

FEEDING OUR GREEN FUTURE: LEGAL RESPONSIBILITIES AND SUSTAINABLE AGRICULTURAL LAND TENURE

*Neil D. Hamilton**

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I. INTRODUCTION: THINKING ABOUT LAND TENURE IN A TIME OF CHANGE

*The social lesson of soil waste is no man has the right to destroy soil even if he does own it in fee simple. The soil requires a duty of man we have been slow to recognize.*¹

Henry Agard Wallace, Forward, *Soils and Men*, 1938 Yearbook of Agriculture.

The future of agriculture has been much in the news in recent months as a cascade of natural and international forces have placed America’s farming future in a period of opportunity and peril. Record commodity prices driven by

* Professor Neil Hamilton is the Dwight D. Opperman Chair of Law and Director of the Agricultural Law Center at Drake University, Professor of Law where he has taught since 1983.

1. Henry Agard Wallace, *Forward to UNITED STATES DEP’T OF AGRIC., SOILS AND MEN: 1938 YEARBOOK OF AGRICULTURE* (Gove Hambridge ed., 1938).

burgeoning world demand and growing markets for bio-fuels like ethanol have led to sharply higher farm incomes for grain producers but threaten the profitability and even existence of many livestock operations. High commodity prices and prospects for future demand have in turn helped drive Iowa farmland prices to record levels with annual increases of fifteen percent or more common.² The rapid inflation in the land market has in turn led owners to increase farm rental rates with average cash rents rising over eighteen percent in Iowa in 2007 as landlords claimed much of the higher commodity prices.³ To add new economic pressures farmers face record fuel prices and tightened supplies of fertilizer have tripled prices for this essential input. The combination of high commodity prices and rapidly increasing input costs create a new calculus for farmers in deciding what crops to plant. But one more uncertainty, perhaps the most constant in agrarian reality – weather – also played a role in 2008. A cold spring followed by weeks of rain gave the crop a late start, made worse when continuing rains resulted in record flooding on many Iowa rivers and along the Mississippi, leaving several million acres of crops in ruins. While the economic and human toll of these events is still being measured another perhaps more long lasting impact is just coming to light. The torrential rains and floods inflicted a heavy wound on the land, resulting in severe soil erosion on millions of acres, extensive land degradation on flood plains, and broken levies as rivers returned to historic channels. Combined, these events created a political and economic crisis, one the state's leaders and politicians are now working to address with disaster relief and promises of new aid for rebuilding. Time will tell how effective the response may be and whether we have listened and learned any lessons for how and where we live and farm.

As for the land, time will also bring answers. Will we use this occasion to reexamine the duty and obligation we have to steward the land, or will the current economic pressures be one more reason to accelerate the demands we place on it? Will we take time to observe how farmland protected by terraces, grass waterways and vegetative buffers fared much better than fields left bare and exposed? Will we recognize and reward landowners who guarded the land and be willing to question those who didn't – or will we chalk these losses up as an "act of God" rather than acknowledge them as acts of men? One can hope this confluence of forces will cause us to pause and contemplate the moral and ethical duty we have to the land – as the basis of the economic miracle of modern agri-

2. Jerry Perkins, *Iowa Farmland prices rise 18% in '07*, D.M. REG., Mar. 1, 2008, at 1D.

3. Des Moines Register Staff, *Cropland rent prices up 18 percent this year*, D.M. REG., June 6, 2008, at 2D.

culture, but also as the very foundation of life and any hope we have for a sustainable future.

Land health and sustainability have been on my mind in recent months in thinking about what the changes in the economic opportunities facing farmers mean for the future of agriculture and law. Changes in farm economics are not new as anyone who lived through the farm financial crisis of the 1980's knows well. On the other hand the land is a constant but one we seem to take for granted – if the extent of our love is measured in the content of our care. These concerns led me to reread Aldo Leopold's writing about the land⁴ – and to consider what Iowa's legal history provides as a guide for shaping our relation to land. The result is a new research initiative the Agricultural Law Center is launching on sustainable agricultural land tenure. This essay is designed to provide both an intellectual backdrop for the project – a prospectus on what it may involve, and for how interested parties – lawyers, landowners, farmers and the public – can become involved. The essay considers how land tenure relates to our sustainable future and examines what we mean by land tenure. It explains why land tenure is a topic our society and legal system needs to study but acknowledges why for many people it is a controversial issue to examine. The essay considers what we know about the current changes in land tenure in Iowa and the nation and what we don't know but probably should. The writings of Aldo Leopold, in particular his seminal essay, *The Land Ethic*, are considered in part to ask whether our current attitudes toward land reveal any progress in the ethical evolution he predicted is inevitable.⁵ The essay reviews the political history of efforts in the U.S. and Iowa to consider land tenure and soil stewardship and examines Iowa's powerful legal precedents that shape the relations and duties of landowners. The essay concludes with ideas for activities the land tenure project will consider and how readers can become involved. It ends with a series of questions designed to stimulate our thinking about sustainable agricultural land tenure and the role the law can play in insuring future generations will have an Iowa left to farm.⁶

II. WHAT ROLE FOR AGRICULTURAL LAND IN THE GREEN SUSTAINABLE FUTURE?

In recent years the nation, even the world, has become smitten with the concept of environmental sustainability. Increasing concerns about climate

4. Readers interested in learning more about Leopold have many sources to consider. One of the best is DAVID EHRENFELD, ET AL., *THE ESSENTIAL ALDO LEOPOLD: QUOTATIONS AND COMMENTARIES* (Curt Meine & Richard L. Knight eds., 1999).

5. See ALDO LEOPOLD, *The Land Ethic*, in *A SAND COUNTY ALMANAC* 201 (1949).

6. *Id.*

change and mankind's impact on the natural environment, combined with rapid economic growth in developing nations like India and China and concerns about food prices and availability, have all added to the recognition of our need to get right with how we treat the environment. Businesses throughout the nation and world are rapidly getting on board the sustainability train with many predicting "green collar" jobs, such as work with renewable energy, as the basis of future economic opportunities.⁷ With this movement comes new economic opportunity and the potential of new "sustainable green future," raising the question – what role will agriculture play in this future? The answer should be easy, especially given three facts. First, agriculture and food production are the original green activities and inherently part of any sustainable future. Current public debate about sustainability has had its proving ground in sustainable agriculture. Iowa created the Leopold Center for Sustainable Agriculture at Iowa State University in 1987, meaning the concept is now over twenty years old.⁸ Second, food related actions such as buying local or organic food, joining a community supported agriculture (CSA), and considered concepts like food miles – the distance your food traveled – when buying food, are among the most accessible actions individuals and communities can take when deciding to go green. Third, the most significant components of "renewable fuels" are bio-fuels, like ethanol and wind, both require farmland or open fields to function, meaning they are inherently agricultural and rural.

You can argue farming and food production are green collar jobs, although we may not see them this way yet. But if agriculture is to be part of the green economy we need to recognize several issues and realities. First, "sustainable agriculture" still struggles for acceptance by many in mainstream agriculture, who view it as yield limiting, expecting too much environmental stewardship, or as just another label for organic. Second, the "clean food" movement in its many forms, be it organic, local, or food raised in ways consumers value, such as pastured poultry, is not accepted as "legitimate" by the volume oriented, mainstream food sector – Big Food. It views consumer interest in "better" food as an implicit threat to the reputation and market for products. This conflict is seen in the intensifying battle over rBST-free milk labels and resistance by some dairy farmers, even with retailer action, like Wal-Mart's recent announcement to sell only rBST-free milk.⁹ Third, much of agriculture, especially grain and livestock

7. Steven Greenhouse, *Jobs of a Different Collar*, N.Y. TIMES, Mar. 26, 2008, at H1.

8. See IOWA CODE § 266.39 (2005) (defining sustainable agriculture as "the appropriate use of crop and livestock systems and agricultural inputs supporting those activities which maintain economic and social viability while preserving the high productivity and quality of Iowa's land.").

9. See, e.g., Stephen Clapp, *Ohio Ag Dept. Rule Outlaws "rBST-free" Milk Label Claims*, FOOD CHEMICAL NEWS, Apr. 28, 2008, at 1.

production, continues to experience significant environmental problems because many common farming practices degrade soil and water resources in ways we can't ignore or paper over forever. Water quality problems from nitrogen use and animal waste run-off, hypoxia in the Gulf of Mexico, localized odor concerns, increasing levels of soil erosion, and the loss of grasslands are just some of the concerns. The irony is some of the new environmental damage, such as planting corn on erodible lands taken out of Conservation Reserve Program (CRP), results from the push for more bio-fuels – the same fuel the public is being led to believe is agriculture's main contribution to sustainability. The reality is some bio-fuels, especially corn-based ethanol, have a tenuous claim to being environmentally beneficial unless care is taken to limit soil erosion and water pollution. Even the promised "next generation" of biofuels such as cellulosic ethanol produced from crop residue and perennial crops like switchgrass raise new concerns about erosion and removing organic matter need for soil replenishment.

Given these concerns, the reality of agriculture's future and its sustainable profile will depend on the choices we make. One key issue shaping the role of agriculture in our sustainable future relates to what is really a first principle of agriculture – who owns the land? But the truth is land ownership – or land tenure – is a topic we seldom discuss in Iowa or the nation. You can have neither agriculture nor a food system without land to farm and you cannot have farming – or a rural economy and culture – without people working the land. These are the citizens we traditionally valued as farmer owners. If private land exists someone must own it and with current values none of Iowa is going unclaimed. We give little time or attention to who owns the land and how they relate to our farming system. Yet we know agriculture is changing rapidly with increasing land prices and aging farmers and landowners. More of Iowa's farmland is changing hands with increasing amounts being held by absentee owners, and more land is being farmed under tenancy or some other relation. There is nothing inherently wrong with either absentee ownership or tenancy because both are important parts of our farming heritage.¹⁰ American history shows a fundamental policy goal since our nation's creation was to promote a political economy of farmer landowners – families who work and steward the land and reap its rewards.¹¹ The Homestead Act and the creation of the land grant universities are emblematic of this objective in action.

10. See Neil D. Hamilton, *Adjusting Farm Tenancy Practices to Support Sustainable Agriculture*, 12 J. AGRIC. TAX'N & L. 227 (1990) (setting out some of the basic issues involved in examining the sustainability of traditional farm leases. The article includes a list of provisions to include in a sustainable farm lease).

11. See, e.g., REP. OF PRESIDENT'S COMM. ON FARM TENANCY 25 (Feb. 1937) (creating a President's Committee on Farm Tenancy in November 1936 to report on land tenure issues).

Today it appears we are racing to create a system of farming and land ownership that increasingly separates these two functions – ownership from operation, work from reward. This is a much different structure of agriculture than we have historically valued and is much different than the structure for which our laws and policies were developed. If it is true our land tenure structure is changing so radically then there are many legitimate questions we should be willing, even forced to ask. How can we prepare for the bright future of green sustainability if we don't know who owns the land on which the future will be based? How can we be confident it will really be sustainable if we do not examine how the land is being treated? How can we know the future will be bright if we do not consider how the rewards and opportunities are being shared? These questions are especially important given the proliferation of land-related legal agreements being promoted in Iowa. Carbon credits, wind rights, manure contracts, conservation easements, and farm leases are among the various legal agreements landowners are now requested to sign. Many create long-term obligations and restrictions on how land is used and who shares in the economic and environmental rewards. To appreciate Iowa's agricultural and social future it is essential we understand who owns Iowa.

III. WHAT DO WE MEAN BY LAND TENURE?

The concept of land tenure can be as simple as questions of ownership and control or as complex as traditional social arrangements and the economic distribution of power in society. For our project we will take a basic and straightforward approach in defining land tenure yet still recognize the diverse and complex forms land ownership can take. The issue of land tenure is based on two simple questions – first, who owns the land and second, the owner's relation to it. Owners can come in many forms – as individuals, as formal business structures, or as fractionated shares among multiple heirs, for example. Ownership can even be divided over time as with life estates, a form of divided interest commonly used in farm estate planning. The second question, the relation of the owner to the land, is also fairly simple. The options are to farm the land or use it yourself, to rent or lease the land to another, or to manage it under some other type of legal relation. These questions relate to the more fundamental reasons why a person owns the land. The motivations of the owner are a critical factor in predicting how the land will be used. For example, in recent years some parts of Iowa have experienced sharp increases in what are known as recreational owners – people who buy land to enjoy non-farm activities such as deer hunting or natural pursuits such as prairie restoration.

If the owner is the primary occupant and user then questions of land tenure typically relate to questions of stewardship and land management. If the

land is leased to another or other people are involved in its care then other questions arise. Is the land subject to a lease or is another form of legal relation – such as a custom-farming contract, involved? The legal status of the person on the land will in part be a function of the agreement involved – for example, whether the person is a tenant, an employee, a share cropper or in some other role. The agreement may – though not always – address the length of the relation and any contractually established allocations of rights and responsibilities for its use.

A third issue may arise in relation to land tenure – do other legal agreements or relations (not directly related to ownership or tenancy) create obligations or restrictions on the use of the land? Various types of contracts and easements may be written for agricultural land, such as conservation program participation, manure application, or transferring mineral and wind rights. In recent years the range and diversity of land related agreements found in farm country have proliferated as new opportunities to make economic use of farmland have grown. Development of carbon credit-related contracts¹² and easements for farmland protection are just two examples.¹³ In addition, agreements for the production and marketing of farm products may also include provisions relating to how the land is farmed and how the products produced on it will be labeled and marketed.

Collectively all these factors – ownership, use, and other legal obligations, combine to create the context of land tenure. One final important factor must also be recognized concerning land tenure. In our legal system land can be easily and quickly transferred to another. The alienability of land is a fundamental tenet of American property law, meaning the identity of the owner, tenant, or

12. See, e.g., AgraGate Carbon Contract, http://www.agragate.com/docs/XFO_Example_Completed_Contract.pdf.

13. Land related legal provisions arise in unexpected places, such as with the use of technology. In light of its wide spread use, it is probable the Monsanto Roundup Ready seed contract is the most commonly used standard agreement in American agriculture. The contract is designed primarily to control the sale or reuse of the company's proprietary genetics, but in order to do so the contract includes very wide ranging provisions relating to farming activities. But a provision added to the contract in recent years under the "Grower Agrees" section creates legal obligations in connection with the land. It provides:

To accept and continue the obligations of this Monsanto Technology Stewardship Agreement on any new land purchased or leased by Grower that has Seed planted on it by a previous owner or possessor of the land; and to notify in writing purchasers or lessees of land owned by Grower that has Seed planted on it that the Monsanto Technology is subject to this Monsanto Technology Stewardship Agreement and they must have or obtain their own Monsanto Technology Stewardship agreement.

2008 Monsanto Technology/Stewardship Agreement, *available at* <http://www.dahlgoseeds.com/images/forms/2008techagreement.pdf>.

holder of a land use right can also change. Historically, agricultural land tenure was generally considered to be relatively stable with land changing hands only once a generation, if at all.¹⁴ Current trends in farm economics may indicate this is changing with landownership patterns becoming more fluid. Regardless how long land is owned, the ability and eventual likelihood of transfer means land tenure has a transient nature. This raises other issues and opportunities especially relating to how ethical and legal obligations to care for and steward land are reflected in social customs and communicated and transferred between generations of owners.

IV. HOW DO SUSTAINABLE AGRICULTURE AND LAND TENURE CONNECT?: THE PREMISES

Sustainable agriculture is essentially a promise to future generations to protect our capacity to produce and thrive. To consider sustainable agriculture is to consider land tenure. Issues of how agriculture will take advantage of the opportunities connected with the “green sustainable future” and how well agriculture is able to perform and protect the natural resources comprising it are fundamentally linked to who owns the land and how the benefits and responsibilities of land use are shared. Land tenure not just a U.S story. In fact, the topic is most often thought of as an issue of the developing world, such as land reform in Africa or agricultural adjustment in former non-market economics like China and Ukraine.¹⁵ Land tenure issues are a constant in news stories of agricultural development. The current world food crisis is fueling new concerns about agriculture’s ability to perform and provide society what it needs making issues of land tenure fundamental considerations both here and abroad.¹⁶

Several premises underpin the discussion about sustainability and land tenure. First, future “green” opportunities in agriculture will be mainly land-based and dependant on the availability of large tracks of productive, fertile and privately owned land to use. Second, a key determinant in how the people or institutions who are the decision-makers for the land – and who are actually working the land – perceive the opportunities will be the economic returns or

14. One of the few agricultural economists who have made a career of studying issues of land ownership and the changing demographics of farmland owners is Dr. Michael Duffy at Iowa State University. See, e.g., Michael Duffy & Darnell Smith, *Farmland Ownership and Tenure in Iowa 1982-2002: A Twenty-Year Perspective*, IOWA STATE UNIV. EXT., PM 1983, July 2004.

15. See John W. Miller, *In Ukraine Tiny Plots of Farmland Spur Big Bet*, WALL ST. J., May 12, 2008, at A1 (about Landkom, a UK based company acquiring long term leases on thousands of small farms in the Ukraine).

16. See, e.g., Sabrina Tavernise, *Old Farming Habits Leave Uzbekistan a Legacy of Salt*, N.Y. TIMES, June 15, 2008, at 6.

other benefits accompanying the activity. Third, land and its related resources like soil and water can be used in ways that are both unsustainable and detrimental to society, resulting in water pollution, resource destruction or degradation, and excessive soil erosion. Decisions to use land in anti-social or unsustainable ways are influenced by a variety of factors including: short-term economic pressures, awareness, attitudes, morality, customs, contractual obligations, and the existence or effectiveness of legal or regulatory policies directing or restraining individual behavior. Fourth, over the last seventy-five years the U.S. has developed a web of state, local and national laws, as well as a body of judicially crafted common law precedents to establish guidelines and expectations for public and private land use. In recent decades regulatory tools, such as soil loss limits and soil conservation protections, have received less attention as pressure to increase agricultural production has grown. At the same time “property rights” based resistance to public regulation has grown in the agricultural and rural community.

Fifth, most attention to soil conservation and water quality improvement is focused on developing and refining an expansive series of government programs offering economic incentives to encourage landowners to conserve soil and water and protect environmental quality. Current conservation programs, as reflected in the new 2008 farm bill offer landowners a veritable alphabet soup of options such as Environmental Quality Incentives Program (EQIP), Conservation Reserve Program (CRP), Wetlands Reserve Program (WRP), and Conservation Stewardship Program (CSP).¹⁷ Sixth, in the last twenty years attention has increased for promoting ideas such as “sustainable agriculture” and measuring “eco-system services” to serve as the foundation for agricultural environmental programs. Sustainable agriculture and economic accounting for both positive and negative environmental externalities are valuable contributions to enhancing public environmental programs; however, the ideas operate at an economic and social level, not as substitutes for traditional legal concepts of duties and responsibilities associated with stewardship and land owning. Finally, in recent years new land related opportunities, for example carbon credits, wind energy development, the sale of conservation easements, and long-term conservation financing agreements, have proliferated. These business arrangements involve the use of binding legal contracts signed by the owners and may establish restrictions on the use of the property in question.

These premises illustrate why it is necessary to reevaluate the role of law in land tenure and to understand the legal implications of land related agreements to adequately evaluate opportunities relating to sustainable development and

17. See H.R. REP. No. 110-627 (2008) (Conf. Rep.) (illustrating the numerous programs offered in Title II of the Act).

growing a greener economy. That is why the Drake University Agricultural Law Center is undertaking the sustainable agricultural land tenure project in partnership with other institutions like the Leopold Center for Sustainable Agriculture.

V. WHY A LAND TENURE INITIATIVE?

There are many reasons to consider land tenure and its relation to the future of sustainable agriculture. First, if the nation hopes to develop or administer laws, policies, and programs relative to farm income, rural development, environmental protection, and renewable energy, there is a fundamental need to understand the structure of agriculture, farming and rural economy. Land tenure relations are essential elements in the structure of agriculture and the operation and design of farm policy. Second, to understand the nature of the legal arrangements currently in use you need access to the contracts, leases, and easements being signed for farm and rural lands. Without examples of agreements being used, it is difficult to understand how they will be interpreted by courts, what is required of the parties, their effect on the land, or how existing laws apply. Third, understanding who owns the land – or who has the right to use it through some legal relation helps identify who is making decisions for its use, how long the tenure of the owner or user might be, and how responsibilities and economic returns are allocated.

The rate of change underway and projected in the next decade in Iowa land ownership patterns and the proliferation of new and often untested legal arrangements relating to agricultural land use create the need for more insight and understanding about the effect of arrangements. Understanding who owns or has the right to use or control land, and the related flow of decision-making authority – and of the economic benefits and risks is fundamental in shaping possible legal responses. The future of agricultural land or any culture, environmental system or set of public expectations based on land, is influenced by issues of control and benefits. Creating an inventory of documents related to land tenure and new understanding of the nature of land ownership, tenancy and use, will make it possible to analyze current land tenure relations. The research will provide the basis for developing model documents, educational materials, possible reforms and interpretations and other information beneficial to individuals faced with understanding and responding to land related issues – whether as owners, policy makers, legal advisors, or courts. A project examining land tenure can identify and link groups and institutions working on agricultural land issues and provide a forum for common issues and concerns.

VI. WHY IS LAND TENURE DIFFICULT FOR SOCIETY TO CONSIDER?

From my perspective of thirty years spent writing, teaching and thinking about the relation between agriculture and the law it is clear land tenure is a topic society is uncomfortable addressing. Many reasons may explain this attitude. First, land ownership holdings and lease agreements are very personal and private matters shared only between the parties or within families, not with strangers or researchers. Second, only some forms of legal documents are public records, such as land titles recorded with the county. Instead, most are private contracts unobtainable without the participation or agreement of the parties. As private matters relating to wealth and income, most people are not anxious to share either the terms of their agreements or provide information about the extent of their property holdings. Third, research relating to farm succession planning and efforts to support beginning farmers reveal how farmland owners commonly lack such plans. This indicates the difficulty most people have dealing with questions of personal mortality and retirement, as well as the related challenge of planning intergenerational transfers.

A fourth reason why examining land tenure is almost taboo in our society is how strongly the idea of private property is hard-wired into the fabric of American political and economic democracy. Private property is widely considered to be one of our most formative citizen rights and motivations. The sanctity and protection of property is protected by the Fifth Amendment of the Constitution. It 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 tenants, and the strong preference for individual rather than collective or community property. This means anything that seems to either question the sanctity of individually owned and controlled property or hint at new ways to consider its use or methods to allocate, reform, or restrict property rights is greeted with suspicion. The suspicion is a concern that somehow an individual's actions, such as the amount of land they own, their motives for owning it, or the nature of agreements they have entered for its use, will be criticized, or even worse, be subject to scrutiny or legal reform.¹⁸ A final reason why land tenure is difficult to study relates to timing. The amount and type of information collected on real property ownership and the patterns or trends in land use are limited and lagging. As a result policy responses may be limited in effectiveness due to incomplete or dated information. Rather than address real time events, often educational efforts and policy responses are delayed and after the fact. The

18. Consider the resistance to the land tenure commissions of the 1930's and the resulting reforms in state tenancy laws, which led to *Benschoter v. Hakes*. See *infra*, note 20, and accompanying text.

difficulty in developing timely information and responses makes renewed efforts to consider land tenure even more important.

VII. WHAT DO WE KNOW ABOUT LAND TENURE TRENDS AND ISSUES?

The land tenure study planned by Drake's Agricultural Law Center will be guided in part by examining the developments now happening on the land. First, absentee landownership (ALO) is increasing and an increasing amount of land is owned and controlled by them. Second, land prices have increased rapidly, driven by the demand for corn based ethanol production and by high commodity prices. Third, new sources of capital and investors are coming into the agricultural land market, creating more demand and competition for farmland. A recent front-page story in the *New York Times*, *Food is Gold, and Investors Pour Billions Into Farming*, indicates the attraction farming and landownership has for investors.¹⁹ Third, the demographics of farmers and farmland owners in the U.S. are steadily aging, making wealth transfer a more significant public policy matter. Fourth, higher land prices and market demand may accelerate the level of land transfers and increasing land prices may increase pressure for short-term returns. As a result, higher land values and landowner financial expectations are driving farm rental rates higher. Fifth, the increase in absentee land ownership means an increasing number of farm tenancies and an increase in the percent of land farmed under tenancy. But current legal protections for farm tenants are minimal. Iowa law now provides farm tenants with six-month notice of termination, but the protection is relatively ineffective if the landlord wants to increase the rent and the tenant wants to remain past the extension year. Sixth, the proliferation of land agreements, such as easements and contracts, creates an increasing number of arrangements to address. Some land contracts are well understood, such as Wetland Reserve Program easements, but other are new and unexplored, such as contracts for carbon sequestration.

In addition to considering land tenure developments now underway, the study will also consider the implications of changing land tenure relations and ask questions about what we do not know about these developments. Some of the questions we do not currently have answers to include: whether the motivations of absentee landowners shape the types of leases used; whether recreational landowners who use property for relatively short periods create new economic opportunities for local farmers such as grazing leases and land management contracts; whether Iowa's soil and water conservation districts come under increasing pressure to examine how land is being farmed if bio-fuels production in-

19. Diana B. Henriques, *Food is Gold, and Investors Pour Billions into Farming*, N.Y. TIMES, June 5, 2008, at A1.

volves removing crop residue from the land; and whether it will be possible to develop longer-term sustainable farm leases.

VIII. HISTORY OF IOWA LAW RELATING TO SOIL STEWARDSHIP

A study of land tenure in Iowa rests in part on the tradition of how Iowa's courts and lawmakers have addressed issues of land stewardship over the centuries. Iowa law on land tenure and soil stewardship rests on three legal pillars. First is the 1943 ruling in *Benschoter v. Hakes*, where the Iowa Supreme Court upheld the state's authority to regulate farm tenancies by requiring advanced notice of termination, even when leases establish a fixed end date.²⁰ The Court's analysis is premised on the importance of soil to the state and the relation between short-term farm tenancies and soil exploitation. The court noted in the following passage how the relation between private landowners and the public had changed in recent years with landowners bearing significant responsibilities to protect public resources like soil.

It is quite apparent that during recent years the old concept of duties and responsibilities . . . has undergone a change. Such persons, by controlling the food source of the nation, bear a certain responsibility to the general public. They possess a vital part of the national wealth, and legislation designed to stop waste and exploitation in the interest of the general public is within the sphere of the state's police power. Whether this legislation has, or will in the future, accomplish the desired result is not for this court to determine. The legislature evidently felt that unstable tenure lead (*sic*) to soil exploitation and waste. The amendment aims at security of tenure and it is therefore within the police power of the state.²¹

The second pillar is the soil and water conservation district law, establishing the network of locally elected commissions designed in part to administer the federal and state programs for soil conservation and erosion control. The law requires each district to establish enforceable soil loss limits and sets out a procedure for enforcement. Iowa Code section 161A.43 makes it the duty of each landowner to comply with these limits or face regulatory action by the district.²² Actions to investigate possible violations of the standards can be initiated by neighbors who are damaged by the erosion or by the district commissioners who believe violations are occurring.²³ The soil loss limits in all Iowa districts are set at 5 tons of soil loss per year or T (T being a measure of the soil loss believed to

20. *Benschoter v. Hakes*, 8 N.W.2d 481 (Iowa 1943).

21. *Benschoter*, 8 N.W.2d at 487.

22. IOWA CODE § 161A.43 (2005).

23. IOWA CODE § 161A.61 (2005).

be replaced by natural soil formation).²⁴ Iowa Code §161A.43 establishing the landowner's duty of soil stewardship, provides:

To conserve the fertility, general usefulness, and value of the soil and soil resources of this state, and to prevent the injurious effects of soil erosion, it is hereby made the duty of the owners of real property in this state to establish and maintain soil and water conservation practices or erosion control practices, as required by the regulations of the commissioners of the respective soil conservation districts.²⁵

The third pillar of Iowa soil stewardship law was written in 1979 when the Iowa Supreme Court upheld enforcement of a mandatory soil loss limit against a claim it was an unconstitutional taking to require private landowners to expend money to implement suggested soil conservation practices or take land out of production to stop erosion from damaging a neighbor. In *Woodbury County Soil Conservation District v. Ortner*, the Court upheld the requirement as being within the state's police power given the public interest in soil and productive farmland.²⁶ The court ruled:

It should take no extended discussion to demonstrate that agriculture is important to the welfare and prosperity of this state. It has been judicially recognized as our leading industry. The state has a vital interest in protecting its soil as the greatest of its natural resources, and it has the right to do so. This is the purpose of ch.467A [now Chapter 161A] as is apparent from this declaration of purposes contained in §467A.2 [now §161A.2]: It is hereby declared to be the policy of the legislature to provide for the restoration and conservation of the soil and soil resources of this state and for the control and prevention of soil erosion and for the prevention of erosion, floodwater, and sediment damages, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist and maintain the navigability of rivers and harbors, preserve wild life, protect the tax base, protect public lands and promote the health, safety and public welfare of the people of this state.²⁷ (citations omitted)

The Court reviewed the owner's taking claim and reversed the district court, concluding the landowner failed to establish the law is unconstitutional, finding "its provisions are reasonably related to carrying out the announced legislative purpose of soil control, admittedly a proper exercise of the police power."²⁸ The Court said, "[w]hile this imposes an extra financial burden on defendants, it is one the state has a right to exact."²⁹ The Court observed, "Defendants still

24. See, e.g., MARION, IOWA, CODE § 176.35(16) (2005) (citing City of Marion Iowa's 5 ton sediment loss maximum).

25. IOWA CODE § 161A.43 (2005).

26. *Woodbury County Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276 (Iowa 1979).

27. *Id.* at 278.

28. *Id.* at 279.

29. *Id.*

have the use and enjoyment of their property, limited only by the necessity to prevent soil erosion beyond allowable standards.”³⁰

This seminal ruling established the constitutionality of Iowa’s soil conservation law. Together the three precedents leave little doubt Iowa law makes it the duty of all landowners – regardless of income, education, or attitude – to embrace soil stewardship. In many ways the precedents give meaning to Secretary Wallace’s quote at the beginning of this essay. However his concern that we have been slow to recognize the duty we owe to the soil still rings true. In the thirty years since the ruling in *Woodbury County*, progress has been slow in helping Iowa landowners embrace their duty to the land. Actions by county soil conservation districts to enforce the soil loss limits are almost non-existent, even though average soil losses in the state still exceed the limits in most areas. The willingness of the USDA Natural Resource Conservation Service to enforce the conservation cross compliance provisions of federal farm programs is no more ambitious. The lack of willingness by the public officials given responsibility to protect the land to confront the evidence of soil and land abuse raises its own set of issues to examine.

IX. HISTORY OF CONCERN FOR LAND TENURE AND STEWARDSHIP – WHAT HAS CHANGED?

The contrast between the heightened concern over land tenure issues that existed seventy years ago as reflected in the 1937 President’s Committee on Farm Tenancy and what exists today is stark. The concern and attention for soil conservation and stewardship articulated by Aldo Leopold in *The Land Ethic* and embodied by the soil and water conservation district movement of the 1940s stand in sharp contrast to attitudes common in agriculture today.³¹ The 1930s era concern for soil conservation and land tenure was, in essence, among the first expressions of public concern for man’s impact on the environment (along with deforestation and wildlife issues). *In many ways, soil conservation was the original environmental movement.* Today the modern environmental movement has emerged but ironically our historic commitment to soil conservation and stewardship and concern for land tenure and agricultural structure have waned (or even disappeared). Perhaps even worse than the waning is the apparent shift of alignment in how agriculture is positioned on environmental issues. Today farmers

30. *Id.*

31. One example of the heightened role issues of and tenure and use played in society was the creation of new organization Friends of the Land billed as “a non-profit, non-partisan society, for the conservation of soil, rain and man” which published a quarterly journal *The Land*, 1 THE LAND (Winter) 1, 11 (1941).

and agriculture are not seen as the frontline of the stewardship movement but instead as the rear guard traditionalists opposed to most environmental concerns and resistant to any expansion of a public role in protecting land.

These factors pose a question: what changes explain the shift in attitude and approaches – especially the legal and regulatory dimensions? Here are some possible explanations:

1. Is it because the job is done? Have our soil conservation laws worked, and soil stewardship is secure? The evidence on the ground and in our streams do not support this. The rush to remove land from the CRP to plant more corn is exhibit one in this reality.

2. Is it because bad practices have been “regulated” out of use? Does the evidence support the idea soil loss limits and the conservation compliance rules have addressed our concerns? Again the facts do not appear to support this conclusion – at least if the levels of enforcement or willingness to use these tools are any measure. The reality may be we translated a once extant personal conservation ethic into public regulations, but ones we are unwilling to enforce or that do not satisfy our needed standard of resource protection.

3. Is it because “property rights” dogma has caused a reevaluation of the public’s right to require individual landowners to care for their land? One outgrowth – if not goal – of recent public debates over “property rights” (driven in part by agricultural interests) has been to question the public’s ability to establish and impose standards as to how land is used. In legal terms the issue is to question what is an appropriate exercise of the police power, for example, does it include protecting wetlands or meeting soil conservation standards? The tragedy is this political controversy has moved the nation and society backwards by necessitating a reappraisal of legal issues settled long ago. Sixty-five years ago the Iowa Supreme Court affirmed the legitimacy of state law to prevent the exploitation and waste of soil and farmland. Rather than build on this history and tradition public officials today ask tentatively whether it is appropriate or legal to expect landowners to conserve and steward the land.

4. Is it because we are not aware of the problems or are not paying attention? Could part of the apparent lack of concern for soil stewardship be due to a lack of awareness or attention? With an array of other public issues and environmental concerns claiming our attention it might be convenient or comforting to consider soil conservation as something already in check. Certainly few in farm country are interested in bringing attention to the issue if doing so could bring into question farmers’ oft heard claim of “being the original environmentalists” or lead to more public action. The drumbeat of concern over water quality

in Iowa has a direct relation to farming practices and if we address that first it is difficult to divorce it from attention to the latter.³²

5. Is it because we have given up on farm structure and the family farm due to the continuing – perhaps almost complete – industrialization of agriculture? The structure of Iowa agriculture in scale and the economic resources involved has changed greatly in the last fifty years, even the last ten. Even assuming we have given up on the ideal of protecting the “family farm” however we might describe it, does this resignation mean our concern for the land on which farming occurs must also vanish? If anything the increase in absentee ownership associated with changes in Iowa’s farming structure should make our concerns about soil conservation and stewardship even more pressing. Similarly the increased economic value of farmland and its enhanced political role as an energy source should mean its protection is an even greater public goal.

6. Is it because our legal tools do not work or are not used? Perhaps the laws we have relating to soil conservation and land stewardship are inadequate or ineffective. It is not that we don’t have laws addressing soil conservation and land tenure. As we have seen, Iowa Code §161A.43 requires every landowner to comply with soil loss limits established by the local soil and water conservation district and Iowa Code §562.6 provides farm tenants with notice before leases can be terminated or altered.³³ But you can count on one hand the soil and water conservation districts willing to enforce Iowa’s soil loss limits and the protection for tenants have little value in competitive rental markets where tenants face complying with rent increases whenever made or risk not farming the land in future years.

X. THOUGHTS ABOUT ALDO LEOPOLD AND *THE LAND ETHIC*

Aldo Leopold’s *Sand County Almanac* published in 1949 is considered one of our most important writings about ecology and man’s relation to the environment.³⁴ From a legal perspective the final essay *The Land Ethic* is a cogent and eloquent discussion of our duty to the land. In framing the discussion as based on ethics Leopold said:

32. See, e.g. Editorial, *Embrace a new water ethic for Iowa*, D.M. REG., June 22, 2008, at OP1.

33. IOWA CODE § 161A.43 (2005); IOWA CODE § 562.6 (2005).

34. ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* (Oxford University Press 1987) (1949). There are many editions of Leopold’s famous work. The citations are to a special commemorative edition published in 1987 on the 100th anniversary of his birth.

An ethic, ecologically, is a limitation on freedom of action in the struggle for existence. An ethic, philosophically, is a differentiation of social from anti-social conduct. These are two definitions of one thing. The thing has its origin in the tendency of interdependent individuals or groups to evolve modes of co-operation. The ecologist calls these symbioses. Politics and economics are advanced symbioses in which the original free-for-all competition has been replaced in part, by co-operative mechanisms with an ethical content.³⁵

Any lawyer will recognize this as a function the law provides for society. Leopold defined his land ethic this way:

A land ethic, then, reflects the existence of an ecological conscience, and this in turn reflects a conviction of individual responsibility for the health of the land. Health is the capacity of the land for self-renewal. Conservation is our effort to understand and preserve this capacity.³⁶

One value of framing the issue of land stewardship in terms of ethics is how it broadens the mechanisms society has for enforcement, including social disapproval for wrong behavior. Leopold said, "The mechanism of operation is the same for any ethic: social approbation for right actions: social disapproval for wrong actions."³⁷

Leopold reserved some of his sharpest criticism for government efforts to promote soil conservation, efforts he felt were long on talk and devoid of content or obligation. His concern was we ask farmers to do only what is convenient to protect the land and expect little more, leaving the largest role in conservation to government, noting "there is a clear tendency in American conservation to relegate to government all necessary jobs that private landowners fail to perform."³⁸ Leopold recognized the fundamental challenge in our relation to land is the dominant role we give economics. He noted:

It of course goes without saying that economic feasibility limits the tether of what can or cannot be done for land. It always has and it always will. The fallacy the economic determinists have tied around our collective neck, and which we now need to cast off, is the belief that economics determines *all* land-use. This is simply not true. An innumerable host of actions and attitudes, comprising perhaps the bulk of land relations, is determined by the land-users' tastes and predilections, rather than by his purse. The bulk of all land relations hinges on investments of time, forethought skill, and faith rather than on investments in cash. As a land-user thinketh, so is he.³⁹

35. *Id.* at p. 202.

36. *Id.* at p. 221.

37. *Id.* at p. 225.

38. *Id.* at p. 213.

39. *Id.* at p. 225.

Leopold was not a lawyer and he questioned the wisdom of relying on government regulations yet he appears to acknowledge a role for law in a land ethic. After speaking about the economic limitations on government conservation, he notes:

What is the ultimate magnitude of the enterprise? Will the tax base carry its eventual ramifications? At what point will governmental conservation, like the mastodon, become handicapped by its own dimensions? The answer, if there is any, seems to be in a land ethic, *or some other force* which assigns more obligation to the private landowner.⁴⁰ (emphasis added)

There has been much focus on the “land ethic” but less commentary about the “some other force” portion of this. One illustration of the potential of “some other force” can be seen by the Iowa courts’ rulings on soil and land stewardship.

One value of Leopold’s writing is his ability to put into historic and biblical context issues still resonating today. Consider this quote about Abraham knowing why the land exists – “to drip milk and honey into Abraham’s mouth. . . [a]t the present moment, the assurance with which we regard this assumption is inverse to the degree of our education.”⁴¹ Does our current rush to corn-based ethanol and visions of a new golden period of agriculture seem reminiscent of Abraham’s view the role of land is to drip milk and honey into our collective mouths? It is here that Leopold’s analogy of agriculture being the pump used to tap the land’s well rings prophetic:

The ecological fundamentals of agriculture are just as poorly known to the public as in other fields of land-use. For example, few educated people realize that the marvelous advances in technique made during recent decades are improvements in the pump, rather than the well. Acre for acre, they have barely sufficed to offset the sinking level of fertility.⁴²

Concerns about land tenure and sustainable agriculture are in essence concerns about caring for the well, not just the pump.

XI. WHAT IS IOWA’S LAND ETHIC?

Reading a new biography on Leopold and rereading *The Land Ethic* raise many questions about how his writings can help shape our thinking about land tenure.⁴³ Applying Leopold’s idea to land relations in Iowa is an interesting but

40. *Id.* at p. 213.

41. *Id.* at p. 205.

42. *Id.* at p. 223.

43. See JULIANNE L. NEWTON, ALDO LEOPOLD’S ODYSSEY (2006).

in some ways disheartening exercise. It is clear many farmland owners recognize little semblance of an ethical duty to the land – at least not in a Leopoldian sense. To a cynic it might appear our land ethic – if ethic can be used so casually – is *all* about economics – maximizing returns, increasing yields, and selling for the highest price. “Get the most you can out of your land now” could be our state motto. If this requires plowing under a hillside pasture or grasslands protected for fifteen years in the CRP to plant more corn, then so be it. If it means recreational fall tillage and leaving the soil bare to blow until spring or running the planter to the riverbank, then so be it. If it means letting cattle amble in the streambed or taking a bulldozer to the last trees in the fence row, then so be it. If it means platting the lots and staking the streets for the final harvest on a flat fertile forty, whose only crime was being in the way of suburban progress, then so be it. As owners we are legally entitled to do all this and more – and we dare anyone to say or even hint our doing so is somehow unethical or improper.

We ask little of the land, that is, other than to yield without resistance to our decisions and to return us the largest sum possible. In exchange we expect the land to ask nothing of us – perhaps other than to pay the taxes, record the deed and cash the checks. There is no expectation we will care for the land at least if caring means love, respect, attention, or foregoing a harmful action. What care we do provide is driven by a calculus it will pay off in the near term – or help us meet an oppressive government rule, one we obey grudgingly, if at all. The truth is we do not expect anyone to ask us to do anything for the land – certainly not the government, the neighbors or nose-y environmentalists and do-gooder professors. “If they care so much for land – then they may buy some of their own!”

Yes Iowa has environmental laws but who is there to enforce them on the back forty? We are quick to sing paeans to our rich Iowa farmland and its bounty but good luck finding a community willing to stay its annexation plans to protect prime farmland. If you are feeling risky, try telling a dues paying member of a farm organization they cannot sell for housing lots. Iowa law may make it the duty of *every* landowner to protect the land from erosion but try finding a soil conservation district willing or wise enough to enforce the rules. The story is no better for the federal farm payments we hand out by the millions – with few questions asked. Part of the public’s bargain in exchange for taxpayer support is a commitment landowners will comply with soil conservation rules but drive down any country road – or check the USDA’s enforcement records – to see if the promise of conservation compliance is empty or real.

Yet even with these challenges there is good news for Iowa’s land. First, not all landowners see land only through the lens of money. Some owners are anxious to find ways to protect the land they care about so deeply. Organizations like the Women, Land and Legacy Project are empowering women land-

owners to care for their land.⁴⁴ Second, more Iowans are buying land with conservation goals and environmental protection in mind. Organizations like the Iowa Natural Heritage Foundation work with hundreds of landowners all across the state to protect the land. Third, public institutions like some of Iowa's county conservation boards are taking more responsibility toward the land. We may never achieve Leopold's vision of a land ethic but we can always strive to be better stewards and recognize fee simple legal title is only one measure of ownership.

XII. LAND TENURE AND THE FUTURE: WHAT DO WE DO NEXT?

If this essay stimulates thinking about land tenure there are many questions to consider. One is how to renew public attention and awareness to these issues – to make land tenure a priority in public policy? The Drake land tenure initiative is designed in part as a catalyst to spark debate and to ask needed questions about land tenure. Heightened public concern and awareness about land stewardship may increase attention to the critical role of agriculture, a trend already reflected in current discourse about the role of bio-fuels in the world food crisis.⁴⁵ The growing public debate over the wisdom of U.S. policy on bio-fuels, especially the diversion of more than thirty percent of the nation's corn to ethanol is precipitating renewed scrutiny. The attention to bio-fuels and the international food crisis illustrates that while farming and agriculture may be part of the "traditional" economy, they are still critical to our future, perhaps more than we have imagined. A reappraisal of the importance of agriculture to society is overdue and should be welcomed. It will increase awareness about the future of our land - who owns it and how it is cared for – as a vital public issue.

Renewed attention to other values agricultural land may create new economic incentives to protect the land and natural resources. Farmland can yield many values as the basis for rural enterprises like tourism and recreation and provide other products like wind energy. These activities can provide new demand and income for land. The development of eco-system services can help quantify and capture other values provided by agricultural land, in addition to crops it may generate.⁴⁶ Recognizing the role land plays in protecting water quality and providing wildlife habitat are just some examples of these services. New

44. Women, Land, and Legacy, Homepage, <http://www.womenlandandlegacy.com/womanvoice.htm> (last visited Aug. 9, 2008).

45. See, e.g., Editorial, *Rethinking Ethanol*, N.Y. TIMES, May 11, 2008, at O11.

46. H.R. REP. NO. 110-627, at § 2709 (2008) (Conf. Rep.) (provision requiring the Secretary of Agriculture to undertake a study on the potential impact the development of markets for environmental services may have for agriculture).

government approaches to soil and water conservation may give landowners incentives to protect the land and steward the soil. The 2008 farm bill sets out a redesigned Conservation Stewardship Program to provide federal soil conservation benefits on working lands. The law shows the potential and promise for new ways of structuring soil and water conservation.⁴⁷ Finally, a critical part of efforts to revive attention to soil and land stewardship will involve creating new tools, examples, and models for how it can be done. Model agricultural leases to promote sustainable farming practices can be developed. The growing use of conservation easements, which combine protections for public resource values with private land ownership, can be examined.

This essay and the new land tenure initiative have the goal of stimulating creative thinking and responses by society. Here are some of the questions such an effort can help society consider:

- How will current interest in carbon sequestration and eco-system services markets influence or shape policies and economics for soil conservation? If we won't do soil conservation for its own sake will carbon markets make us better stewards?
- How will the existence of other environmental laws, such as the Clean Water Act with non-point source authority and the potential for enforceable TMDL's in watersheds influence soil erosion and conservation issues? Could these "water" based environmental laws, even though unintended and unexpected, be the key tool for progress? Do these laws threaten traditional farming practices and if so, how would this happen and who would be the moving agent in enforcement?⁴⁸
- How will the floods of 2008 shape our thinking on soil erosion and landscape management? Is this a teachable moment where we consider the impact of how we farm and how our practices create the potential for the wide spread soil losses? Will we re-examine how we use flood plains? Will we require ever landowner to keep their land in place? Or will the current debate about food prices and grain shortages, such as proposals for early release of CRP acres, over-ride any longer-term concerns about soil stewardship?
- How will the current economic situation –with run ups in land prices and cash rents and more land coming on the market impact land stewardship,

47. H.R. REP. NO. 110-627, at § 2301 (2008)(Conf. Rep.)(making a major overhaul in the CSP to make this "working lands" program more widely available and attractive to farmers).

48. See Malte Petersen, *European Soil Protection Law after the Setback of December 2007 – Existing Law and Outlook*, EURO. ENERGY & ENVTL. L. REV. 146 (2008). (Discussion of the role of various European Union laws and directives to serve as the basis for the protection of soil quality).

especially if it proves to be temporary? Will new owners who paid high prices do more to protect the soil or will they pump the well harder? If prices crash will there be more pressure on the land to produce whatever it can? If there is an economic shake-out and land prices fall – who will be the next owners who buy land on the fall? If this happens will there be opportunities for government initiatives to put land into the hands of new farmers similar to the 1930s?

- Is it possible to engage the non-landowning public in the discussion about land tenure? Significant progress wasn't made in the public debate about smoking until non-smokers became alarmed about the effects of second-hand smoke. Is there a parallel issue for the non-farm community in water quality, hypoxia, or higher food prices?
- Could a citizen group have legal standing in Iowa to challenge whether a soil and water conservation district (or the USDA) is enforcing the soil loss limits or the conservation cross compliance provisions of the law?

The Agricultural Law Center land tenure initiative will develop over the next several years. Readers who are interested in being involved or learning more have several ways to participate. The value and content of the project will in part be formed by the timeliness and quality of information we can obtain. Readers are invited to share examples of land tenure related issues you have encountered. Perhaps it is an unreported district court case involving a dispute over farming practices or soil conservation. It could be a unique farm lease you have written or encountered detailing the rights and responsibilities of the parties. One goal of the project is to develop an inventory of legal documents relating to the use of farmland. Readers are encouraged to submit copies of any non-confidential agreements for inclusion in the inventory. Finally if you have thoughts or reactions to the essay and the comments about the status of land tenure in Iowa or the nation please let us know. The Center is planning on hosting a legal symposium in early spring 2009 on these topics to include academics, attorneys, farmers and landowners in the discussion. If you have a topic or question you would like to address or have other ideas for use to consider please let us know. One fundamental principle of sustainable agricultural land tenure is that all citizens, both those who own farmland and those who simply enjoy eating its bounty have a stake in the future of Iowa's land.