

The Role of Land Tenure in the Future of American Agriculture

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I. Introduction –The Challenges of Land Tenure - The issue of land ownership or land tenure is fundamental to the nature and performance of American agriculture. It is hard to overstate the historic and cultural role of farmland ownership in the development of our nation. From providing autonomy and independence for farm families, to offering a mechanism for creating wealth and transmitting it across generations, the ability to acquire, own, and transfer land is woven throughout our farming heritage. While land tenure patterns may vary somewhat by region the defining characteristic of farmland ownership in the U.S. has been family ownership over multiple generations. Agricultural land tenure is somewhat unique from other forms of property ownership such as residential homes, because farmland ownership has historically included both the family dwelling and the farm business on working land, this in part explains the importance of homestead protections.

Decisions relating to land tenure are very personal and private, this contributes to a relative lack of attention to land tenure in public policy and research. Agricultural technology has evolved over time, as have the economic structures of farm businesses, but for the most part – the land remains, even if the identify of who owns it and in what form has changed. Four central questions about land tenure - who owns the land, who farms it, how is it farmed, and who benefits from its production? – help determine the economic and environmental performance of the agricultural sector and the returns to owners. But other questions are critical to our nation’s ability to maintain a stable, sustainable system of farming and food production – questions such as will those who want to farm have access to land; will existing family farms be successfully transitioned to the next generation; and will the public interest in how land is cared for be respected. Collectively these questions are at the heart of land tenure because they determine who makes the decisions for how land is used and who benefits from the production and wealth potential of farming and land ownership. These issues are inextricably bound up with American property law, and the business arrangements and legal agreements used in agriculture. The goal

of this timely conference is to consider how well our land tenure system performs and what it means for those interested in land access and farm transition.

Land tenure has always been a key feature of American agriculture and it drove major federal policies such as the public land survey, the Homestead Act, the 16th section provision, and the Morrill Act. After the era of settlement and land allocation of the 19th century – a period marked with bitter episodes of exploitation and the failure of Reconstruction - for the most part, land tenure has been in the background as a topic for federal action. There are exceptions to this history, for example in the late 1930's, the formative period of the modern USDA, the model state soil and water conservation district law created a decentralized system to deliver conservation assistance and economic supports. The related Depression driven President's Committee on Farm Tenancy in 1937 proposed changes in federal and state laws to achieve such goals as increasing farm ownership and protecting farm tenants from short term leases and sudden termination (see e.g., Iowa Code §562.6). At least two USDA Yearbooks of Agriculture made important contributions to our national understanding of soil stewardship and land tenure, *Soil - 1938 Yearbook*, and *Land - 1958 Yearbook*. A final example is Time to Choose, the USDA farm structure study, completed in 1980 under Sec. Bergland and Pres. Carter, focused on the impact industrialization and the increasing scale of agriculture was having on family farms. This report followed a flurry of state legislative actions in the upper Midwest for laws to restrict corporate ownership of farmland and farmland acquisition by non-resident aliens.

For USDA the implications of the trends in land tenure are clear and critical issues raised include: who are the clients for FSA farm programs, how does NRCS locate and communicate with a new generation of NOLO's, and how do the income protections offered by RMA influence land stewardship on fragile ground farmed under short term cash leases? For our nation land tenure directly influences our ability to address a series of critical questions:

- How can we offer a new generation of beginning farmers access to land ownership and to the wealth creation integral to family farming?
- If an increasing share of farmland is owned by those who do not farm it or ever set foot on it, how can we achieve a stable and sustainable agricultural future – a future responsive and resilient to the forces of climate change, to the needs of environmental

stewardship, to the pressures of fluctuating land values and farm incomes, and to the demands of international trade?

- How will the economic structure of rural society and the inequalities in wealth be impacted if our farming is performed by a growing network of tenants and farm workers with little long-term connection to the land or incentive to care for it?

These critical questions need to be asked, but are easy to ignore or put off to the future, in part because they require us to ask difficult questions about our values and goals.

II. Ten Important Trends in Land Tenure - Several economic and social demographic forces underway in the U.S. make land tenure one of the most critical issues shaping the performance and future of American agriculture. The factors include:

1. the increasing age of farmland owners and the compression of more land in the hands of older owners. The compression and concentration of land is in part driven by tax considerations, such as capital gains taxation of increased land values, reducing incentives for owners to sell land during their lifetimes.
2. retaining ownership of land increases economic security to provide for retirement and address health care costs, but many landowners are no longer actively engaged in farming or live on the land, as reflected in the land holdings of elderly widows many living in long-term care.
3. the compression of land ownership and wealth in the hands of older people is natural but presents the likelihood a significant amount of farmland and rural wealth will change hands in a condensed period, creating challenges and opportunities for those involved in farming or interested in buying farmland.
4. the related increase in the amount of land farmed under tenancy or lease relations, most of which are short term or one year agreements; and the impact of short-term tenancy on stewardship decisions made by farm operators and on investing in longer-term conservation measures. There is nothing inherently wrong with farm tenancy especially if stewardship is integrated into lease terms, but it is important to recognize few people wash rental cars.

5. the significant increase in cash leases, which shift economic risks of weather and market fluctuations to tenants, as opposed to more traditional crop share leases.
6. the increasing amount of farmland owned by a growing number of non-operator landowners (NOLOs), not just retirees, but next generation heirs inheriting farmland from aging parent farmers. Many heirs and new landowners are off-farm siblings with little involvement in the farm operation of the on-farm siblings, other than some portion of land ownership and an interest in knowing how or when the economic value of the farm and land can be realized.
7. the fragmentation of farm ownership into multiple owners with differing objectives may challenge the long-term viability of many operations due to difficulties on-farm heirs face in purchasing land from off-farm siblings or in reaching mutual decisions with others who have a legal ownership interest, e.g., as tenants in common. One result has been a marked increase in the number of court cases involving bitter intra-family disputes over estates and trusts.
8. the increased role of NOLO's combined with restructuring of swine and poultry production through contracting means much of the profits from farming are shipped to "owners" who may reside elsewhere, while the social impacts of low paying, custodial like farm jobs, and the environmental impacts of concentrated animal production are left for the small towns and rural areas to absorb.
9. the poor economic performance of parts of agriculture as reflected in large crop surpluses, declining prices and lower net farm incomes – all trigger greater reliance on the so called "safety net" of federal farm program benefits and income transfers. One effect is pressure to maximize production in the hope higher yields can overcome lower prices, contributing to continued deterioration of soil and water resources through the overuse of nitrogen, reliance on chemical intensive crop systems, and pressure to continue converting grassland to cropland.
10. the combined effect of the land tenure trends creates serious obstacles for those interested in entering agriculture as new and beginning farmers, and makes the potential of wealth access through land ownership more difficult to obtain. The effect of the economic trends challenges the structure, operation and even the very idea, of traditional federal farm payments and conservation programs.

III. Examples for the Future of Land Tenure - In looking to the future of land tenure in the U.S., several developments and activities offer promise, but the challenges of developing an effective, organized response remain. As we have heard, in 2015 the USDA Economic Research Service issued the Tenure, Ownership, and Transition of Agricultural Land (TOTAL) study documenting trends in landownership and farm leases (see <https://www.agcensus.usda.gov/Publications/TOTAL/>). The information is a valuable and interesting snapshot of ownership, although the report does not suggest how different policy objectives might be approached. Also in 2015 the Secretary of Agriculture took a tentative step in addressing these issues by forming a land tenure subcommittee under the USDA Beginning Farmer and Rancher Advisory Committee. I served as co-chair of the subcommittee, and after several meetings, we produced a set of over fifty recommendations for actions USDA could take relating to land tenure (See <https://www.outreach.usda.gov/committees/2015-8-21%20final%20copy.pdf>). To their credit several USDA staff in FSA are very supportive of the effort to focus on land tenure and many recommendations relating to USDA administrative changes were enacted. One example is an FSA led pilot in several Iowa counties to communicate with NOLO's concerning their potential interest in transferring land to new and beginning farmers.

From a legal perspective several land tenure developments provide examples for examination. One is to the growing interest of non-farm investors to purchase farmland to diversify investments and get in on the future profits from farming. One wrinkle in some investment vehicles is to couch them in terms of “sustainable” and “socially responsible” farmland investment. [See the People’s Land Company report from Iowa, [https://peoplescompany.com/pdfs/2015/NEW%20Socially%20Responsible%20Farmland%20Investment%20\(EDJE%202\).pdf](https://peoplescompany.com/pdfs/2015/NEW%20Socially%20Responsible%20Farmland%20Investment%20(EDJE%202).pdf). See also a related report from Yale http://cbey.yale.edu/sites/default/files/Sustainable%20Farmland%20Investment%20Strategies_Nov%202016.pdf] The theme here is the view the new owners will work to have conservation and other environmental objectives incorporated into the management of the land. However, it is unclear why investors believe their ownership of the farmland will result in the significantly different returns needed to afford spending on conservation or other “costs” associated with

using more sustainable production methods? The use of the “sustainability” label - also present in many of the private conservation initiatives companies are using to promote sustainable supply chain purchasing - may be an effort to green washing what was once considered a threat to traditional farm structure. Another interesting development concerns efforts to develop new and “innovative” forms of land ownership, an idea especially prevalent among those hoping to support new and beginning farmers. Various experiments with forms of farm trusts and co-ownership structures are in play, though most involve only a handful of properties. [See e.g., Report on community land trusts - <http://community-wealth.org/strategies/panel/clts/index.html>]

The economic and legal reality is there are only so many ways you can slice and dice farmland ownership – and there are limits to the amount of income any tract of land can generate. The more people involved and the more entities expecting some “return” on investment make inventing ‘new’ ways to own farmland a daunting challenge. This is why perhaps the most significant development in the search for new “owners” of farmland interested in maintaining working land, may be the land trust movement using traditional property law tools but combining preserving farm land with saving other natural features. Innovative public efforts such as in Boulder County may illustrate what is required for effective farmland – and farming – protection. [For more information on this initiative see <http://www.bouldercounty.org/os/openspace/pages/agriculture.aspx>] Our nation has historically well understood the economic structure needed to profitably operate a family-based farming system. Unfortunately, the current reality of land tenure challenges our ability to maintain a traditional family farming and land owning structure.

IV. How Well Does our Land Tenure System Perform? Asking Provocative Questions about Land Tenure in American Agriculture

Answering the question how well does our current land tenure system work - depends on who is asked and where they sit. From the perspective of those who currently own farmland a primary focus is on how they will be able to transfer or transition the land and the farm to another. From the perspective of someone who does not own land but would like to farm, the

focus is primarily on how they can have access to land and the capital to afford it. From the perspective of the general public who have no plans or interest in owning land, the focus is primarily on how well the current owners or operators care for the land and how its use impacts the environment. As a result there is no one or easy answer to the question how well our land tenure system functions. However, we need to acknowledge our land tenure system must be performing exactly like we want it to because we are ones who created it over time with our laws, politics and practices! We did not get where we are today by accident.

Clearly our land tenure system performs its basic functions admirably – our land surveys and measure are clear, our systems for recording and transferring titles and interests to land are well refined and understood, our mechanisms to resolve disputes over land ownership are accessible, and our markets for land function smoothly and efficiently. However, if we ask a different question – can we improve how our land tenure system functions – then we may find many answers and suggestions. Offering and seeking these answers brought you to this conference. So let me close today by posing a number of questions about land tenure and the role we can play in shaping it. Kathy asked me to be provocative and I appreciate her charge – so please consider these ideas in that spirit - and if you are offended talk with her.

1. As we changed our attitude toward farm leasing as a necessary but only intermediary step on the path to farmland ownership and instead came to embrace increasing reliance on tenancy did we lose sight of the national goal our farmland is best owned by those who farm it?
2. What is the appropriate role – if any – for the USDA in helping current landowners understand the importance of farm succession or in considering opportunities to transfer land to new and beginning farmers, other than family?
3. Given the magnitude of the coming generational transfer of farmland, is it reasonable to ever expect the array of state and local land link programs will be able to reach the scale necessary to be a significant force in directly farmland transfers to new and beginning farmers?
4. Can we confront or reconcile the conflicting goals and the hierarchy of priorities reflected in our land tenure system, such as how the priority we give to placing no restraints on

land alienation (or acquisition) means we offer few protections for farm tenants; or how our rhetoric about the need for new farmers doesn't match our willingness to improve their land access?

5. Are we in danger of repeating all across the U.S. the confusing pattern of landownership problems found in Indian country or the fractionated heir land issues of the South, through widespread use of trusts, corporations, joint tenancies and other legal devices separating land from ownership by natural people and dividing decision-making among multiple parties with limited interests?
6. Did we spend the last thirty years placing farm families and their land into increasing complex business and trusts structures, with the primary goal of avoiding taxes only to create unworkable and unnecessary obstacles to smooth farm successions and farmland transfers?
7. Is the continuing increase in farm size, especially in Midwest commodity production contributing to the growing economic and class divides in rural areas, where a stark division into “haves and have not's” based on landownership is exacerbating the social tensions and ills related to wealth?
8. Can USDA programs for farm income support, crop insurance, lending, and conservation be designed and administered in ways to adequately address how shifting land tenure arrangements influence who receives the benefits and who makes the decisions for how the land is used?
9. Is it healthy for the long-term prosperity of American agriculture to have pension funds and other types of investors increasing the purchasing of farmland and how does the increased competition in the land market impact families and individuals interested in buying land to farm themselves?
10. There are powerful sentimental and nostalgic reasons why those who grew up on farms but left for other professions, want to continue “owning the farm” after their parents have passed, but is this separation of ownership from operation good for the land or for a society interested in seeing a new generation of farmers working and owning the land – or is that goal no longer valid?