

# Legal and Liability Issues that Should be Considered In a Business Plan

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## Introduction

Contemplating the prospects of legal action against your farming or ranching operation can be unnerving. The assorted unknown variables can make the planning process frustrating, while the threat of enormous adverse judgments generates an emotional response. Planning for the loss or withdrawal of a key member of your management team can also be unpleasant. The business planning process will help identify risks and assign resources to manage these risks. A large number of potential legal and liability issues will be identified with a thorough SWOT analysis. Similarly, a resource inventory will help identify the individuals and tools necessary to manage these risks. It will be impossible to list all potential liability risks as well as to completely eliminate all of the legal and liability risk from an activity as inherently risky and uncertain as agriculture. The completed business plan will address specific action plans for dealing with identified risks, as well as outline contingencies for the unforeseen risks.

## SWOT Analysis

A SWOT analysis is a term used to describe a tool that is effective in identifying your **S**trengths and **W**eaknesses and for examining the **O**pportunities and **T**hreats you and your operation may face. The process of performing a SWOT analysis can be difficult and time consuming. If completed however, a SWOT analysis will provide a complete summary of each component or segment of the business. The identified legal and liability risks may be considered as weaknesses, but most production oriented managers will consider these risks as threats.

There is no fixed way of completing a SWOT analysis. The manager of the operation (or whoever else will be using the analysis) should be comfortable with and understand the analysis. The objective of the analysis should always be to place the business in a position where the manager can determine a strategy for the future to improve its overall performance or maintain it if the final results are favorable.

## Types of Legal and Liability Risks

Initially, legal and liability risks of an operation can be categorized into six basic categories; **product liability, employee safety, public safety, environmental risks, financial and contractual risks and successional risk**. This list of categories is incomplete. Each operation may have particular circumstances that create unique types of risk.

As part of the SWOT analysis, questions need to be asked about the operation that will assist you in identifying some of the risks facing an operation. Below are examples of questions for the six identified types of legal and liability risk.

Product Liability – Are there risks inherent in the in the type of products that are being produced by the operation?

- Is there a possibility of GMO/non-GMO contamination of my grain?
- Does the possibility of vaccine or antibiotic residue pose a threat in the calves I am marketing?
- Does marketing alfalfa to horse owners increase my risk?

Employee Safety - Production agriculture has historically had high rates of accidents that result in injury or death for both owner/operators and hired labor.

- Does the type or condition of my equipment require specific training for my employees? Have they received sufficient amounts of this training?
- Is the operation crossed by any major thoroughfares?

Public Safety – The unanticipated interaction of farm or ranch operations and the non-farming public can have serious consequences. This interaction can occur as a result of daily operations, or as a result of trespassing or other unintended or unplanned activities by non-farm individuals.

- Is there a windmill or stock tank within view of the school district's bus stop?
- Does the type or condition of my equipment require specific training for my employees? Have they received sufficient amounts of this training?
- Are any pastures bisected or crossed by any major thoroughfares that will need to be crossed when rotating or burning pastures?

Environmental Risks - This category can be further segmented into numerous subcategories to make the assessment easier or more complete. These issues could include air quality, surface water pollution (animal waste or crop chemical residue runoff) or groundwater pollution issues.

- Is the operation within the watershed of a population center using surface water for its municipal needs?
- Were the terraces and lagoons of my CAFO engineered properly?
- Have my employees been fully trained on the mixing and application of herbicides and the use of spray equipment?

Financial/Contractual Risks – These issues could arise from someone's failure to make good on an agreed upon transaction.

- Do you have a written lease with all of your landlords?
- Do you allow hunting leases/day hunts of your operation?
- Do you have a contract for a deed?

Successional Risk - The loss of a key member of an operation can greatly hamper the performance of any business. In small, family oriented businesses this is even more evident in that these key people provide labor, management talent, financial resources as well as a number of other intangible factors.

- Will the death of our father jeopardize the long term viability of the operation?
- If your brother decides on a career change, will the operation be able to buy him out and continue to operate?

Tables 7.1 and 7.2 can be used to begin organizing the legal and liability weaknesses and threats as identified in the SWOT analysis.

### **Resource Inventory**

Another segment of the business plan that will be of assistance in the development of a strategy for managing the legal and liability risk facing an operation will be the resource inventory. The resource inventory is simply a list of **all** the resources available to the management team to achieve the goals and objectives established for the operation. These resources are exposed to the legal and liability risks, but also are the resources that will be employed to manage these same risks. This list of resources can also be separated into five main categories with each of those having any number of sub-categories;

- Physical/Natural Resources
  - Land
  - Topography
  - Carrying capacity
  - Brush density
  - Water facilities
  - Weather (precipitation)
- Human/Personnel Resources
  - Full time management team
  - Employees
  - Ad hoc team members
    - Banker
    - Lawyer
    - Commodity broker
    - Insurance representative
    - Texas Cooperative Extension personnel
    - Crop Consultant
    - Veterinarian
    - Etc.
- Equipment Resources
  - Size
  - Age
  - Condition/State of repair
- Animal/Crop Resources
  - Crop yields and government payment histories
  - Livestock description – Head, age, weight, market value

- Breeding livestock
- Grazing/growing/stocker livestock
- Financial Resources
  - Cash balances
  - Outstanding debts and interest rates
  - Cash flow
  - Borrowing power

Each resource will have particular attributes that make it valuable to the operation. The value of these resources is also likely to vary between the resources. A lack of a resource to address an identified threat will likely need to be listed as a weakness of the operation in the SWOT analysis.

## **Planning**

The planning process is unique to each operation and to each of the threats and weaknesses that have been identified. The SWOT analysis has identified risks or threats to the operation. The management team will need to prioritize these risks and assign specific personnel and resources to the development of a strategy, or action plan, to address the issue. That person will be expected to report to the management team on progress and other developments.

At this point in the planning process, the manager has resources assigned to proactively address threats to the operations, and a list of weaknesses that the management team can now focus their efforts on. A periodic review of their business plan will be necessary for the operation to adapt to changes as they arise.

Table 7.3 illustrates a systematic approach to listing each of the legal and liability weaknesses and threats, the person assigned to that issue, and a brief description of the action plan to address the issue.

**Table 7.1 Legal and Liability Weaknesses Identified in SWOT Analysis.**

List all the Internal Weaknesses of the Operation. (Use additional Pages if Necessary)

Identified Weakness	Type of Risk/Threat	List of Weaknesses
W <sub>1</sub>		
W <sub>2</sub>		
W <sub>3</sub>		
W <sub>4</sub>		
W <sub>5</sub>		
W <sub>6</sub>		

**Table 7.2. Legal and Liability Threats Identified in SWOT Analysis.**

List all the Internal Weaknesses of the Operation. (Use additional Pages if Necessary)

Identified Threat	Type of Risk/Threat	List of Threats
T <sub>1</sub>		
T <sub>2</sub>		
T <sub>3</sub>		
T <sub>4</sub>		
T <sub>5</sub>		
T <sub>6</sub>		

**Table 7.3. Action Plans for Legal and Liability Weaknesses and Threats.**

Weakness or Threat Identified by SWOT Analysis	Assigned Resource Person(s)	Action Plans
W <sub>1</sub>		
W <sub>2</sub>		
W <sub>3</sub>		
W <sub>4</sub>		
W <sub>5</sub>		
W <sub>6</sub>		
T <sub>1</sub>		
T <sub>2</sub>		
T <sub>3</sub>		
T <sub>4</sub>		
T <sub>5</sub>		
T <sub>6</sub>		
T <sub>7</sub>		

# Legal and Liability Assessment For TTAP Enterprises Case Study

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As part of the development of a full business plan for TTAP enterprises, Thomas Jr. and Julie Rancher have completed a **SWOT** analysis and an inventory of available resources on their operation. They have also developed an action plan for the operation which seeks to exploit the identified strengths and opportunities while at the same time improving their weaknesses and developing definitive plans for managing the threats facing them. This discussion will address the legal and liability weaknesses and threats identified in the **SWOT** analysis.

Table 7.4 provides the list of legal and liability weaknesses of TTAP Enterprises while Table 7.5 similarly provides a list of the legal and liability threats of the operation. The type of risk or threat is also identified in each table.

## Successional Risk

The first issue to deal with is that Julie is the only person involved with the accounting and financial aspects of the operation (W<sub>3</sub>). This can be viewed as an operational weakness as well as a successional weakness. The intimate knowledge of the daily financial conditions of the operation would likely benefit Thomas Jr.'s management ability. Thomas Jr.'s ability to handle the accounting and financial responsibilities provides some long term stability to the operation if Julie is unavailable due to childbirth/child rearing or other circumstances.

The current lack of an estate plan for Thomas Sr. is a weakness to the operation as well (W<sub>5</sub>). This is especially critical if Thomas Sr. were to pass sooner rather than later. The issue of providing for Thomas Sr.'s spouse after his death also needs to be considered. Obviously the planned transition of ownership of Thomas Sr.'s property would be more desirable. The last successional risk is the lack of a plan to provide for Julie and her new/growing family in the event of a personal catastrophe to Thomas Jr. (W<sub>12</sub>). None of these issues are particularly pleasant to discuss, but a firm plan is necessary to ensure the long term success of TTAP Enterprises.

## Public and Employee Safety

Agriculture in the rolling plains of Texas implies the availability of water, either through precipitation or groundwater. The **SWOT** Analysis identified windmills as being the major source of livestock water in the far reaches of pasture (W<sub>7</sub>). The current placement of two windmills and possibly one dirt tank can be viewed as a potential weakness in that windmills, stock tanks and ponds could be viewed as an attractive nuisance. It is not intended that windmills become a place for children to climb or for ponds and tanks to become popular swimming holes. This issue may be compounded by bringing in the non-

farming/ranching public for hunting or other outdoor recreational activities. Placement of future livestock watering infrastructure needs to account for visibility and access to unintended trespassers.

The line equipment is thought to be only moderately aged ( $W_8$ ). While the age of machinery is usually thought of as a financial issue, it also poses an employee and public safety issue. Older or relatively worn machinery and equipment requires more repair and servicing to maintain its safety and efficiency. Obviously the compromised integrity of a piece of machinery or equipment is a safety issue to the operator, but if the equipment is traveling on public highways, the general public is also being exposed.

The proximity of a county road on the west side of the operation creates some public safety concerns( $T_{13}$ ); trespassers coming onto the Rancher's property and TTAP Enterprises' cattle getting loose on the county road.

### Product Liability

Two product liability threats have been identified for TTAP Enterprises, the threat of kernal bunt ( $T_1$ ) and BSE ( $T_7$ ) or other foreign animal disease. The possibility of BSE or another foreign animal disease being discovered anywhere in the U.S. is a threat to market prices. But the possibility of that event happening on TTAP Enterprises is also a very real threat. This threat may become more critical if TTAP Enterprises enters a niche market where consumer perceptions of health issues may be more focused than in the general public.

### Environmental

The threat of increased regulations aimed at reducing non-point source pollution from agricultural runoff limiting activities or greatly increasing production costs is a real concern to both Thomas Jr. and Sr. ( $T_{10}$ ). The threat of ground or surface water pollution being traced back to TTAP enterprises needs to be minimized.

### Financial or Contractual Risks

TTAP Enterprises face several financial risks as a result of the uncertainties in weather and the markets. These types of financial risk are addressed by the financial analysis, cash flow projection and the application of various risk management strategies; futures market, crop insurance, LRP policies, forward contracts, etc. Financial liability in this context is referring to the additional potential liabilities created when invited non-farming/ranching individuals or groups are on the ranch ( $T_{11}$ ), or to other contractual arrangements that TTAP Enterprises may enter into. Thomas Sr. is also concerned about the financial losses that TTAP Enterprises may incur if the owner of the mineral rights grants a lease to a drilling or exploration company ( $T_{12}$ ).

## Action Plans

Table 7.6 begins to lay out the plans for systematically addressing each of the identified weaknesses and threats. Each weakness or threat is addressed individually, and a specific person or combination of people will be assigned to each issue. Delegation of these responsibilities will make the overall task more manageable for Thomas Jr. and Julie, as well as give the other team members a sense of ownership of the plan they are to help develop. The initial action plan for individual threats or weaknesses may be somewhat vague or generalized until the appropriate resources or expertise is applied to the problem. Upon completion of the full business plan, several threats and weaknesses will remain on the **SWOT** analysis, but the action plans for managing these risks will be much more specific and detailed.

The first weakness from Table 7.4 involves Thomas Jr. becoming proficient with the accounting and financial reporting of the operation (W<sub>3</sub>). Thomas Jr. has committed to spending a half day per week with Julie working on the production and financial records. A managerial accounting system will be tailored to TTAP Enterprises with the help of a Texas Cooperative Extension economist. This system will use QuickBooks Pro<sup>®</sup> and integrate financial and production records.

Thomas Sr. has agreed to begin work on an estate plan for himself and his wife (W<sub>5</sub>). However, Thomas Jr. also requires a plan for the continued use of land currently owned by Thomas Sr. This plan will also address any provisions of Thomas Sr.'s plan that are phased in over a number of years. Thomas Jr. will work closely with I.M. Honest, the TTAP Enterprises attorney in developing this plan.

Water availability was identified as a weakness of TTAP Enterprises' crop and livestock operations. Thomas Sr. will develop a plan for addressing additional water needs for each component of their operations. This will include the placement of wells, stock tanks, diversion dams and ponds (W<sub>7</sub>). Thomas Sr. will consult with the attorney about trespassing, liability and attractive nuisance issues as they pertain to windmills or stock tanks, and if necessary will also consult with their insurance representative. Thomas Sr. will make a full report to Thomas Jr. on the status of this project.

Mr. Maverick will develop a formal preventive maintenance program for each major piece of equipment used by TTAP Enterprises. This is intended to reduce maintenance related accidents (W<sub>8</sub>), but may prove to also lower repair costs and down time. Frequent and regular reports of the maintenance status of all equipment will be exchanged between Mr. Maverick and all other employees and owners of TTAP Enterprises. Mr. Maverick will also report on the progress of the maintenance plan to Thomas Jr.

As Thomas Jr. and Julie contemplate parenthood, Thomas Jr. also needs to develop a plan to care for his family in the event of his disability or death (W<sub>12</sub>). Much like the estate plan that Thomas Sr. is developing, Thomas Jr.'s plan will address the disposition of real and personal property to Julie and the anticipated minor children. This plan will require periodic review and revision to account for the maturing of children and the acquisition

of additional real estate through new purchases or from the inheritance from Thomas Sr. Again, the expertise of Mr. Honest and possibly their insurance representative will be an important part of the development of this plan.

Two product liability threats have been identified for TTAP Enterprises, the threat of BSE (T<sub>1</sub>) or other foreign animal disease and karnal bunt (T<sub>7</sub>). The possibility of BSE or another foreign animal disease being discovered anywhere in the U.S. is a threat to market prices. But the possibility of that event happening on TTAP enterprises is also a very real threat. This threat may become more critical if TTAP Enterprises enters a niche market where consumer perceptions of health issues may be more focused than in the general public. Thomas Sr. will develop a set of guidelines or operating procedures for each enterprise or commodity being produced by the operation. These guidelines will include best management practices (BMP) as currently being recommended by the appropriate specialists from Texas Cooperative Extension, Texas Department of Agriculture, Texas Animal Health Commission, and other industry specialists/consultants. These guidelines will cover all aspects of cropping and livestock operations to include risk management and marketing. These BMPs will also likely address some of the environmental threats also identified in the SWOT analysis (T<sub>10</sub>). Thomas Sr. will make a full report to Thomas Jr. on the status of this project.

Thomas Jr. will establish a policy manual for the proper use, storage and handling of agricultural chemicals, animal waste and other materials that have the potential to pollute surface and groundwater (T<sub>10</sub>). Many of these “proper use” practices will be included in the operating procedures for each enterprise being developed by Thomas Sr. The maintenance and pre-execution checklists for spraying/application equipment being developed by Mr. Maverick will also address the liability threats related to environmental issues. Thomas Jr. will ensure that himself, Thomas Sr. and Maverick all keep their pesticide applicators licenses current and participate in the required associated training.

The issues revolving around increased hunting and agri-tourism issues are of particular concern to Thomas Sr. While he recognizes the need to diversify and generate additional revenues that will strengthen their cash flow position, he is very concerned about the increased level of potential liability these activities carry with them (T<sub>11</sub>). Thomas Jr. together with Mr. Honest and their insurance representative will develop a strategy for proactively managing these perceived liabilities. This plan will include the use of liability waivers, liability insurance, written policies for invitees and other precautions as recommended by Mr. Honest. In this instance, Thomas Jr. will report make a full report to Thomas Sr. on the progress of this project.

Recent energy prices have sparked exploration and drilling interests in areas not typically associated with oil and gas production. Both Thomas Jr. and Sr. are concerned the effects exploration or production will have on their operation in light of the fact they do not own the mineral rights associated with their property (T<sub>12</sub>).

Thomas Sr. will work with Mr. Honest to develop a contingency plan in the event of future exploration or drilling activities. This will include: 1) Methodology for

documenting and valuing surface damages, and 2) A defensible pricing scheme for surface water that may be needed for drilling activities. Though these measures appear rather punitive in nature, these steps may be the only way TTAP Enterprises can get compensation for the disruption of their daily activities, damage to roads and fences, and the loss of useable pasture.

The proximity of the county road on the west side of the ranch has the potential for several unintended interactions with the public (T<sub>13</sub>). Poaching, though infrequent, has always been an issue along the county road. As doe numbers are reduced and the bucks that are harvested increase in value, any poaching equates to a monetary loss to TTAP Enterprises. Thomas Jr. will request stepped up monitoring along the county road by local game wardens. In conjunction with reviewing the increased liability associated with hunting and agri-tourism, Thomas Jr. will review trespassing laws and legal posting requirements with Mr. Honest. Legal postings will be placed around the perimeter of the entire operation.

Loose livestock being struck by passing auto traffic, while again rare, cannot be tolerated. Thomas Jr. will initiate a semi-annual inspection of fences along the county road and will perform repairs as necessary to maintain the integrity of the fences. A written account of the inspections and required repairs will also be kept. Thomas Jr. will review liability coverage with his insurance representative as it specifically pertains to escaped livestock.

## **Summary**

The business planning process is a continual process. Once the initial plan is drafted and implemented, progress will be monitored. Changes in the operation's financial condition, new opportunities or threats, new or changing markets may all dictate a change in the overall business plan, and will certainly change or require an updated SWOT analysis.

**Table 7.4. TTAP Enterprises Legal and Liability Weaknesses.**

Identified Weakness	Type of Risk/Threat	Description of Weaknesses
W <sub>3</sub>	Successional	Julie (wife) is the only one involved with the accounting and financial aspects of business.
W <sub>5</sub>	Successional	No estate plan for receiving land from Thomas Sr.
W <sub>7</sub>	Public Safety	Windmills only means of supplying water in far locations of pasture.
W <sub>8</sub>	Public and Employee Safety	Most of the Equipment has some age.
W <sub>12</sub>	Successional	Thomas Jr. does not have a plan to provide for his young family in the event of his disability or death.

**Table 7.5. TTAP Enterprises Legal and Liability Threats.**

Identified Threat	Type of Risk/Threat	Description of Threats
T <sub>1</sub>	Product and Financial/Contractual	BSE, or other foreign animal disease.
T <sub>7</sub>	Product and Financial/Contractual	Karnal Bunt
T <sub>10</sub>	Environmental	Increasing regulations due to non-point source pollution.
T <sub>11</sub>	Financial/Contractual	Hunting and agri-tourism will bring the non-farming/ranching public onto the property.
T <sub>12</sub>	Financial/Contractual	Ranchers do not own the mineral rights on the land they own.
T <sub>13</sub>	Public and Employee Safety	County road creates the opportunity for poaching, and safety issues due to unsupervised trespassers and loose livestock.

**Table 7.6. TTAP Enterprises Action Plans for Legal and Liability Threats.**

<b>Weakness or Threat Identified by SWOT Analysis</b>	<b>Assigned Resource Person(s)</b>	<b>Action Plans</b>
W <sub>3</sub>	Thomas Jr., TCE Economist	Thomas Jr. will commit ½ day per week to working with Julie on TTAP Enterprises production and financial records. Julie and Thomas Jr. will enroll in QBP workshop and make use of TCE economist to monitor progress and functionality of financial records.
W <sub>5</sub>	Thomas Jr., I.M. Honest (Attorney)	Thomas Jr. and I.M. Honest will develop a realistic plan to handle the additional workload and financial burden associated with a sudden loss of Thomas Sr. This plan will be reflect the direction of Thomas Sr.’s estate plan.
W <sub>7</sub>	Thomas Sr., Insurance agent, I.M. Honest	TTAP Enterprises will review trespassing laws and review liability insurance with attorney and insurance agent. Practical plan for the placement of new livestock wells (windmills), stock tanks or ponds as to not create attractive nuisance situation.
W <sub>8</sub>	Maverick, Thomas Jr.	Mr. Maverick will develop a formal preventive maintenance program and pre-execution checklist for all major pieces of equipment. Frequent and regular reports of maintenance status of all equipment will be exchanged between Jr., Sr., and Mr. Maverick
W <sub>12</sub>	Thomas Jr., I.M. Honest, Insurance Agent	Thomas Jr. and I.M. Honest will develop a plan to care for his young family in the event of his disability or death. Annual reviews of plan and adequacy of insurance coverage will be performed.
T <sub>1</sub>	Thomas Sr., TCE	Thomas Sr. will, with the input of various TCE specialists develop a Standard Operating Plan (SOP) for the livestock operations of TTAP Enterprises. This will include current BMPs as recommended by Texas Cooperative Extension, Texas Animal Health Commission and other industry working groups. These plans will cover all aspects of the livestock operation to include risk management and marketing.

**Table 7.6. TTAP Enterprises Action Plans for Legal and Liability Threats-Continued**

T <sub>7</sub>	Thomas Sr., TCE	Thomas Sr. will, with the input of various TCE specialists develop a Standard Operating Plan (SOP) for the cropping operations of TTAP Enterprises. This will include current BMPs as recommended by Texas Cooperative Extension, Texas Department of Agriculture and other industry working groups. These plans will cover all aspects of the cropping operations to include risk management and marketing.
T <sub>10</sub>	Thomas Jr.	Thomas Jr. will establish a policy manual for the proper use, storage and handling of agricultural chemical, animal waste and other materials that have the potential to pollute surface and groundwater. Thomas Jr. will ensure that himself, Thomas Sr. and Maverick all keep their pesticide applicators licenses current and participate in the required associated training.
T <sub>11</sub>	Thomas Jr., Insurance Agent, I.M. Honest	Thomas Jr. and I.M. Honest will develop a strategy for dealing with the additional potential liabilities created with increased hunting and agri-tourism activities. This will include the use of liability waivers, liability insurance, written policies for the invitees and other precautions as recommended by I.M. Honest.
T <sub>12</sub>	Thomas Sr. I.M. Honest	Thomas Sr. and I.M. Honest will formulate a strategy for documenting and valuing surface damage and for the potential sale of surface water in the event that any production does begin.
T <sub>13</sub>	Thomas Jr., Insurance Agent, I.M. Honest	Thomas Jr. will request stepped up monitoring by Game Warden along the county road. Thomas Jr. will also consult with his insurance agent and I.M. Honest regarding trespassing laws. Legal postings will be placed on the perimeter of the entire operation. Fences along county road will be inspected semi-annually, and repaired as necessary.