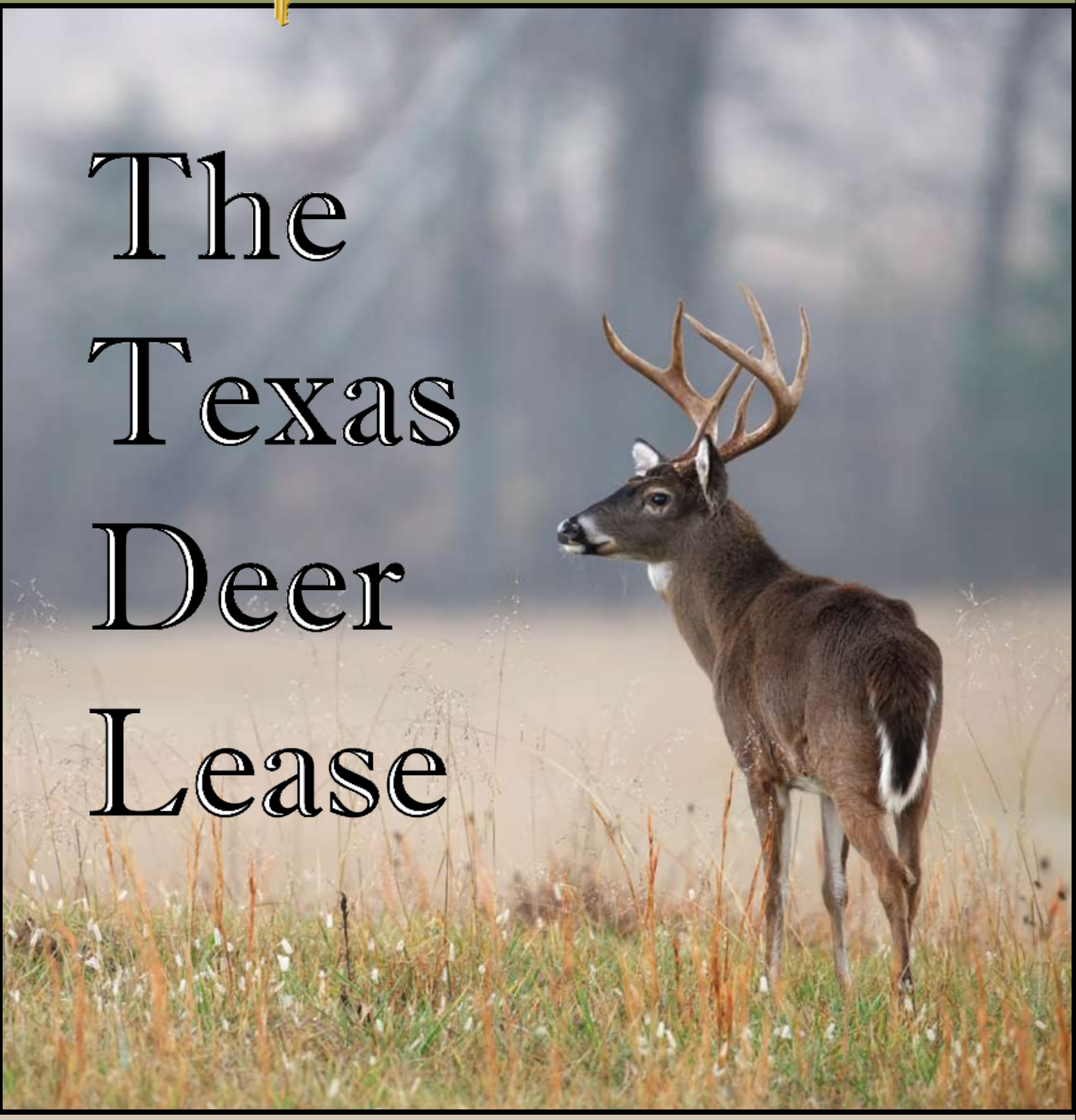
REAL ESTATE CENTER
AT TEXAS A&M UNIVERSITY

The Texas Deer Lease



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The Texas Deer Lease

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Deer hunting is big business in Texas. Hunting leases continue to be a constant source of revenue for many Texas land-owners following cycles in the agriculture and petroleum sectors.

Texas landowners hold a unique position. Unlike many other states, Texas has little federally or state-owned land available for public hunting. Thus, private landowners control the major supply of huntable land. This position affords Texas landowners a unique source of income.

Location of the deer and not the ownership of the animals, however, generates the revenue. In Texas, all indigenous wild animals such as white-tailed deer belong to the state. As such, the state regulates the taking of game through hunting laws.

Although the state regulates when, how and the number of deer that may be taken, the state cannot authorize trespassing on privately owned land. Independent permission from the landowners must be secured. Granting the right to enter and hunt generates the income.

Historically, permission to hunt was granted for the asking. Recently, however, Texas landowners began exacting a price for this privilege in the form of an agreement commonly referred to as a *hunting lease*. Depending upon the size of the lease tract, the abundance of game and the amenities available to the hunter, prices may range from a few dollars per day to thousands of dollars per season. The lease may last a few hours, a few days, several weeks or the duration of the hunting season.

The so-called Texas hunting lease is not, in fact, a lease but rather a license. Technically, a lease is a contract that conveys exclusive possession or control of land to another for a specified period. A license, on the other hand, grants permission to do something that otherwise would not be allowed or would be illegal. Because the typical Texas hunting lease does not grant the hunter exclusive possession or control of the land, it is better characterized as a license. However, in this publication, the term *lease* is used.

The hunting lease takes numerous forms. It may be granted orally on the payment of a specified amount of money. Or, it may be given by way of an elaborate written document covering all aspects of the hunt, including how the landowner's property may be used.

Whether the lease is oral or written, the landowner and hunter should concur on key issues before consenting to the agreement. By doing so, each party knows what to expect and thereby avoids possible misunderstandings. The terms of the agreement may affect the lease price.

Duration of Lease Term

The agreement should specify the beginning and end of the lease term. If the hunter has the privilege to scout the premises, set up feeders, erect blinds or conduct other similar projects before the season, this should be stated.

Description of Lease Tract

The exact area on which the hunting privilege is granted, to the exclusion of all others, should be described. If a legal or metes-and-bounds description is not available, a sketch or plat is the next best thing. The lease should prohibit the hunter from entering other property except to access the hunting premises.

Access to Lease Tract

If the land does not have a public access, the specific route or routes for the hunter's ingress and egress should be designated. When there is more than one public access, the landowner may wish to restrict the hunter's use to only one or two.

Game to Hunt

Generally, the primary game animal is white-tailed deer. Other game may be present such as doves, quail, ducks, turkeys, pigs, exotics and varmints. The agreement should state what game may be taken and when. Some leases may deny quail hunting until the deer season closes. Other limitations may apply. The price of the hunting lease may rise with the permission to hunt more game.

Hunting Weapons

The parties need to agree on types of weapons that may be used. The list may include all legal weapons or may be limited to centerfire rifles, muzzleloaders, shotguns or bows, depending on the game hunted.

Hunting Method

The hunting method, in part, is related to the types of weapons that may be used. The agreement may limit shooting to blinds only, may restrict shooting from a vehicle or may allow stalking only during bow season. Some leases may allow certain types of hunts only when a guide or designated individual accompanies the hunter.

Dogs may be prohibited or limited to pursuing quail and doves or trailing wounded deer.

It is against the law to hunt deer at night. However, it is legal to hunt some other game such as raccoons. The lease should state whether night hunting is permitted. It may be prohibited during deer season.

Number of Hunters and Guests

The number of hunters who participate in a particular lease needs to be specified. Generally, the landowner will specify the maximum number or enter individual agreements with each hunter or group of hunters. However, the lease needs to state whether guests

of hunters will be allowed and when. If hunting guests are allowed, the quantity of game the guests may take must be determined. For instance, if the game limit on deer is four per hunter per season–i.e., two bucks and two does, can a guest hunter harvest a deer in addition to the four allowed the lease hunter who invited the guest?

Also, if guests are permitted, must the host hunter accompany (or be on the premises with) the guests? Children below a certain age may not be permitted to hunt, or the landowner may require that they be physically accompanied by an adult at all times. Landowners assume additional risks and liability for children on the premises. (See pages 5 and 6 for more details.) Are hunters responsibile and liable for the acts of their guests?

Finally, the maximum number of both hunters and guests present on the leased premises at one time should be stipulated.

Order of Deer Taken

Many Texas hunters want trophy deer only. For those hunters, harvesting a doe is out of the question; however, to ensure that an adequate number of does is harvested, the landowner may require one or more does to be taken before a buck.

Harvesting Surplus Does

Much of Texas is overrun by does. The buck-to-doe ratio in some areas exceeds 1 to 10. Even with hunters taking their limit, the surplus persists. For this reason, the landowner and hunters may wish to address the problem.

Here are two possible solutions. First, the landowner and hunters may agree to allow a special doe hunt sponsored by the Texas Game Warden Association for underprivileged children. The children are introduced to hunting, and surplus does are harvested at the same time.

Second, hunters may donate unwanted does to the Hunters-for-the-Hungry Program. The hunter must pay a nominal fee to a participating locker to process the meat for needy families. For more information on the program, contact the local chamber of commerce or the local game warden or call the Texas Parks and Wildlife Department's toll free number, 800-792-1112.

The landowner and hunters may agree that if a certain number of does is not harvested by a given date, guests of either the hunters or landowner may take a specified number before the season ends. The meat may be kept by the guests or donated to the Hunters-for-the-Hungry Program.

Lease Price

The price of the lease per year, per day, per hunter or per animal needs to be set. The price may vary according to the lease terms. For instance, the lease price may rise as the duration of the lease, the number and variety of game animals allowed, the lease tract size, the types of weapons and permitted hunting methods increase.

Some deer leases are priced by the sex and quality of the deer. For example, there may be one price for each doe, while the price for bucks varies with antler quality.

Payment Schedule

The lease may be paid either in lump sum when privileges begin or periodically throughout the year. Generally, the landowner will require partial payment before the hunting season to ensure that the hunter will honor the contract on opening day. The agreement should address the consequences of missing an installment payment. Are all prior payments forfeited or may the landowner pursue the hunter in court for the balance?

Effective September 1, 1997, landlords have a duty to mitigate rent if the tenants breach the lease by leaving early. The Texas courts may apply this rule to hunting leases.

Use of Facilities

The lease price should reflect the quantity and quality of hunting facilities available to the hunter. Any hunting facilities on the lease usually are at the disposal of the hunter, but this should be clarified before hunting begins. The manner in which the facilities are maintained should be specified. For instance, which party has the duty to clean the premises, repair broken appliances, windows, plumbing or maintain the roads?

If the lease does not have overnight accommodations, or if they are not available to the hunter, the parties need to decide if overnight camping will be permitted and where. Fires may be restricted and cleanup required.

Clearing Senderos and Improving Premises

If the lease permits the hunters to maintain and improve the lease by clearing and maintaining senderos (cleared lanes for shooting), improving the roads and crossings, bringing in electricity, digging water wells, erecting a camphouse and so forth, the tasks may be at the hunter's discretion. The expenses, however, may be borne solely by the hunter, solely by the landowner or shared, depending on the agreement.

If the hunter is entirely or partially liable for the expenses, the lease agreement should prohibit the attachment of any liens on the property by virtue of the improvements.

Vehicular Travel

On certain parts of the lease, vehicular travel may be restricted. Landowners may prefer that the hunter use only existing roads. The use of off-road or four-wheel drive vehicles, except on existing roads, may be prohibited. Others may allow off-road travel but not across improved pastures, cropland, wet ground or other inappropriate areas. Depending on the terrain, speed limits may be imposed.

Blinds and Game Feeders

Most Texas deer are taken from blinds. The blinds may be provided by the landowner or erected by the hunter. Permission to use pre-existing blinds should be discussed as well as the hunter's installation of new ones.

In particular, an agreement should stipulate the:

- landowner's liability, if any, for injuries incurred by hunters using the blinds;
- necessity of obtaining the landowner's permission for both the construction and location of blinds and game feeders installed by the hunter and the construction of any senderos incidental thereto;
- fate of blinds and feeders installed by the hunter but not removed within a designated period after the lease terminates; and

- duty of the landowner, if any, to fill and maintain feeders both before and during the hunting season.

To lure game off adjacent property, hunters may erect feeders on fence lines and harvest crossing game. Although the practice is legal, it may create hard feelings. For this reason, landowners may require prior permission for locating and installing game feeders and blinds near boundary fences.

Also, to ensure the presence of game and a fairer hunt, the landowner may prohibit hunting within a certain distance from watering holes and feeders. Alternatively, the landowner may restrict hunting around certain feeders maintained exclusively by the landowner.

Regardless of the location of blinds, the agreement should prohibit shooting across boundary fence lines.

Handling Harvested Game

Landowners may stipulate where deer may be hung and cleaned. Likewise, the disposal of the carcass and other inedible parts may be restricted if deer are cleaned and quartered on the leased premises.

Gates and Keys

The lease usually requires the hunter to keep all gates shut and possibly locked. If the hunter is given a key, it should be returned at the termination of lease privileges.

Right of Inspection

The landowner may reserve the right to inspect the camphouse, motor vehicles and the game bags of hunters and guests on the leased premises for compliance both with the lease terms and game laws. The same privilege extends to any game warden with the Texas Department of Parks and Wildlife.

Camp Safety

The agreement may impose certain safety rules around the camphouse. In particular, procedures to ensure that all guns are checked and unloaded should be implemented. Also, consumption of alcohol may be prohibited.

Transferability of Lease Rights

The lease should address whether the rights and obligations of either party to the agreement may be transferred or assigned. The lease may permit a transfer but only with the other party's prior consent. If all or a part of the leased premises are sold—i.e., transferred, during the lease term—the impact, if any, on the lease should be addressed.

Hunting Rights of Landowner

Generally, the lease grants the hunter or hunters the exclusive right to hunt. However, if it is not stated, some understanding should be reached concerning the right of the landowner, the landowner's family and guests to hunt.

Right of Renewal

The hunter and the landowner may want to undertake long-term projects to enhance the habitat and hunting facilities. Because most leases are on a short-term basis, the hunter may want to include a right of renewal in the lease so the hunter can reap the long-term benefits from such projects. Likewise, the landowner may insert a renewal clause because of the favorable relationship the two parties have established.

Compliance with Game Laws and Recordkeeping

Obviously, the hunter must comply with state hunting laws. The agreement should state this so a game law violation breaches the contract.

Until September 1, 1997, hunters had to complete a daily hunting ledger required by Section 43.0485 of the Texas Parks and Wildlife Code. The name, address and hunting license number of each hunter was entered along with the number and type of game harvested each day. The ledger is now optional with the landowner.

In addition to the ledger, landowners may initiate a sign-in and sign-out sheet posted at the entry to the property. Upon entering the property, the landowner determines who is on the property and where.

Finally, the landowner may want other pertinent information concerning each harvested deer. The landowner may require the hunter to:

- measure and record the spread and number of antler tines;
- record the weight;
- furnish photographs of the front, back and sides of each buck;
- save and provide to the landowner the lower jaw or one side of the lower jaw; and
- identify on a map the approximate location where each deer was taken.

In some trophy-hunting areas, landowners require hunters to mount the head of a trophy buck and display it at the ranch's headquarters for a specified period.

Cooperation with Other Surface Users

Hunters must share the use of the surface with the landowner or with other lessees. This includes those with grazing leases, farming leases and oil and gas leases. The lease needs a cooperation clause whereby the hunters agree to cooperate with other surface users and not infringe on their rights.

At the same time, conflicts may arise. For example, hunters using roads built by oil companies; oil companies drilling in prime hunting areas; landowners clearing habitats for agricultural use; livestock ruining or destroying feeders and blinds; and hunters killing or injuring livestock or damaging fences and gates all create potential problems.

The lease needs to address how to resolve the conflicts.

Filing Lease of Record

In some areas of the state, it is customary to record the lease agreements in the official county records. The lease can be recorded only if the parties sign the document before a notary public. Recording gives notice of the hunter's rights to the leased premises. The lease is effective, however, without being recorded.

The lease agreement may address recording. If either party insists on recording, a memorandum of the hunting lease may be prepared, executed by the parties before a notary public and recorded in lieu of the actual agreement. A memorandum gives effective notice of the hunter's rights without disclosing the details of the agreement.

Use for Non-Hunting Purposes

The hunter may want to use the leased premises for non-hunting purposes both in and out of hunting season. The activities may include camping, fishing, photography, target shooting and other recreational activities.

The activities permitted need to be described. Some limitation may apply as to where and when certain activities may be conducted in relation to the hunting season. Using bottles for targets should be prohibited.

Resolving Disputes

Probably one of the most difficult issues is establishing the consequences for breaching the lease agreement. If neither party abides by the agreement, the agreement is useless. To ensure compliance, some method of resolution needs to be established. Mediation or arbitration is a possibility.

Depending on the severity of the violation, the consequences may range from immediate termination of the lease without refunding the lease fees to the denial of certain privileges granted under the lease. This may include forfeiting the right to take a full limit of deer during the season or denial of the right to conduct off-season activities such as camping and fishing.

Obviously, the dispute resolution will be the most difficult issue to negotiate, yet it is vital to the overall agreement.

Imparting 'No Trespass' Notice

Texas landowners wishing to prevent trespassing and poaching should be aware of the methods described by the statutes. The Texas Penal Code (Section 30.05) states that a person commits criminal trespass in one of two ways. First, after receiving notice that entry is forbidden, a person enters and remains on the property without effective consent. Second, a person enters or remains on the property after receiving notice to depart.

Entry is defined as the intrusion of a person's entire body.

The statute describes five ways that landowners may impart notice that entry is forbidden. These include:

(1) oral or written communication by the owner or agent;

(2) fencing or other enclosures obviously designed to exclude intruders or to contain livestock;

(3) signs posted at places reasonably likely to come to the attention of an intruder;

(4) visible presence of crops grown for human consumption that are under cultivation, in the process of being harvested or marketable if already harvested; and

(5) identifying purple paint marks on trees or posts.

The statute elaborates on the last measure added September 1, 1997. The purple paint mark must be a minimum of one inch wide and eight inches long, placed three to five feet above the ground and readily visible to anyone approaching the property. The marks must be placed every 100 feet on forest land and every 1,000 feet on all other land. *Forest land* means land on which trees are potentially valuable for timber products.

The statute excludes fire fighters and emergency medical services personnel while discharging their official duties in an emergency.

A violation of the statute is a Class B misdemeanor unless the intruder carries a deadly weapon. Then, the violation is a Class A misdemeanor. Class A misdemeanors are punishable by a fine not to exceed $4,000, confinement in jail for no longer than one year or both. Class B misdemeanors are punishable by a fine not to exceed $2,000, confinement in jail for no longer than 180 days or both.

Hunting and Fishing Over Submerged Private Property

Effective September 1, 2005, a new statute imposes limits on hunting and fishing over certain submerged lands. The new law is found in Section 62.002 of the Texas Parks and Wildlife Code.

Basically, no person may hunt or take wild animals or wild birds over privately owned land that is submerged by public fresh water caused by seasonal or occasional inundation or by public salt water located above the mean high tide line of the Gulf of Mexico, its bays and estuaries. However, the prohibition applies only where the land is conspicuously marked as privately owned by a sign or signs saying "Posted," "Private Property," "No Hunting" or similar messages.

As for fishing, no person may fish or take other aquatic life on the same type of submerged lands except when the:

- person owns the submerged land,
- person obtains consent from the owner of the submerged land,
- land is dedicated to the permanent school fund and is located within the tidewater limits of Texas,
- land is dedicated to the permanent school fund and is located within the gradient boundaries of a navigable stream or
- land is submerged by public water and is located below the mean high tide line of the Gulf of Mexico, its bays and estuaries.

Poaching and Poachers

Many landowners and hunters believe poaching involves taking game out of season. In contrast, Texas statutory law defines poaching as trespassing to fish or hunt whether in or out of season. According to Section 61.022(a) of the Texas Parks and Wildlife Code, a person may not hunt, catch or possess a wildlife resource at any time or place without the consent of the landowner.

Poaching carries different penalties depending on the game killed and the number of times the poacher is caught. Generally, the first violation is a Class A Parks and Wildlife Code misdemeanor. This is punishable by:

- a fine between $500 and $4,000 and/or
- confinement in jail not to exceed one year.

However, if the first violation involves killing a desert bighorn sheep, pronghorn antelope, mule deer or white-tailed deer, the offense is a Parks and Wildlife Code state felony. This is punishable by:

- a fine between $1,500 and $10,000 and
- confinement in a state jail ranging from 180 days to two years.

The second violation shall be classified one category higher than the first violation or a Parks and Wildlife felony, whichever is less. The Texas Parks and Wildlife Code provides three

punishments for a violation. They are, in ascending order:

- Class A Parks and Wildlife Code misdemeanor,
- Parks and Wildlife Code state jail felony and
- Parks and Wildlife Code felony.

Consequently, the second violation will be either a Parks and Wildlife Code state jail felony or a Parks and Wildlife felony depending on the circumstances of the first offense.

The punishment for the third and subsequent violations is a Parks and Wildlife Code felony. This is punishable by:

- a fine between $2,000 and $10,000 and
- imprisonment for a term of two to ten years.

Other rules bear on the offense and the punishment. For example, each offense carries with it the automatic revocation or suspension of the poacher's current hunting and fishing license for one to five years. If the person applies for a hunting or fishing license during the term of the revocation or suspension, this is a separate offense punishable as a Class A Parks and Wildlife Code misdemeanor.

Also, each fish, bird or animal taken, killed or possessed is a separate violation. Consequently, if a poacher takes three white-tailed deer illegally, the punishment could go as high as the third offense.

To report poachers, call the Texas Parks and Wildlife Department at 800-792-1112.

Discharging Firearms Across Property Lines

Property owners and hunters alike should be aware of a change to Section 62.0121 of the Texas Parks and Wildlife Code effective September 1, 2005. The new law makes it a Class C Parks and Wildlife misdemeanor to "knowingly discharge" a firearm while hunting or engaging in recreational shooting when the projectile travels across a property line. A Class C Parks and Wildlife misdemeanor is punishable by a fine not less than $25 or more than $500.

The discharge across a property line is permissible as long as the same person owns the property on both sides of the line or has written permission from the other owner to fire on, over or across the property. The written agreement must contain the following:

- name of the person or persons allowed to hunt or engage in recreational shooting,
- identification of the property on either side of the property line and
- signature of the property owner whose land the projectile crosses.

Hunting in Fringe Areas in and Around Cities

The rule regarding the discharge of firearms across property lines needs to be read in conjunction with another new law permitting hunting on the fringe areas in and around municipalities. The statute took effect on September 1, 2005.

Basically, the statute provides that a city's governmental requirements (its ordinances) do not apply to any agriculture operations located outside the corporate limits that are subsequently annexed or otherwise brought within the city's jurisdiction.

The city may limit such agriculture operations as long as the requirements are reasonably necessary to protect persons in the immediate vicinity of the operations.

The definition of "agriculture operations" was expanded to include wildlife management.

Changes in the statute deleted the discharge of firearms from the list of activities a city may regulate but modified the prohibition to some degree. The law (Section 229.002 of the Local Government Code) now provides that a municipality may not regulate the discharge of firearms or other weapons in its extraterritorial jurisdiction or in an area annexed by the municipality after September 1, 1981, if the firearm or other weapon is a shotgun, air rifle, pistol, BB gun or bow and arrow and is discharged:

- on a tract of land 10 acres or more and beyond 150 feet from a residence or occupied building located on another property and
- in a manner not reasonably expected to cause a projectile to cross the boundary of the tract.

However, if the weapon is a center fire or rim fire rifle or pistol of any caliber, the municipality may not regulate the discharge if it occurs:

- on a tract of land 50 acres or more and beyond 300 feet from a residence or occupied building located on another property and
- in a manner not reasonably expected to cause a projectile to cross the boundary of the tract.

The end result is that hunting (the discharge of a weapon) is now permitted in and around the fringe areas of cities. However, the projectile cannot cross a property line whenever the weapon is "knowingly discharged."

Landowner's Liability to Hunters

A landowner's liability (or responsibility) for the safety of anyone entering the property depends on the legal classification of the person at the time of injury. There are four categories: an *invitee,* a *licensee,* a *trespasser* and *children under the attractive nuisance doctrine*. Theoretically, a hunter could fit in any one of these.

Fee-paying hunters are classified as invitees. Landowners have a legal duty to keep the premises safe for the invitee's protection. The landowner must give the fee-paying hunter adequate and timely notice of concealed or latent perils (dangerous conditions) that are personally known or that a reasonable inspection would reveal. Injuries caused by dangerous conditions that are apparent or that could be revealed by reasonable inspection are the landowner's responsibility, but comparative negligence may lessen the liability. (See reprint 893, "Landowner Liability for Hunters," for a complete explanation of comparative negligence.)

Nonpaying hunters with permission to hunt are classified as licensees. Landowners have a legal duty to warn licensees of known dangerous conditions or to make the conditions reasonably safe. No inspection is required.

Hunters who enter without permission are classified as trespassers. The landowner owes them no legal duty. The law prohibits the landowner from willfully or wantonly injuring a trespasser except in self-defense or when protecting property. The landowner is liable for gross negligence or for acts

done with malicious intent or in bad faith.

Trespassing children are protected by the attractive nuisance doctrine. (See reprint 475, "Landowners, Children and Perilous Conditions," for details.) An attractive nuisance exists when the child is too young to appreciate or realize a dangerous condition; the location of the condition is one that the landowner knew or should have known children frequent; and the utility of maintaining the condition is slight compared to the probability of injury to children. The landowner may avoid liability if any one of these conditions is missing.

According to present revisions to Chapter 75 of the Texas Civil Practices and Remedies Code, (better known as the Recreational Guest Statute) agricultural landowners owe a recreational guest (including hunters) no greater degree of care than is owed a trespasser if there is no charge for entry.

The Recreational Guest Statute protects landowners from their negligent conduct only. If a landowner negligently injures a recreational guest, no liability arises, assuming all the conditions of Chapter 75 have been met.

However, if the landowner injures a recreational guest willfully, wantonly, deliberately, intentionally, maliciously or through gross negligence, he or she is not protected by the statute and may be liable.

If there is a charge, the protection remains until the total charges collected during the previous calendar year exceed 20 times the total amount of ad valorem taxes imposed on the premises during the same period. Prior to September 1, 2003, the limit on charges was four times the amount of the ad valorem taxes.

However, even if the fee limit is exceeded, the trespassory degree of care continues if the landowner has specific amounts of liability insurance coverage in effect. These amounts are $500,000 for each person, $1 million for each single occurrence of bodily injury or death and $100,000 for each single occurrence for injury to or destruction of property.

Landowners achieve two advantages by having the minimum amounts of liability insurance. First, the trespassory degree of care continues to hunters when charges exceed 20 times the amount of the ad valorem taxes. Second, the stipulated amounts serve to cap the landowner's liability if sued for an act or omission relating to the premises.

If the fee limit is exceeded without the minimum liability coverage in effect, then the landowner faces the degree of care owed to either an invitee or licensee, whichever the case may be. The amount charged has no effect on the attractive nuisance doctrine.

The hunting lease becomes a two-edged sword. Landowners receive an economic benefit for allowing entry to hunt. At the same time, they bear the risk and responsibility for the hunter's safety.

What, then, are the landowner's alternatives for limiting liability?

First, the landowner may charge no fee or charge no more than 20 times the amount of ad valorem taxes imposed on the hunting premises. This is not a viable option for large-scale hunting operations or where agricultural-use valuation is taken.

Second, landowners who charge more than 20 times the amount of the ad valorem taxes may purchase liability insurance according to the specified minimum amounts.

Third, the landowner can do as the law dictates: inspect the property routinely and either warn the hunters of the dangerous conditions or make the conditions safe. This may be difficult because conditions change rapidly. Notifying all hunters of a dangerous condition may prove impossible.

Fourth, the landowner may require the hunters to purchase and assign a liability insurance policy to the landowner covering the landowner's liability to the hunters. The minimum coverage should equal or exceed the limits mentioned earlier. Again, the premiums may cause the lease price to become prohibitive.

If the hunters or recreational guests have insurance that covers them while on the property, the landowner must insist that he or she be designated an additional insured under the policy. Otherwise, the landowner may be sued by the insurance company after it pays for any injuries sustained by the hunters or guests.

Fifth, the landowner may secure waivers from the hunters releasing the landowner from his or her negligent conduct. Valid waivers, like the Recreational Guest Statute, protects landowners from their negligent conduct only. A *waiver* is defined as the intentional relinquishment of a known right. To be valid, the release provision must meet five, possibly seven, standards.

First, the agreement must be based on an offer and acceptance between parties who have equal bargaining power. For this reason, a recent Texas appellate court ruled that parents cannot release, in advance, a minor's right to recover for personal injuries caused by the negligence of another *(Munoz v. II Jaz Inc. d/b/a Physical Whimsical, 863 S.W. 2d 207 [1993])*.

Second, the release agreement must be based on consideration, but it need not be monetary. The agreement not to sue in exchange for the right to hunt may be sufficient.

Third, the Texas Supreme Court requires an effective waiver agreement to state that the hunter indemnifies (releases) the landowner from any acts arising "from the landowner's negligence." This is sometimes referred to as the Express Negligence Doctrine *(Ethyl Corp. v. Daniel Const. Co., 725 S.W. 2d 705 [Tx. S. Ct., 1987])*.

Fourth, the written contract must give the hunter fair notice of the release provision. The fair-notice principle focuses on the appearance and placement of the provision, not its content. However, the fair-notice requirement is not necessary if the landowner can prove the hunter had actual notice or knowledge of the provision *(Spense & Howe Constr. Co. v. Gulf Oil Corp., 365 S.W. 2d 631 [Tx. S. Ct., 1963])*.

Fifth, the release provisions must be conspicuous. The element of "conspicuousness" is tied to the previous "fair-notice" requirement. Basically, the release provision must be conspicuous enough to give the hunter fair notice of its existence *(Dresser Industries, Inc. v. Page Petroleum, Inc., 853 S.W. 2d 505 [Tx. S. Ct., 1993])*.

How "conspicuous" is conspicuous? No absolute answer can be given. However, the following suggestions may be useful.

- Make the written provision noticeable.
- Emphasize the entire paragraph—not just a portion. Better still, place the waiver at the end of the contract on a separate sheet of paper.

- Use headings but not misleading ones.
- Italicize the headings.
- Ask the hunter to initial the waiver provisions of the contract or sign the page if placed on a separate sheet.

Note. The next two requirements are mentioned in post-injury release cases. However, under the right circumstances, the court could apply them to pre-injury releases.

Sixth, the document must specifically name the parties or individuals being released. "The mere naming of a general class of tortfeasors in a release does not discharge the liability of each member of that class. A tortfeasor (one who commits a civil wrong) can claim the protections of a release only if the release refers to him (or her) by name or with such descriptive particularity that his (or her) identity or his (or her) connection with the tortious event is not in doubt. In this way, a plaintiff would not inadvertently release nonsettling wrongdoers." *Duncan v. Cessna Aircraft Co., 665 S.W. 2d 414 (Tex. 1984)*.

Seventh, the document must mention or specify the type of claim being released. "To release a claim, the releasing document must mention it" *Victoria Bank and Trust Co. v. Brady, 811 S.W. 2d 931 (Tex. 1991)*.

For some protection from the attractive nuisance doctrine, the landowner or lease agreement may require all children to be accompanied by an adult.

A waiver form was presented by the late Dean Patton, an attorney with Morrill, Patton and Bauer in Beeville, Texas, at the 13th Advanced Real Estate Law Course sponsored by the Texas State Bar in 1991. The Real Estate Center received permission to use the form and has edited and included it at the end of this report. In 2008, the Center added an Assumption-of-the Risk provision that is explained in the next section. While this is the Center's best effort at a viable form, users are advised that the form has not been tested in a court of law.

Gross Negligence and the Texas Supreme Court

In June 2006, the Texas Supreme Court ruled that under certain circumstances a landowner may be held liable for gross negligence for failing to warn of a dangerous condition in spite of the language in the Recreational Guest Statute.

The case involved a young girl who was swept into a culvert and drowned while tubing on the Blanco River. Because several people had nearly succumbed to the same fate at the same location weeks earlier, the plaintiffs alleged gross negligence for failing to warn.

The high court agreed that sufficient facts existed for a jury to hear the case based on gross negligence even though the statute provides that landowners do not assure the property is safe for the intended recreational use. Here is how the court ruled.

"A landowner has no duty to warn or protect from obvious defects or conditions. Thus, the landowner may assume that the recreational user needs no warning to appreciate the dangers of conditions, such as a sheer cliff, a rushing river, or even a concealed rattlesnake. But the landowner can be liable for **gross negligence** in creating a condition that a recreational user would not reasonably expect to encounter in the course of the permitted use."

According to the court, gross negligence is defined as "an act or omission involving subjective awareness of an extreme degree of risk, indicating the conscious indifference to the rights, safety or welfare of others." Gross negligence is a question of fact for a jury, not a question of law for the judge.

Another important aspect of the case involved contemporaneous acts by the landowner in connection with the dangerous condition. In an earlier 2001 appellate case, the Waco Court of Appeals required a contemporaneous act by the landowner in connection with the dangerous condition before negligence could be proven. The Texas Supreme Court overruled that decision. The condition of the property itself is sufficient to raise a claim for either negligence or gross negligence. *(State v. Shumake, 131 S.W.3rd 66, Tex. 2006)*.

Protecting Against Gross Negligence Claims

Texas landowners face a crisis following the Texas Supreme Court decision. Neither the Recreational Guest Statute nor waiver forms will protect the landowner against claims for gross negligence. What can landowners do? Should they refrain from allowing recreational guests to enter their property?

Two possibilities exist. They are not mutually exclusive. One alternative is to secure liability insurance that covers gross negligence. The other is to secure an assumption-of-the-risk agreement from each potential claimant.

Landowners wishing to rely, in whole or in part, on liability insurance should contact their current or potential insurance carrier to see if claims for gross negligence are covered by the policy. Likewise, if the claims are covered, see if the policy also covers punitive damages that may stem from a gross negligence claim.

The other alternative, the assumption-of-the-risk agreement, is less expensive, but more risky. Texas case law recognizes that a valid assumption-of-the-risk agreement serves as a defense against gross negligence. It will not protect against claims for willful, wanton, deliberate, intentional or malicious conduct.

The risk involves satisfying the requirements imposed by case law. These requirements must be met contractually and cannot be implied from the plaintiff's conduct. For example, placing a sign at the entry of the property saying "Enter at your own risk" is inadequate.

The case of *Howard v. General Cable Corp. (674 F.2d 351)*, sets forth the contractual requirements. These must be met, for the most part, before the person enters the property.

- The person subjectively knew of the condition on the premises.
- The person subjectively knew the condition was dangerous.
- The person subjectively knew and appreciated the nature and extent of the danger.
- The person thereafter voluntarily exposed himself of herself to the danger.

The sample form at the end of this publication has been revised in an attempt to meet these contractual requirements. First, it warns (by listing) all of the dangerous conditions that the hunter or recreational guest is apt to encounter on the property. Second, the hunter or recreational guest declares that he or she has read and understood the warning, and that it serves to make

them aware of any actual or potentially dangerous conditions that they may reasonably expect to encounter. They declare that they understand and appreciate the nature and extent of the risks and dangers associated with entering the property. And finally, they voluntarily and knowingly consent to exposing themselves to the dangers by entering.

By reading and signing the form, the hunters or recreational guests, consent to the use of the agreement as a defense to a claim for negligence or gross negligence for failing to warn of a dangerous condition he or she is apt to encounter expectedly or unexpectedly on the premises.

Finally, landowners are asked to list all the accidents or incidents that have occurred in the premises during the past two years whether or not a complaint was made or lawsuit was filed. Incidental things such as fire-ant bites, wasp stings, being chased by a cow or falling out of a blind should be listed. This feature was added to avoid claims for failing to warn even though the events seem insignificant to the landowner.

Other Features in the Revised Form

The revised form includes other features to benefit landowners. For example, the Texas Supreme Court in the Shumake Decision held that the condition of the property alone without any contemporaneous act of the landowner is sufficient to bring a claim for premise liability. The revised form includes a waiver for any negligent condition of the property to possibly offset this ruling.

The revised form covers the use of testimonials. If landowners wish to advertise the hunting or recreational opportunity available on their property, they may want to use pictures, videos and letters taken by or written by previous hunters or guests. To legally do so, a release must be secured. The revised form has space for the hunters or guests to consent or reject the subsequent use of testimonials.

Perhaps one of the greatest features of the new form is the parental/guardian responsibility provision. Remember, the Attractive Nuisance Doctrine stares landowners in the face whenever they consent to minor entering the property. Also, a valid waiver cannot be secured from the minor or from the minor's parents. Insurance is about the only protection landowners have from a potential claim for a minor's injury or death.

The revised form takes a new approach. Basically, in consideration for allowing minors to enter the property, the parents or guardians agree to keep close watch and supervision at all times. If a minor is injured or killed because of their lack of or negligent supervision, the parents or guardians agree to indemnify the landowner for any court costs, attorney fees and judgments stemming from the injury or death. Also, the form allows landowners to designate the number of minors that may accompany the parents or guardian.

Another concern landowners voiced in the past is the duration of the waiver and assumption-of-the-risk form. If landowners have repeat hunters and guests, must they get them to sign a new form each time they enter or each year? There is no clear answer in the case law. Consequently, the revised form provides that the agreement lasts for so long as the hunters or guests are permitted on the property and until the agreement has been revoked or amended in writing.

Finally, the form contains a severability clause. This clause provides that if any part of the agreement is deemed unenforceable by a court of law, the rest of the document is still binding on the parties. Consequently, if the courts find one or more of the provisions invalid such as the assumption-of-the-risk, the waiver provision is still good.

Conclusion

This report lists some of the more important issues that the landowner and hunter should resolve prior to or in conjunction with granting permission to hunt. Not all items apply to every lease. The terms must be tailored to the particular situation.

Preferably the lease agreement should be written and signed to establish the exact terms and conditions. A lease agreement allows all parties to realize the privileges both being granted and received for the consideration paid.

This report is for information only; it is not a substitute for legal counsel.

1098-100-570

(Provided as a Sample only)
RELEASE OF LIABILITY, CONSENT FOR EXPOSURE TO DANGEROUS AND HAZARDOUS CONDITIONS, AND ASSUMPTION OF THE RISK

I (we) hereby acknowledge that I (we) have knowingly and willingly entered a Hunting Lease Agreement, or become a party bound by the terms and conditions of a Hunting Lease Agreement by and between **(Name of Landowner, Ranch, Farm or Business)** _____ _____, (hereinafter referred to as the **Lessor,** whether one or more), and **(Name[s] of Hunter[s])** bound by the Hunting Lease Agreement) _____ _____, dated _____, 20_____.

I (we) understand the terms, provisions and conditions of the Hunting Lease Agreement. I(we) agree to abide by its terms and conditions and also by the terms and conditions of this Release, Consent and Assumption-of-the-Risk Agreement.

I (we) acknowledge and understand the Lessor makes no warranties, either express or implied, as to the condition and/or safety of the hunting lease and the improvements located thereon (hereinafter collectively referred to as the leased premises) located in _____ County, Texas.

Warning of the Dangerous Conditions on Leased Premises

The dangerous conditions listed below serve to warn me (us) and make me (us) aware, appreciate and understand that dangerous conditions, risks and hazards exist, both obvious and latent, both natural and man-made, that can cause serious bodily injury or death and damage or destruction of my (our) personal property. My (our) presence and activities on the leased premises expose both me (us) and my (our) personal property to these dangerous conditions, risks and hazards, both obvious and latent and both natural and man-made, including, but not limited to, poisonous snakes, insects and spiders; elevated blinds and tree stands, whether or not erected by Lessor; eroded areas, holes, uncovered wells, steep inclines, sharp and jagged rocks located both on and off roadways and trails that create rough, hazardous and dangerous driving and walking conditions; animals both wild and domestic that maybe diseased and/or possessed with propensities to injure or kill; rushing and still water with perils lurking above and beneath the surface; persons with firearms and other lethal weapons both on or off the leased premises; the presence of bare electrical wires to restrain livestock; and the use of vehicles, boats and ATVs both on and off roadways, waterways, ponds and lakes.

Waiver and Release of Claims

In consideration for the right to enter the leased premises, I (we) hereby waive and release all claims and agree to indemnify, defend and hold harmless the Lessor named above, his or her (or the) respective owners, heirs, agents, employees and assigns from and against any and all claims, demands, causes of action and damages, including, but not limited to, court costs, judgments and attorneys' fees resulting from any accident, incident or occurrence arising out of, incidental to or in any way resulting from the use of or my (our) exposure to the conditions of the leased premises or the Lessor's active or passive negligent conduct thereon. These include, among other things, injury or death to the undersigned and damage or destruction of the undersigned's personal property.

Also, I (we) hereby further covenant and agree that I (we), my (our) heirs, successors and assigns will not make any claim or institute any suit or action at law or in equity against the Lessor named above or his or her (or the) respective owners, heirs, agents, representatives, employees, successors or assigns by reason of the Lessor's active or passive negligent conduct or by reason of the condition(s) of the leased premises, whether natural or man-made and whether the condition is caused by the Lessor's active or passive negligence.

ASSUMPTION OF THE RISK

Furthermore, I (we) declare I (we) are aware of *State v. Shumake, 131 S.W. 3d 66 (Tex. App. –Austin 2003), affirmed, 2006 WL 17;16304 (Tex.2006)* decided by the Texas Supreme Court in 2006. In that case, the landowner's failure to warn of an extremely dangerous man-made condition may give rise to a cause of action for gross negligence.

I (we) hereby agree and declare that the "Warning of Dangerous Conditions on Leased Premises" stated earlier **serves to warn me (us) of any actual and/or potentially dangerous natural or man-made** condition(s) that I (we) may reasonably expect to encounter on the leased premises that may cause serious bodily harm or death or cause damage to or destruction of my (our) personal property.

I (we) hereby state that I am (we are) aware of the dangerous conditions, risks and hazards mentioned earlier and that I (we):

(1) understand and appreciate the nature and extent of the risks and dangers of being exposed to those and other associated dangerous conditions and
(2) voluntarily, expressly and knowingly consent to exposing myself (ourselves) and my (our) personal property to those and other associated dangerous conditions.

By affixing my (our) signature(s) below, I (we) knowingly and expressly **ASSUME THE RISK** of my (our) exposure to the dangerous conditions, risks and hazards expressed above. This assumption of the risk may be used by the Lessor as a defense in a court of law as outlined by the Texas Supreme Court in *Farley v. M.M. Cattle Co., 529 SW 2d 751,* against any allegations either for negligence or gross negligence for failing to warn me (us) of any dangerous natural or man-made conditions that I am (we are) apt to encounter expectedly or unexpectedly on the leased premises. **This assumption of the risk does not extend to Lessor's reckless or intentional conduct.**

The Severability Clause

If any term, provision, covenant, release, assumption or condition of this agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

Length of Agreement

This Release and Assumption of the Risk Form applies during the time that I am (we are) permitted on the leased premises, now and in the future, and until this agreement is revoked in writing.

Parental, Guardian and Supervisory Responsibility for Minors and Indemnification for Injuries or Deaths

In consideration for allowing _____ (enter the number in the blank) minor(s) to accompany me (us) on the leased premises, I (we) agree to keep close supervision of the minor(s) in my (our) watch and care at all times. I (we) further agree to indemnify the Lessor for all claims stemming from the injury and/or death of a minor or minors in my (our) watch and care caused by my (our) lack of or negligent supervision.

Consent or Denial for Use of Testimonial, Pictures, Etc.

In the event photographs, slides or videos are made of me (us) while on the leased premises, I (we) consent to the Lessor's use of the to the photographs, slides and videos in promoting and marketing the Lessor's hunting and recreational activities on the leased premises. Likewise, by sending any testimonials or pictures via letters, emails or otherwise of my (our) experiences on the leased premises to the Lessor, I (we) consent to the Lessor's using them in like manner.

_____ Yes. You May Use the Material _____ No. You May Not Use the Material

List of Recent Accidents and Incidents Occurring on the Leased Premises

According to Texas Case law, the Lessor needs to warn hunters and guests of accidents and incidents occurring on the leased premises that may influence their decision to enter. The following is a list of all accidents and incidences that involved injury or death to a hunter or guest or to the damage or destruction of his or her personal property. The list covers all accidents and incidences occurring during the past two years. _____

_____

_____

_____

Dated and signed this _____ day of _____ 20_____.

_____ _____

(Hunter's or Guest's Signature) (Hunter's or Guest's Printed Name)

Hunter's or Guest's Address:

_____

_____

Dated and signed this _____ day of _____ 20_____.

_____ _____

(Hunter's or Guest's Signature) (Hunter's or Guest's Printed Name)

Hunter's or Guest's Address:

_____

_____

Portions of this waiver form was presented by the late Dean Patton, an attorney with Morrill, Patton and Bauer in Beeville, at the 13th Advanced Real Estate Course sponsored by the Texas State Bar in 1991. It has been edited by the Real Estate Center at Texas A&M University and is offered as a sample only.

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