

# Feeding our Sustainable Green Future: Legal Issues in Agricultural Land Tenure

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# Premises of the Sustainability - Land Tenure connection

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Future “green” opportunities in agriculture are mainly land based and a function of having large tracks of productive, fertile and available privately owned land to utilize.

## Who decides for the land?

A central determinant in how the developments are received or adopted will be how the people or institutions who are the decision makers for the land – and who may actually be working the land - perceive the opportunities.

A major factor in those perceptions will be the level of economic returns or other objective benefits accompanying the activity.

Land and its resource components can be used in ways that are both unsustainable and detrimental to society, in the form of water pollution, resource destruction or degradation, excessive soil erosion, etc.

Many opportunities now enticing farmers and agricultural landowners provide incentives to intensify the use of land and natural resources creating the possibility of adverse impacts.

## What influences land-use decisions?

Decisions to use land in anti-social ways are influenced by a variety of factors, short-term economic pressures, awareness, attitudes, morality, customs, contractual obligations, education and the existence or effectiveness of legal or regulatory regimes directing or restraining individual behavior.

## Law and regulations as one guide

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Our society has developed over the last 75 years a web of state, local and national laws and regulations, as well as a body of common law precedents establishing guidelines and expectations for the use of both public and private lands.

## Our reliance on regulation declines

In recent years attention to these regulatory tools, for example soil loss limits and protections from soil erosion, have received limited attention as pressure has grown to increase agricultural production and property rights based resistance to regulation has grown in some parts of the agricultural and rural community.

# Conservation as a proliferation of programs

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Much of the attention to soil conservation and water quality improvement has instead focused on the development and refinement of a proliferating series of programs and economic incentives to encourage landowners to take soil and water conserving steps, such as EQIP, CRP, WRP, and CSP.



## Promoting “sustainable agriculture” and environmental services

During this same period increasing attention has been given to promoting ideas relating to “sustainable agriculture” and measuring “environmental services” so these can serve as the basis for agriculture environmental programs – marrying economic concern with an articulation of environmental responsibility.

# Economics not a substitute for ethics and law

Both sustainable agriculture and the expansion of economic evaluation of positive externalities reflected in environmental services are valuable contributions to enhancing environmental programs; however, they are not perfect substitutes or replacements for traditional legal – and ethical - concepts of rights, duties, and responsibilities associated with owning land.

## Land related contracts expand

In recent years land related opportunities have proliferated, for example carbon credits, wind energy development, conservation easements, long-term conservation financing agreements, which often involve use of binding legal agreements signed by the owners and applicable to the property in question which may establish restrictions on use or alienability for the land.

# Examining the role of law in sustainable agricultural land tenure

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To adequately understand and benefit from the opportunities relating to sustainable development and related ideas of a greener economy there is a need to understand and reevaluate the role of law and the legal implications of land related agreements, especially as these agreements proliferate.

# Why a land tenure initiative?

There is a fundamental need to understand the structure of agriculture, farming and rural economy if you are to develop or administer laws, policies, and programs relative to farm income, rural development, environmental protection, renewable energy and other issues. Land tenure relations are an essential element in that structure.

## Access to legal documents is critical

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You need access to the legal agreements currently in use – such as contracts, leases, easements – and being signed by people relating to farm and rural lands – whether as landowners, tenants, or other users.

Without examples of the documents being used you can't begin to understand how they will be interpreted by courts, what they require of the parties, the effect on the land, or the application of existing laws to them.

## Knowing who makes decisions for the land is essential

Understanding who owns the land – or who has access to the right to use it – through some form of legal relation – helps identify who is making the decisions for its use, how long or short the tenure of the owner or user might be, and the allocation of responsibilities (e.g. soil stewardship) and economic returns, e.g. farm income, conservation benefits, lease payments.

## Changes underway in land tenure make examination timely

The rate of change underway and projected in the next decade in land ownership patterns and the proliferation of new and untested legal arrangements relating to agricultural and rural land use create the need for more insight and understanding about the impact of arrangements and shape the possible role of legal responses.



## Knowing who benefits from land decisions influences future actions

Understanding who owns or has the right to use land, as well as understanding the related flow of decision making authority – and of the economic benefits and risks is fundamental to any effort to consider the future – not just of the land, but any environmental system or set of public expectations based on the land.  
[Consider how current shifts in CRP acreage impact wildlife and conservation values.]

## Inventory of land documents, insights into land ownership and use

Creating an inventory of land tenure documents and of information concerning land ownership, tenancy and use, make possible further studies and analysis. It provides the basis for developing models, education materials, proposals for reform and interpretation – and other information useful to those faced with understanding and responding to land related issues – whether landowners, policy makers, legal advisors, courts or others.

# Linking institutions interested in land tenure

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Projects to examine land tenure will help identify and link other groups and institutions working on agricultural land related issues and provide a forum for the consideration of common issues and concerns.

## Why is land tenure difficult and controversial for society to consider?

Land ownership holdings and lease agreements are very personal and considered private for sharing only between parties or within families, not with strangers or researchers.

Only some forms of property documents are public records, e.g. land titles with the county recorder, instead most are private contractual agreements which can not be obtained without the participation or agreement of the parties.

## Land ownership and wealth are personal matters

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As private or personal matters, and ones which relate directly to matters of wealth and income, most parties are not anxious to share either the terms of their agreements or provide information concerning the extent of their property interests.

## Farmland owners find succession planning difficult to confront

Research relating to farm succession planning reveals the lack of such planning is common for many farmland owners, indicating the difficulty of dealing with personal mortality and retirement and the challenges of inter-family and intergenerational planning and transfers.

## Private property fundamental to shaping American society

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The idea of private property is hard wired into the fabric of American political and economic democracy as one of most formative of citizen rights and motivations, protected by the 5<sup>th</sup> Amendment of the Constitution.

## Protections for private property woven throughout legal system

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The sanctity and protection of property is woven throughout our common and statutory law in such concepts as opposition to restraints on alienation, protection for the widest latitude of landowner actions, limited protections for tenancy, and the strong preference for individual rather than collective or community property.



# Restrictions on property viewed with suspicion

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This means anything that seems to either question the sanctity of individually owned and controlled property or hint at new ways to consider it or methods to allocate, reform, or restrict property rights is greeted with suspicion.

## Worries about restricting what landowners can do

The suspicion flows from concerns an individual's actions, e.g. the amount of land they own, their motives for owning it, or the agreements they have entered for its use, will be criticized, or even worse, made subject to scrutiny or legal reform. [Consider resistance to 1937 President's land tenure commission and resulting recommendations to reform state tenancy laws, creating cases like *Benschoter*.]

## Limitations and lags in information impact ability to develop responses

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The amount and type of information collected on real property ownership and the patterns or trends in its use are both limited and lagging, meaning any forms of education or policy response are either delayed and after the fact, or limited in effectiveness due to incomplete or dated information concerning real time events.

## What do we know about land tenure trends and issues?

There is an increasing number of absentee landowners (ALO) and an increasing amount of land owned and controlled by them

There is a sharp increase in land prices, driven by the demand for corn based ethanol production and high commodity prices.

New sources of capital and investors coming into the market for agricultural lands, creating more demand and competition for land.

## Land transfers and values increasing

Aging demographics of farmers and land owners as indicated by Dr. Duffy make wealth transfer issues significant public policy matters.

The higher land prices and market demand may be accelerating the level of land transfers.

The increase in land values, farm income and landowner expectations are driving farm rental rates higher, e.g. cash rents increased 18% in Iowa in 2008 to \$177 per acre.

## Farm tenancy increases with absentee ownership

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The increase in the amount of absentee owned land means an increase in the number of farm tenancies and an increase in the percent of land farmed under tenancy.

Increasing land values and prices increase the demand for short term returns to help finance the higher costs, especially if borrowed funds involved.

## Tenant protections weak as tenancy increases

Legal protections in current law for farm tenants are minimal – one year leases with six month notice to terminate – and are relatively ineffective if the landlord wants to increase the rent and the tenant wants to remain past the extension year.

## New legal agreements proliferate

The proliferation of other land related legal agreements, such as other wind easements and manure contracts are increasing the types of legal arrangements to address.

Some of these land related contracts are well understood, such as the Wetland Reserve Program easements but other are new and unexplored, e.g. carbon sequestration contracts.



## History of concern for land tenure and stewardship – what changed?

The contrast between the level of concern over land tenure issues seventy years ago in the U.S. as reflected in the President's Committee on Farm Tenancy and what we see today is stark. As is the concern and attention for soil conservation and stewardship – as reflected in Aldo Leopold's "The Land Ethic" and in the soil and water conservation district movement of the 1940's

## Has society lost its concern for soil conservation?

One point for inquiry for any land tenure initiative is to consider what has changed in the intervening period to explain the change in attitude and approaches – especially as relates to the legal and regulatory dimensions and to consider what confluence of events might cause a renewed attention to these issues. Here are some preliminary thoughts on these issues.

## Soil Conservation was the original environmental movement

Concern for soil conservation and land tenure of the 1930's was among the first expressions of public concern for man's impact on the environment. Now as the environmental movement has emerged and projects forward, our historic commitment to soil conservation and stewardship and our concern for land tenure and agricultural structure have both waned.

# Not moving forward – but losing ground

Perhaps even worse than the waning is the apparent shift of alignment to the point where farming and agriculture is not seen as the frontline of the stewardship movement but instead as the rear guard of traditionalists opposed to environmental concerns and a role of public authorities in protecting land.

Is it because we have done the job?

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Is the reality that the soil conservation laws have worked and that soil stewardship is secure? The data and evidence on the ground don't seem to support this. The rush to remove land from the CRP in order to plant more corn is exhibit one in this reality.

Is it because we have “regulated” the bad practices out of use?

Does the evidence support the idea conservation compliance rules have addressed our concerns? The facts don't support the conclusion – if levels of enforcement or willingness to use the tools are any measure. The reality may be we translated any personal conservation ethic into a public regulatory model but one we either are not willing to enforce or which might not be what is needed (i.e. “I met the plan – or rule – isn't that enough?”)

Do “property rights” mean the public can’t require owners care for the land?

One outgrowth – if not goal – of recent public debates over “property rights” (driven in part by agricultural interests) has been to question the ability of the public to establish and impose standards as to how land is used. In legal terms the question is what is an appropriate exercise of the police power, e.g. does it include protecting wetlands, or requiring satisfaction of soil conservation standards?

## Property rights concerns restrain progress on soil conservation

The tragedy of this political controversy is how it moves the nation and society backwards by reprising legal issues settled long ago. Sixty-five years ago Iowa's Supreme Court affirmed the legitimacy of state laws designed to prevent exploitation and waste of soil. Rather than build on this history and tradition public officials today ask tentatively whether it is appropriate to expect landowners to conserve and steward their land.



Is it because we are not aware of the problems or are not paying attention?

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Part of the apparent lack of concern for soil stewardship could be due to a lack of awareness. With an array of other issues and environmental concerns claiming our attention it is convenient or comfortable to consider soil conservation as already in hand. Few in the farm community have interest in bringing attention to the issue because doing so would challenge the avowals of “being the original environmentalists.”

## Did we give up on the family farm due to continuing industrialization?

The structure of agriculture in terms of the scale and economic resources has changed greatly in the last fifty years, even the last ten. Even if we have given up on the ideal of the “family farm”, this resignation shouldn’t mean concern for the land also vanishes. The increase in absentee ownership and changes in farming structure should make concerns about soil conservation and stewardship more pressing.

Is it because the legal tools we have don't work or are not used?

Perhaps one reality of the situation is the laws we have on the books relating to soil conservation and stewardship are inadequate or ineffective for the job. It isn't that we don't have laws addressing soil conservation and land tenure instead we just don't use them.

## Laws exist but have limitations

Iowa Code §161A.44 requires landowners comply with soil loss limits conservation districts set and §562.6 provides farm tenants six month notice for leases to be terminated or altered. But you can count on one hand the soil districts willing to enforce Iowa's limits and tenant protections have little value in competitive rental markets where tenants must comply with landlords' increasing rents – or risk not farming the land in future years.