms of the Listing Contract between Seller and Listing Company).

Form of Deed

Seller will wish to limit warranties of title relative to the property conveyed as much as possible. Although buyer's prime reliance will be on the deep pocket of the title insurance company if title insurance is utilized, buyer also will want to preserve his or her remedies against seller and seller's predecessors. This is even more crucial where an abstract is the basis for evidence of title, as buyer is relying on the continuance of malpractice coverage by the attorney giving the title opinion. The parties should be particularly wary of using contract language such as a requirement that the deed be "in the form customarily used in _____ County, Colorado." The potential for serious dispute is obvious.

Many contracts specify that the exceptions to seller's warranty of title in the deed mirror those found in the title commitment. If so, counsel should make it clear whether this includes the preprinted exceptions, which exclude warranties relative to such survey matters as whether fences are on the legal boundaries, adverse possession, prescriptive easements and potential mechanic's lien claims. The contract might include language favoring seller, such as the following:

> Seller shall execute and deliver a general warranty deed to Buyer, on closing, conveying the Property subject to general property taxes and assessments for 1995 and all subsequent years; easements, restrictions, reservations, rights-of-way, and all other documents of record; easements and rights-of-way visible upon inspection of the Property; any rights or claims of parties in possession not shown by the public records; building, zoning, and land use rules, regulations, resolutions, restrictions, codes, and decisions; and any facts which a correct survey or inspection of the Property would disclose (for example, discrepancies, conflicts, shortages in area, or encroachments).

Buyer would want more limited language (particularly as to claims of possession) and should not allow exceptions for mechanic's lien claims. If the Commission Contract is used, the provisions relative to the limited exceptions to title permitted in seller's deed should be carefully reviewed. These exceptions may be sufficient for residential transactions, but they are too restrictive for most farm or ranch transactions.

Many contracts require title to be conveyed subject to "easements, restrictions, reservations, and rights of way of record." This language may cause problems for either party and should be avoided in agricultural land sale contracts. Although it could be assumed the quoted language refers to documents of record on the contract date, this may be subject to dispute.

Buyer also may find after closing that he or she has accepted title subject to a recorded interest missed by the issuer of the title commitment or opinion, or one put of record in the interim between the contract and the closing and not reflected on the title commitment reviewed in the early stages of the contract. This latter problem is avoided if the transaction is closed by the title company issuing the title policy, which is then responsible for insuring against documents recorded in the "gap" between the effective date of the commitment and recording of the deed.[21]

Seller, meanwhile, may be put in an even worse position by being forced to warrant title against known or unknown unrecorded interests, which should be excepted from that warranty. Seller in this type of transaction also should consider inclusion in the contract of a provision entitling him or her to deliver different types of deeds for the various interests conveyed. For example, seller certainly will not want to include within the coverage of a general warranty of title those water rights being conveyed with the property and should insist on conveying those interests by special warranty, bargain and sale or quitclaim deed. The same also may be true for mineral interests, easements and other interests associated with the property.[22]

WATER RIGHTS

As population increases, water rights become more valuable and crucial to agricultural operations. Indeed, in some instances, the purchase of land is merely a byproduct of the desire to acquire the water rights associated with a particular property. Consideration also must include ditch rights, reservoir rights and wells.[23]

Types of Water Rights

Direct flow interests represent the right to divert water as it passes a particular point propelled by the natural flow of the source induced by gravity. Diversion may be accomplished by gravity flow or with mechanical assistance (for example, by pumping). Although the water ultimately may be taken from a ditch or canal far from the source, direct flow rights will be tracked back to the stream, river or spring from which the water flow originates.[24] Storage rights are a separate type of water right that represents the right to impede the natural flow of water and retain it for use at a later time.

Tributary groundwater is underground water which affects the flow in a natural stream. Rights to tributary groundwater are administered by priority with surface rights, and must be adjudicated in the same manner.[25] Generally, groundwater is nontributary if it does not affect the flow of natural stream.[26] If the property is in a designated basin, the rules of that basin will apply. Counsel should first contact the state engineer if property is in a designated basin or where nontributary water is suspected.

Transferability of Water Rights

Unadjudicated (vested but not decreed) water rights are usually used with or upon a particular parcel of land. Either adjudicated or unadjudicated water rights may be conveyed separately from the land on which they have historically been used. However, water court approval may be required for their use on other lands if the water rights are adjudicated and if the point of diversion or manner or place of use is changed. Where not described in the deed, the appurtenances clause may be adequate to convey both types of water rights, if it can be shown that that was the intent of the grantor. To avoid any potential for dispute, each of these types of water rights should be described as specifically as possible in both the contract and the deed.

Water rights represented by water stock certificates are unique in that they combine elements of both real and personal property. They are fractional interests of larger water rights owned by a corporation or unincorporated association and are represented by stock certificates entitling the holder to a proportionate share of the issuer's water rights.

Unlike other water rights, water stock is personal property. Although often described as part of the conveyance in a

deed of real property, water stock is transferred in the same manner as other stock and governed by provisions of Article 8 of the Colorado Uniform Commercial Code ("UCC") as a certificated security.[28] Conveyance is by a physical delivery of the certificate, accompanied by indorsement of the certificate or a separate stock power. Many issuers accept inclusion of the stock in the description of the subject property contained in the deed along with physical delivery of the certificate to complete the transfer. Water stock occasionally also may be uncertificated, which raises different issues for transfer and encumbrance.

Investigation of Title and Availability

Although a complete discussion of the issues and information associated with transfer of water rights is beyond the scope of this article, some of the important matters which should not be overlooked are noted below.

Real estate title documents cannot be relied on to depict accurately the title to water rights because water rights are frequently transferred by instruments referring to the water rights only in general terms. To assess the nature, quality and value of the water right, counsel must consider whether the rights in question are conditional or absolute, their priority, whether they have been abandoned, the nature of their use (domestic or irrigation, for example), the extent of consumptive use and whether the water is being diverted at its decreed point of diversion.

A knowledgeable individual representing the buyer should assess the adequacy of measuring or diversion devices used in connection with the water rights, together with the condition of and problems associated with ditches, reservoirs, pumps, pipelines and any other improvements related to the water rights. Talking to neighbors, any other users of those improvements and holders of junior and senior water rights also is a valuable means of discovering potential problems with respect to the water rights associated with the property, such as the rights of any waste water users. In any transaction where water rights are extensive or critical to the operation of the property, buyer should obtain the necessary assistance to assess the status of title *and* the adequacy of the water rights.

Beyond examining the title documents relative to the water rights in question, it is crucial to estimate the actual amount of useable water based on historical availability. Priority records, when combined with historical availability information, help to determine real world limitations on the availability of water in dry years. Reviewing records of historical use is crucial because water rights may be subject to claims of abandonment if not used to the extent required by law. If the water rights in question are crucial to the transaction, a determination of the extent of any decreed conditional rights senior to the rights being purchased is advisable. The future operation of those conditional rights may substantially affect water availability.

Some of the sources to be considered in obtaining such information include water court records, division engineers, ditch riders, local commissioners, water association or water company officials, neighbors, water clerks and court records, prior owners of the subject property or water rights and long-time area residents.

Water rights evidenced other than by water stock are encumbered by inclusion in the legal description contained in a mortgage or trust deed. Water stock may be encumbered by a security agreement under the UCC or treated as a real property interest.[29] Possession of the water stock certificate is crucial in either case.[30] If the water stock has been treated as a real property interest and described in the mortgage or trust deed as part of the collateral encumbered by a mortgage or trust deed, it can be foreclosed in a judicial or public trustee foreclosure or as personal property.[31]

Warranty of Title

The extent to which seller warrants title to the water rights covered by the contract is subject to negotiation. From seller's viewpoint, seller should never be required to give a general warranty of water rights. The complexity and intricacies of water title and practical limitations on actual usage briefly described above make such a warranty by seller extremely risky. Seller should convey water and related rights by quitclaim deed, leaving buyer with the burden of title and usage research. Buyer must at least negotiate sufficient time during the due diligence period in which to investigate the water rights. Buyer also must recognize the cost of such physical and legal investigations and consider them in purchase price negotiations.

A middle ground may be for seller to convey water or related rights by special warranty deed. By so doing, seller war-

rants to buyer that seller has not dissipated (or created liens or encumbrances against) the water rights described in the contract. If a special warranty deed is given, seller may be at risk because of the possibility of claims of abandonment arising during seller's period of ownership. The protection buyer gains by use of a special warranty deed may be more illusory than real. In many situations, defects in title injurious to water rights being conveyed predate the ownership of the current seller, so buyer gains no protection from seller's special warranty deed.

Whatever type of water title warranty is negotiated, the parties must be certain that the contract accurately reflects their agreement and intent. The language of the current Commission Contract creates a potential trap for the unwary drafter in this regard. Water rights are described in the Commission Contract as one of several ancillary items or "inclusions."[32] A blank near the end of that section allows the drafter to specify the type of deed by which those interests will be conveyed. A problem may arise because the remainder of the sentence indicates that the water rights will be conveyed free and clear of taxes, liens and encumbrances. except those applying to the real property being conveyed described elsewhere in the Commission Contract. This language suggests the existence of a warranty of title. If the blank is filled in to indicate a quitclaim deed is being used but the exception language is not struck out, an ambiguity will exist.

Sometimes the blank is not filled in at all. The cross-reference to the limitations on title applicable to the land (which will almost always be conveyed by general warranty deed) then creates the inference that the water rights also are to be conveyed by general warranty deed, which may create a serious problem or dispute. Occasionally, the blank will be marked "n/a" (not applicable), creating the potential for confusion as to the effect of this action on the remainder of the sentence that contains the blank. This single contract term provides a perfect example of how careless or improper use of even a single form provision creates the potential for major problems.

GRAZING RIGHTS

BLM Permits

One of the most frequently seen types of governmental grazing interests is a permit from the U.S. Department of the Interior, Bureau of Land Management ("BLM") granting the rancher the right to graze a certain number of head of livestock on a designated area of public land for a stated time period each year.[33] The owner must control a specified amount of fee land to qualify to hold the permit. This private grazing land is referred to as base or commensurate property.

Any private land controlled by the permittee may be used as base land for the permit. Subleasing is permitted, if the sublessee has adeqnate commensurate property to support the permit. A fee land lease ordinarily must be for three years or more. The permit is transferred into the name of the suhlessee dnring the term of the sublease.

Assuming that the land that is the subject of the ranch contract is all of the base land for the permits to be transferred, the documentation to be filed with the applicable district office of the BLM includes at least a Grazing Application-Preference Summary, Grazing Application-Supplemental Information and a copy of the recorded deed showing the conveyance of the base property. In addition, it is necessary to file an Assignment of any range improvement agreements, cooperative agreements and exchange-of-use agreements related to the permits being transferred. Forms, information and assistance can be obtained from the range specialist assigned to the portion(s) of the public domain covered by the subject property at the BLM district office responsible for that area.

If a mortgage or trust deed is being carried back against the base property and grazing permits, a copy must be filed with the district office in each permit file to prevent possible transfer of the permit free of that lien. Recording in the office of the clerk and recorder is not sufficient. Counsel should have a BLM representative note the filing of a copy of the mortgage in the BLM lease file on the original mortgage, and then record the mortgage in the clerk and recorder's office where the base property is located to provide notice to those who fail to check the BLM records. Any prior lien will need to be released as part of the closing of the current sales contract.

Bnyer should investigate the status of any permits before the contract or during the due diligence period of the contract and attempt to have the contract specify that unsatisfactory information permits termination of the contract without loss of earnest money. Buyer also should attempt to obtain representations or warranties from seller concerning important issues relative to the permits. These might include (1) a statement that there are no existing violations of any of the permits or any cooperative agreements; (2) a statement that there has been no threat of suspension or reduction of the permit; and (3) confirmation of the upper head limit and time periods covered by the permit. The contract might provide:

> Seller does not warrant that there will not be reductions, modifications, or cuts in the grazing capacity of the BLM permits or the Forest Services grazing privileges. However, seller does warrant that seller has no present notice, knowledge, or information that any such cuts, modifications, or reductions in the permits or grazing privileges are planned or will be made at the time of transfer or waiver, as applicable.

Seller should resist demands to warrant that there will be no reduction in time period or number of animals permitted on a transfer of the permits, since the issuer will review the status of the permit on transfer and can change its terms.

Cooperative agreements are contracts between the permit holder and the government for sharing the cost and/or work for construction of improvements on the federal land covered by the permit. Buyer also will want to review any cooperative agreements to ascertain what obligations will be imposed on buyer by accepting an assignment of those agreements and any other existing range improvements. This review should be undertaken when buyer can still terminate the contract if onerous provisions are found in any of the cooperative agreements.

Similar to BLM permits, Forest Service privileges give the holder the ability to graze livestock on designated portions (called allotments) of a particular national forest.[34] The Forest Service does not consider these interests to be rights, but only privileges that are not transferable.

Assuming the land that is the subject of the transaction is all of the base property for the Forest Service privileges to be waived in favor of the buyer, the documentation required to be filed to complete the transaction includes at least an Application for Term Grazing Permit, Waiver of Grazing Permit and a copy of the recorded deed conveying the base or commensurate property.

A release of escrow waiver as to existing encumbrance needs to be filed to discharge any prior lien on the grazing privilege, and a new escrow waiver form should be filed for any lien, mortgage or trust deed given as part of the transaction. Encumbrancing is limited to first and second escrow waivers. Information and forms can be obtained from the district ranger's office for the national forest in which the privileges are located.

Counsel for buyer should investigate these interests in the same manner as BLM permits. Buyer also should attempt to obtain representations or warranties from seller concerning important issues relative to the grazing privileges. These issues are generally similar to the potential problems and desirable warranties discussed above with regard to BLM permits. It is important that no consideration be allocated to Forest Service privileges in the contract because of the Forest Service position concerning nontransferability.

Counsel for buyer will want to verify with the office of the district ranger the existence and status of the allotments and any exchange-of-use agreements, use of common facilities agreements and improvements agreemeuts that may impact the grazing privileges related to the contract. It also is necessary to determine whether any of the use has been suspended or if the threat of such suspension exists.

Base or commensurate property must be owned by the holder of the privileges. Unlike BLM permits, leased base land is not permitted. The privileges must be used for one season before they can be waived to another party or non-use can be taken. If the transfer is based on sale of permitted animals, those animals must be run for one grazing season on the allotment before non-use is taken or the permit is waived to a third party.

Colorado State Leases

Transfer of these leases requires completion of a questionnaire form and filing of lease assignment form, together with a copy of the contract or the recorded deed from the sale of the fee land with which the lease is used. In addition, if a lien is to be carried back on the lease assigned, a collateral assignment form must be completed and submitted. Obviously, the release of any prior assignment of the lease should be obtained. No specific form for such a release is speci-

fied by the state. Counsel should arrange for this release and be certain that its form is acceptable to the state.[35]

The lease must be used by the lessee only, unless express written permission is obtained from the State Board of Land Commissioners. If the lessee is a corporation, it must be authorized to do business in Colorado, and a copy of the certificate of authority issued by the Colorado Secretary of State must be submitted with the other lease assignment application materials. The lease assignment fee is substantial. For grazing leases, an assignment fee equal to the greater of $250 or two years' lease payments (in addition to annual lease payments) is assessed, while a fee equal to one year's lease payment is charged for other agricultural leases, such as those for crop lands.[36]

The purchase contract should clearly state who will pay the transfer fees relative to all governmental grazing rights. Annual fees should be prorated at closing based on the grazing season rather than the calendar year. All of the governmental grazing rights described above require that the lessee be a U.S. citizen. Counsel should be certain to contact the appropriate governmental officials to determine any potential problems associated with the governmental grazing rights.[37]

Counsel should be aware that an AUM (animal unit per month), in which the livestock capacity of governmental permits is expressed, represents one month of grazing for one cow, one horse or five sheep, while calves or lambs at side are not counted. For example, 400 AUMs may equal 100 head per month for four months or 200 head per month for two months. The time period and carrying capacity of the permit must be considered, not merely the number of AUMs.

Buyer's counsel, or some knowledgeable individual acting on the buyer's behalf, should carefully assess the particular attributes and any problems associated with governmental grazing permits or interests. This might include, for example, assessing the timing fit between the grazing periods permitted under governmental grazing permits and the availability of grazing on deeded land and any leased land covered by the contract; potential transportation problems between grazing areas; and the availability of adequate livestock water sources on permit lands (particularly on desert permits).

PERSONAL PROPERTY

The sale of personal property as part of a transaction for sale of farm or ranch real estate, such as livestock, farm equipment and untitled vehicles used in the agricultural operations, may be made part of the main agreement or covered by separate agreement.

Livestock

Sales of farm and ranch property frequently include the sale of livestock. Livestock may represent permitted animals required to be transferred to preserve the Forest Service privilege where base property is not being conveyed, when buyer seeks to acquire the ranch operation as a going concern or if parties wish to avoid cost and possible death losses incurred in transportation of livestock by either party. Some of the difficult problems frequently encountered in the sale of livestock include description, tallying and inspection, handling offspring, risk of death loss, definition of unmerchantability and payment provisions.

These problems often are sufficiently difficult that the parties may reserve these (or other) issues for negotiation after arriving at the basic terms of the contract. A sample provision of this nature might state:

> *Additional Assets to be Purchased.* If Seller and Buyer have not entered into a written, binding Addendum to this Contract on or before _____, 19__, providing for the purchase by Buyer and the sale by Seller of the livestock, livestock brand, and all other personal property now located on or pertaining to the _____ Ranch, then, at Buyer's election, this Contract may be terminated and Buyer's earnest money deposit will be returned.

Seller may resist this type of provision to avoid giving buyer the opportunity to use it to terminate the contract. Even if a livestock sale agreement is negotiated concurrently with the contract, it is often evidenced by a separate agreement.

Unless closing occurs when cattle have been gathered, it is necessary to provide for post-closing tally and physical condition and brand inspections.[38] Sheep are customarily accompanied by herdsmen who count the sheep frequently. Therefore, if a facility is available for condition and age inspection, deferred inspection provisions are not usually necessary.

Livestock purchase agreements and provisions can take many different forms, depending on the unique circumstances surrounding each transaction. The agreement may be that cattle will be maintained by seller on seller's BLM permit until a later date, with the purchase price being paid in cash concurrently with delivery of the cattle. Where the purchase price is to be paid in advance of the gathering, counting and inspection of the cattle, an escrow agreement can be used to provide for retention and disbursement of a portion of the purchase price agreed upon by the parties. The agreement also should reflect the maximum likely price adjustment required, based on expected death loss and unmerchantability of some of the animals. Escrow of funds may not be necessary if seller financing expressly gives buyer the right to offset for this purpose. A contract provision containing some of the elements described above might state:

> *Condition of Livestock—Adjustment of Purchase Price*:
>
> a. At the time of delivery of possession of the livestock to buyer, all cattle will be in marketable condition and free of cancer eye, lump jaw, broken mouth, or crippled condition.
> b. At the time of delivery of possession to buyer, all horses will be in reasonably good health and free of any crippled condition.
> c. If seller and buyer are unable to agree as to the health and the merchantable condition of any particular animal, the parties will retain _____, D.V.M., to determine the health and condition of a particular animal. The decision of Dr. _____ will he binding on the parties, and any fees charged for this determination will be paid one-half by seller and one-half by buyer.
> d. The parties acknowledge that it will be impractical to gather all of the mother cows for count and condition check at or prior to the time of closing. Therefore, buyer will pay seller full purchase price for the livestock at closing. The parties agree that they will cooperate in gathering all of the mother cows for accurate count and condition check at a time and place as to which the parties agree, but no later than _____.
> e. If, when the mother cows are gathered and counted, there are more than _____ merchantable cows, then buyer will pay seller the addi-

tional sum of $_____ per head for each mother cow in excess of _____. If, when the mother cows are gathered and counted, there are fewer than ____ head of merchantable mother cows, then seller will refund to buyer an amount obtained by multiplying the sum of $_____ times that number of cows calculated by subtracting the actual number of merchantable cows gathered from _____.

f. The yearlings, second-year heifers, bulls, and horses will be delivered to buyer at closing.

g. If there are fewer than _____ marketable yearlings available for delivery to buyer at closing, then the purchase price of the livestock will be reduced by an amount calculated by deducting from _____ the actual number of marketable yearlings available for transfer to buyer at closing and multiplying the difference by $_____.

h. If, at the time of closing, there are fewer than _____ marketable second-year heifers available for transfer to buyer, then the total purchase price of the livestock will be reduced by an amount calculated by deducting from _____ the actual number of marketable second-year heifers available for transfer to buyer at closing and multiplying the difference by $_____.

i. If, at the time of closing, there are fewer than _____ marketable bulls available for transfer to buyer, then the purchase price of the livestock will be reduced by an amount calculated by deducting from _____ the actual number of marketable bulls available for transfer to buyer at closing and multiplying the difference by $_____.

Buyer can seek a promise of ranch capacity from seller, but this may be difficult to obtain. Such a provision might state:

> Seller warrants and represents that the carrying capacity of the property in an average year is approximately _____ head of _____.

This language is certainly not terribly specific, but may be prudent or appropriate in some circumstances.

The sales or livestock contract also may provide for sale of one or more brands as part of the transaction.[39] It also is possible for seller to lease to buyer the right to use the brand on the cattle being sold (assuming seller is retaining no cattle bearing the same brand) for a transitional period while buyer begins his or her operations on the property. In any case, the parties will need to arrange for a brand inspection by a brand inspector of the Colorado State Board of Livestock Inspection Commissioners at a convenient time and place after the cattle have been gathered, tallied and inspected by the parties.

Titled Vehicles

Certificates of title for any vehicles sold will have to be gathered. Any necessary releases must be obtained from lenders noted on the titles, and applications for new titles must be signed by seller. The bill of sale for any equipment transferred should provide a price allocation for any taxable items. It also is wise to contact the local motor vehicle office in advance to determine the specific documentation and procedures required by that office.

UCC Search

A UCC record search should be undertaken to assure that any untitled personal property transferred is free and clear of all liens and encumbrances (which buyer should seek to have represented and warranted by seller in the contract and bill of sale).[40] Absent specific provision in the contract, this expense customarily is borne by buyer.

For equipment collateral used in a farming operation, farm products (including crops and farm products held as inventory) or accounts and general intangibles arising from or related to the sale of farm products by a farmer, the UCC requires that the financing statement be filed in the office of the county clerk and recorder in the county of the debtor's residence. Alternatively, if the debtor is a nonresident, the financing statement must be filed in the office of the clerk and recorder of the county where the goods are kept.[41] When the collateral is farm products, a security interest is not perfected unless filed in the Central Filing System.[42]

The procedure regarding perfection of security interests in farm-related personal property is somewhat unclear. CRS § 4-9-401(1)(a) states that central filing is required for perfection of a security interest against farm products. Although this is clear, the provision also appears to require filing in the clerk and recorder's office where the debtor resides. The situation is further complicated by differences in the language of the definition of farm products in CRS § 4-9-109 (a statutory definition for the purposes of differentiating farm products from other types of personal property, such as inventory) and the definition of farm products in CRS § 4-9.5-103(8) (describing those items as to which central filing is required for perfection of a security interest). The safe course for seller's attorney seeking to perfect a security interest in farm products to secure payment of the deferred portion of the purchase price in a sales contract is to file and perfect in both manners.

The necessity for caution is amply demonstrated by the case of *Morgan County Feeders, Inc. v. McCormick*,[43] where the perfected security interest of an *equipment* lender in certain cattle prevailed over the buyer of cattle under an oral contract with the debtor. The court determined that the cattle were in fact equipment, and not inventory, because the debtor had acquired them not for resale, but for use as equipment in cattle drives as part of his recreational (dude ranch) business.

Security interests against timber, minerals and fixtures must be filed in the clerk and recorder's office in the county in which the real estate is located.[44] Security interests in most types of collateral other than those described above are perfected by filing with the Colorado Secretary of State. The only safe procedure in a farm and ranch sale transaction is to check all possible locations for personal property lien filings: Secretary of State, clerk and recorder (personal and real property locations, county of debtor's residence and motor vehicle filings), and the Central Filing System.

Bills of Sale

Sale of livestock requires a statutorily mandated form of bill of sale.[45] In addition to specific requirements for the description of the livestock, the statute requires that the bill of sale be signed by buyer, seller and a witness to both of their signatures, all of whom must provide their post office addresses. The witness must be a legal resident of the county where the transfer takes place. Brands may be transferred by bill of sale.[46] They also may be transferred by a state brand deed that appears on the brand inspection form, which will be used by the state brand inspector in the inspection of the livestock to be conveyed.

The bill of sale used for ordinary items of personal property to be conveyed as part of the sale can take many forms. In view of the potential for dispute as to whether express or implied warranties are made or disclaimed with regard to the personal property transferred, the sales contract should include, at a minimum, a specific provision with regard to the existence or disclaimer of any express warranties and all implied warranties. Language most favorable to seller (sometimes erroneously referred to as a "quitclaim" bill of sale) might read as follows:

> The personal property described in this Bill of Sale is sold as is, where is, and with all faults of every nature. This sale is made from seller to buyer without (and seller disclaims any) warranty or representation of any nature, express or implied. By way of example and not limitation, all warranties and representations of title, merchantability, fitness for a particular purpose, and physical or operating condition are expressly disclaimed by seller and waived by buyer's acceptance of this instrument.

Each listed warranty disclaimer may be deleted separately (most likely at least the warranty of title) and express warranties may be added to fit the circumstances.

If seller is to carry back a lien on the personal property sold, special encumbrancing requirements for the types of property involved must be considered. For example, when titled vehicles are the collateral, the lien must be noted on the title for the lien to be perfected.[47] Perfection of a lien against water stock is described in the last paragraph of the section entitled "Investigation of Title and Availability," above.

ENVIRONMENTAL CONCERNS

Potential liability for significant costs under the various applicable federal and state environmental protection laws constitutes a minefield through which the parties must carefully negotiate, addressing the allocation of risk and expenses of investigation and compliance.[48] Counsel for both parties should be aware of the issues involved and appropriate inquiries should be undertaken. This area in particular may require that an outside expert be retained, such as an environmental engineer, to assess the physical condition of the property.

CERCLA Issues

The impact of the Comprehensive Environmental Response of the Compensation Liability Act of 1980 ("CERCLA")[49] is most often analyzed in the context of industrial real property transactions, but also should be considered in every farm and ranch contract. Although there is an exception to liability under CERCLA for pesticides and fertilizers applied during agricultural operations in accordance with manufacturer's directions, this does not necessarily preclude problems. There may be factual issues and proof problems concerning potentially improper application. Dumping of residue also may create liability.[50] This is a serious concern to buyer because one of the categories of potentially responsible parties under CERCLA is the present owner or operator of the property. The present owner is subject to liability even if his or her actions did not contribute to the contamination.

Although there has been much discussion of the innocent buyer defense, it requires that buyer must have undertaken all appropriate inquiry into previous

ownership and use of the property consistent with customary practice. Obviously, the only safe response of buyer is to evaluate fully the property prior to acquisition to avoid potential liability as the subsequent owner. The fact that seller's indemnification may be of little real value compared to the potential expense of remedial action is another strong incentive for buyer to require a thorough examination of the property and a right of termination for environmental contamination.

Environmental contract provisions may be relatively simple or extremely complex. A simple environmental provision favoring buyer might be as follows:

> *Hazardous Substances.* Seller warrants and represents to buyer that the property is not, and has not been, the site of any releases of hazardous substances which might result in liability or responsibilities under CERCLA or any other federal or state environmental protection statutes; except pesticides, fertilizers, and materials such as petrolenm-based products used in normal farming and rauching operations, all of which have been utilized and disposed of properly and in conformance with all manufacturer's instructions and all applicable state and federal laws and regulations. If in the future violation of this provision has been shown to have occurred, seller shall indemnify and hold buyer harmless from any and all claims or liability (including, by way of example and not limitation, response costs, cost of removal action, cost of remediation and liability for damages to natural resources) and all costs (such as expert witnesses and attorneys fees) incurred by buyer to defend any claim under any federal or state environmental protection law or regulation.

Seller should limit environmental warranties to problems caused by seller and matters within seller's actual current knowledge.[51] Buyer's concern is to be able to terminate the coutract in the face of environmental contamination problems. Seller's intent is to limit that right of termination, possibly conditioned on the time or cost of cleanup or the nature of the contamination. The extent of the investigation or environmental andit, the allocation between the parties of the expense of that examination and the rights and responsibilities of the parties arising from the results of that investigation are other subjects for negotiation.

Finally, the parties must negotiate and provide a mechanism for allocation of potential liability after completion of the transaction. This can place the risk of loss on either party or provide for it to be allocated between them in some fashion. In any case, both parties (whether they specifically accept a portion of the liability or attempt to transfer it to the other party) must consider the potential value of the promise of the other party to assume all or part of that liability in making the decision to enter into the contract.

Underground Storage Tanks

The Colorado Underground Storage Tank Act[52] interrelates with the Resource Conservation Recovery Act ("RCRA").[53] Both are concerned with soil and groundwater contamination from leaking underground storage tanks. If the particular facts fall within coverage of these two acts, the concerns of the parties will be similar to those discussed above concerning CERCLA.

Although the definitions included in both the state and federal legislation exclude from their coverage farm tanks of 1,100 gallon capacity or less,[54] because "farm" is undefined, counsel for the parties must consider whether the specific transaction is covered by these environmental protection laws. Even if these remedial statutes do not apply, counsel should address in the contract the existence of underground tanks and responsibility for their condition or removal. Buyer's counsel should be certain that the protections afforded his or her client by the contract concerning termination and other recourse are broad enough to apply to potential problems from this source. If applicable, the contract should contain a representation by seller that no underground storage tanks are (or have been, to the knowledge of the seller) present on the property.

OTHER ISSUES

Where the purchase price is seller-financed, the form of security documents may be an issue. The Real Estate Commission-approved forms of note and trust deed are frequently used and generally accepted. Alternatives should be considered. The form trust deed does not contain environmental protection language or the requirement for use of sound grazing, husbandry and agricultural practices.

Counsel for both parties should be certain to consider the tax implications of each transaction. This should at least include working with the client's tax professional and may necessitate obtaining specialized tax advice. Some potential issues are described below.

The contract should include an agreed price allocation between real and personal property and among the various major items of personal property covered by the contract.[55] This will have an impact for purposes of determining seller's gain, buyer's basis, depreciation potential for buyer and sales or use tax (if any is due) on the sale. If seller's residence is located on the property, an adequate price allocation will be necessary to enable seller to take advantage of the rollover provisions of 26 U.S.C. §1034 for gain realized in the sale of his or her principal residence. Price allocation also will impact the dollars available for use in a tax-free exchange.

Any attempt by the parties to structure a tax-free exchange under 26 U.S.C. § 1031 will necessitate careful consideration of those provisions in structuring the transaction to protect the parties and meet their individual needs. The contract language is relatively simple:

> Buyer agrees to cooperate with Seller if Seller wishes to undertake a tax-deferred exchange in accordance with I.R.C. Section 1031 relative to the sale of the Property and related interests by Seller to Buyer described in this agreement. This may include assignment by Seller of Seller's rights under this Contract for purchase and sale to a third party for the purposes of acting as an exchanging party or as a qualified intermediary under applicable Treasury Regulations. If there is an assignment by Seller under this provision, Seller shall pay all costs arising from or related to that assignment.

This language can be changed to suit exchanges by either or both parties. If a qualified intermediary is to be used for a nonsimultaneous exchange for buyer's benefit to prevent ambiguity, the language of Section 6 of the Commission Contract must be modified to permit assignment of the contract by buyer. If seller is financing the sale in reliance on buyer's financial and operational strengths, the right of assignment should be limited to § 1031 exchange purposes.

If there is to be seller financing, the parties will need to take into account the provisions of 26 U.S.C. § 453 concerning

installment sales. If either attorney is to close the transaction, the attorney should consider whether he or she is subject to and, if so, must comply with, the real estate reporting requirements of 26 U.S.C. § 6045. The sale of personal property as part of a farm or ranch sale may generate sales or use tax liability.[56]

Representations of seller's compliance or proof of exemption from withholding requirements should be included in the contract.[57] Where either party is an entity, appropriate documentation has to be prepared to confirm that execution and performance of the contract have been duly authorized and approved.[58] Counsel for buyer also needs to determine whether governmental licenses and permits are required for conduct of any business planned by buyer on the property, and counsel needs to take the necessary steps to obtain those governmental permits. In addition, counsel must be certain that the agreement conditions buyer's obligation to complete the contract on acquisition of any necessary approvals.

Under a provision of the Agricultural Credit Act of 1987,[59] the debtor from whom Farm Credit Services has obtained property by foreclosure or deed in lieu of foreclosure has certain rights of first refusal to reacquire that property. Buyer's counsel should review these provisions if seller in the transaction is Farm Credit Services.

Finally, counsel for buyer should determine whether the subject property contains any driveways opening directly on a state highway. CRS § 43-2-147 specifies that no driveway may be constructed providing direct access to any state highway after June 30, 1979, without an access permit. Any violation may result in an injunction, removal of the driveway or the installation by the state Department of Highways of a barrier across the driveway. The unexpected need to comply with this provision, or worse still its discovery after a contract is signed or after closing, may result in substantial unexpected expense to buyer or buyer's attorney.

Access generally is an issue of great importance. Be certain that buyer obtains access that is both legally sufficient and functionally practical. Access that has been used for generations may never have been confirmed by deed or quiet title decree. Crossing public land creates problems requiring a special use permit to create any sense of permanency. In almost no instance where public land must be crossed will a guarantee of perpetual access be possible. Insist on documented right of access and be prepared for unexpected factual problems.

CONCLUSION

The greatest challenge for counsel in preparation of the contract for an agricultural land or business sale frequently is recognizing and properly addressing the numerous and often subtle issues in the transaction. Counsel must not rely ou any form or checklist as a substitute for careful review and consideration of the unique aspects of each transaction. Therefore, it is critical for counsel to analyze whether each contract provision is adequate or applicable on a case-by-case basis.

NOTES

1. *See also* Carpenter, "Acquisition of Rural Lands," 2 *The Colorado Lawyer* 11 (Sept. 1973).

2. *See, e.g.*, Gaudio, ed., "Planning and Zoning," 2 *American Law of Real Property* (N.Y.: Matthew Bender, 1994).

3. The Colorado Real Estate Commission Statement of Policy Concerning Rule F, effective Sept. 1, 1995, (*hereafter*, Rule F) precludes brokers from preprinting italicized additions in the body of the contract (along with other requirements), and requires nonstandard language to be contained in addenda to make transaction-specific language more readily identifiable.

4. *Conway-Bogue Realty Co. v. Denver Bar Assoc.*, 312 P.2d 998 (Colo. 1957), *see also* Rule F, *supra*, note 3. If real estate brokers prepare the contract, Commission forms will be used.

5. If the buyer contemplates future conservation contributions, mineral reservations may reduce charitable deductions. *See* 26 U.S.C. § 170(h)(5) and (6).

6. CRS § 38-41-101. *See Thompson v. Whinnery*, 24 *Col.Law.* 1708 (July 1995) (S.Ct. No. 93SC495, *annc'd* May 15, 1995).

7. *See* CRS § 38-44-112.

8. *See* CRS § 38-51-102 *et seq.* An improvement location certificate should not be relied on. CRS § 38-51-108.

9. CRS § 38-51-103(13).

10. CRS § 38-51-102(9). Counsel also should have the surveyor research and show apparent unrecorded easements or rights-of-way.

11. *See, e.g., Mt. Sneffels Co. v. Estate of Scott*, 789 P.2d 464 (Colo.App. 1989), in which the U.S.G.S. topographical map relied on by the parties for a description of the location of the subject property contained an error of one-quarter mile in the location of the county line intended by the parties to serve as the property boundary line in the transaction.

12. *See Wright v. Horse Creek Ranches*, 697 P.2d 384 (Colo. 1985). Although limiting a prescriptive easement to its historical use in that case, the court recognized that unrecorded easements may be expanded by normal evolution of use and also may be created by implied easements and ways of necessity.

13. Ranch managers, employees, tenants and neighbors are an invaluable source of information concerning various aspects of the property and should not be overlooked.

14. If the Commission Contract is used, be careful to consider the form exceptions to title. Section 12 cross-references unrecorded third-party interests in subsection 9(b) as exceptions to title. However, that subsection describes both disclosure of such interests of which seller has actual knowledge and buyer's right to inspect. It is somewhat unclear whether the permitted exception to warranty of title includes both those interests disclosed by seller and those which are (or perhaps could or should be) discovered by buyer's inspection.

15. Section 10, Commission Contract.

16. Buyer's counsel should remember that oral leases of real estate for a term of less than one year are enforceable under Colorado's Statute of Frauds (CRS § 38-10-108).

17. Krohn, "Recreational Use of Agricultural Lands," 23 *The Colorado Lawyer* 529 (March 1994).

18. CRS § 38-12-103(4).

19. *See* Section 16, Commission Contract.

20. *Id.*

21. Reg. 3-5-1, VII, B and C, Colo. Div. of Ins.

22. For a general discussion of real property contracting issues, *see* Carpenter and Hoxeng, *Colorado Real Property Practice* (Denver, CO: Continuing Legal Education in Colorado, Inc., 1994).

23. *See generally*, 2A Krendl, *Colorado Methods of Practice*, §§ 2631-2579 (St. Paul, MN: West Publishing, 1991); Vranesh, *Colorado Water Law* (Boulder, CO: Vranesh, 1987).

24. Direct flow, storage and tributary groundwater rights may be adjudicated, or "decreed," pursuant to CRS Art. 92, Title 37.

25. Additional permitting requirements stated at CRS § 37-90-137 must be met prior to digging a groundwater well.

26. CRS § 37-90-103(10.5).

27. *See Weibert v. Rothe Bros.*, 618 P.2d 1367 (Colo. 1980).

28. *See* CRS 4-8-101 *et seq.*

29. CRS § 4-9-501(4).

30. CRS § 4-9-304.

31. *Kinoshita v. North Denver Bank*, 501 P.2d 1337 (Colo.App. 1972).

32. Section 2, Commission Contract.

33. 43 C.F.R. § 4100 *et seq.* (amended Aug. 21, 1995).

34. *See generally*, 36 C.F.R. § 222.

35 Information can be obtained from the office of the Colorado State Board of Land Commissioners in Denver, which oversees these leases.

36. CRS § 24-65-101 *et seq.*; Colorado Board of Land Commissioners Order No. 95-230 (Aug. 9, 1995).

37. With the continuing possibility of significant increases in grazing fees for federal land, buyer and buyer's counsel also must consider those potential costs in assessing the viability of any ranching operation.

38. CRS § 35-53-105; *see also* CRS § 35-43-101 et seq.

39. CRS § 35-43-109.

40. *See generally*, CRS § 4-9-101 *et seq.*, concerning creation and perfection of liens against personal property.

41. CRS § 4-9-401.

42. The central filing system for security interests relating to farm products was established pursuant to the federal Security Act of 1985. *See* CRS § 4-9.5-101 *et seq.*

43. 836 P.2d 1051 (Colo.App. 1992).

44. CRS § 4-9-401.

45. CRS § 35-54-103.

46. CRS § 35-43-109.

47. CRS §§ 42-6-120 and 121.

48. A detailed discussion of these issues is beyond the scope of this article. *But see* Hill, "Contractual Indemnification for Enrivoumental Liabilities," 21 *The Colorado Lawyer* 943 (May 1992); Griffith, "The Impact of CERCLA Liability on Real Estate Transactions," 17 *The Colorado Lawyer* 471 (March 1988).

49. 42 U.S.C. 9601 *et seq.*

50. Almost every sizable farm or ranch has a dump area of some kind that should be carefully inspected for potential environmental problems.

51. The terminology is borrowed from: Committee on Legal Opinions, "Third-Party Legal Opinion Report Including the Legal Opinion Accord of the ABA Section of Business Law," 47 *The Business Lawyer* 167 (Nov. 1, 1991). It is more common to see "to the best of seller's knowledge," which may or may not be a broader representation. Seller's counsel should be wary of warranties based on "knowledge, information, and belief" or "after diligent inquiry." As always, the terms used should be chosen with care.

52. 1989 Colo. Sess. Laws 384; H.B. 1299.

53. 42 U.S.C. § 6991 *et seq.*

54. CRS § 8-20-502(11).

55. 26 U.S.C. § 1060.

56. Colorado Dept. of Rev. Regs, § 26-117.1 imposes a use tax on the buyer of a business. A number of assets acquired in a farm or ranch sale may be exempt, such as certain livestock [CRS § 39-26-115(5)] and feed [CRS § 39-26-114(b)]. The allocation of purchase price can reduce sales or use taxes. Additionally, CRS § 39-26-114(5) completely exempts "farm close-out sales" from sales or use tax. Although the definition of that term [CRS § 39-26-102(4)] is not entirely clear, the intent of seller is important to using the exemption and should be evidenced in the contract recitals and warranties of seller.

57. Buyer is potentially liable for an amount equal to 10 percent of the purchase price if that amount is not withheld from seller's proceeds when seller is a foreign person (26 U.S.C. § 1445). An appropriate affidavit should be completed by seller for buyer's protection at closing. Colorado has a similar statute requiring 2 percent withholding (sometimes called "mini-FIRPTA": CRS § 39-22-604.5). Also, Form 1063 from the Colorado Department of Revenue must be completed by seller at closing or the necessary withholding should be made and paid to the state by the closer.

58. The form of a buyer entity also may affect the ability to assign federal grazing permits. For example, a foreign individual who would not be able to hold a federal grazing interest because of the requirement that the holder must be a U.S. citizen may be to able to use a domestic corporation as buyer to avoid this problem.

59. 12 U.S.C. § 2219(a).

NEWS FROM THE WOMEN'S BAR

PRO BONO RESTRAINING ORDER PROJECT

A *pro bono* workshop sponsored by the Colorado Women's Bar Association ("CWBA"), Project Safeguard, Legal Aid and the University of Denver College of Law will be held Friday, November 17, from 9 A.M.-5 P.M. at the College of Law Campus, Room C185. Eight CLE credits have been applied for. The *Pro Bono* Restraining Order Project, the only collaborative project of its kind in the nation, is designed to prepare attorneys to represent victims of domestic violence in Denver's Protective Orders Court. The all-day program (including lunch) costs only $10 when you agree to volunteer for two restraining order cases per year (approximately one-half day per case).

Judge Brian Campbell will give his perspective on Denver's Protective Orders Court, and other experts in the field of domestic violence will explain the dynamics of domestic violence, to provide attendees with practical instruction on the restraining order process and help them provide vital representation to battered women. Attorney involvement in the project is crucial!

For more information, call Madeline Collison in Denver at (303) 571-0777 or Linda Gordon in Denver at (303) 863-7416. To register for the program, call the CWBA in Denver at (303) 298-1313.

WORKSHOP FOR VOLUNTEER LAWYERS TO STAFF THE DENVER DISTRICT COURT'S INFORMATION AND REFERRAL OFFICE

On November 10, from 11 A.M.-1:30 P.M., Denver District Court Chief Judge Connie Peterson will kick off the CWBA's newest legal services project by training volunteer lawyers to staff the Denver District Court's Information and Referral Office. The office is designed to provide *pro se* litigants with legal information regarding dissolution of marriage and post-decree matters. Volunteer lawyers are needed to help explain to *pro se* litigants the process and the forms used. The minimum time commitment requested for volunteer lawyers is two half days per year.

Come hear Judge Peterson describe her innovative approach to helping *pro se* litigants through the legal system. For more information, call Madeline Collison at (303) 571-0777 in Denver, or Julie Wells at (303) 298-1313 in Denver.