

HELPING LANDOWNERS HELP NEW FARMERS: INCENTIVE PROGRAMS AND OTHER LEGAL TOOLS FOR TRANSITIONING LAND TO THE NEXT GENERATION OF FARMERS

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I. INTRODUCTION

The increasing average age of American farmers may not surprise many people, but it should be cause for concern. The average age of farm operators in the United States increased from 54.3 years in 1997 to 57.1 years in 2007.¹ In

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2007, close to thirty percent of farm operators were age sixty-five or older.² Meanwhile, people of all ages are expressing a desire to make their living as farmers.³ This new generation of farmers is a diverse lot. Some come to farming through what many consider the traditional route—growing up in an agricultural family and wanting to take over the family farm, or a portion of it. Other new farmers grew up in the same agrarian environment, first pursued professional careers away from the farm, and are now seeking to return to an agrarian life-style.⁴ Finally, other new farmers perhaps never set foot on a farm, but have been invigorated by the local and sustainable foods movement to take food and nutrition into their own hands.⁵ Whether an agronomy student hoping to someday take on the family farm, a prodigal farm kid returning to their roots, a suburbanite disenchanted with the nine-to-five routine, a military veteran with limited job prospects, or some combination thereof, substantial challenges face new and beginning farmers and ranchers.⁶

Policy-makers and landowners, as well as the general public, recognize the need to assist new farmers and express a desire to provide additional support.⁷

1. NAT'L AGRIC. STATISTICS SERV., USDA, 1997 CENSUS OF AGRICULTURE—UNITED STATES DATA 10 tbl.1 (1999), *available at* http://www.agcensus.usda.gov/Publications/1997/Vol_1_Chapter_1_U.S._National_Level_Data/us-51/us1_01.pdf; NAT'L AGRIC. STATISTICS SERV., USDA, 2007 CENSUS OF AGRICULTURE—UNITED STATES DATA 220 tbl.63 (2009), *available at* http://www.agcensus.usda.gov/Publications/2007/Full_Report/usv1.pdf [hereinafter 2007 CENSUS OF AGRIC.].

2. 2007 CENSUS OF AGRIC., *supra* note 1, at 219–20 tbl.63 (percentage calculated by adding the number of operators in the 65–69 (130,683) and 70+ ranges (244,016), divided by the total number of principle operators (1,210,111)).

3. Makenna Goodman, *Is Becoming a Farmer the New American Dream?*, HUFFINGTON POST, May 25, 2011, http://www.huffingtonpost.com/2009/08/13/is-becoming-a-farmer-the_n_258961.html.

4. *Id.*

5. Valerie Jaffee, *Increasing Age of Farmers Puts Our Food System at Risk*, HUFFINGTON POST, Mar. 16, 2011, http://www.huffingtonpost.com/valerie-jaffee/increasing-age-of-farmers_b_835710.html; Isolde Raftery, *In New Food Culture, a Young Generation of Farmers Emerges*, N.Y. TIMES, Mar. 6, 2011, <http://www.nytimes.com/2011/03/06/us/06farmers.html>.

6. There are several terms with important, though perhaps subtle and sometimes conflicting, distinctions describing the various people who are attempting to become or have recently become agricultural producers. While these descriptors do have important distinctions and connotations, for the purposes of this Article, new and beginning farmers and ranchers are collectively referred to as “beginning farmers.” This term is used simply to correspond with the language of the government programs evaluated and to avoid confusion.

7. *See, e.g., Organic Farmland Access Program*, NEW SPIRIT FARMLAND PARTNERSHIPS, <http://newspiritfp.com/> (last visited June 3, 2012) (providing an example of social financing where members of the public purchase land with the sole purpose of providing long-term land access to beginning farmers through renewable leases).

Public funding for a variety of programs that assist beginning farmers, however, is subject to the same budgetary and political constraints as many other public programs. Direct loans and programs with set asides for beginning farmers, such as USDA conservation incentive programs, may see significant decreases in funding.⁸ Despite funding challenges, however, farmland owners hold the keys to unlock the potential of America's next generation of farmers. Landowners possess an element critical to the success of beginning farmers—land. These landowners, however, may lack the knowledge and financial resources needed to provide beginning farmers with access to the land. In addition, landowners may have legitimate concerns regarding the capacity of beginning farmers to fulfill the financial obligations on which many landowners depend, particularly elderly landowners—often retired farmers or widows living close to the land and with roots in the community they wish to improve.⁹ Thus, there is a need not only for financial incentives and security but also assurances for landowners that those who will begin to work the land will be successful stewards and participating members of rural communities.

This Article examines both public efforts to assist individuals owning or controlling America's farmland and the legal tools available to help ensure an adequate financial return on a landowner's investment, while meeting the less tangible, but no less important, desire of many landowners to see an economically and socially renewed rural community and to provide others with the opportunities and benefits inherent in farm living. Thus, this Article begins with a brief overview of the relatively limited research available in relation to landowner concerns about beginning farmer issues and the outlook for beginning farmer assistance from landowners as America's farmland changes hands. This will include an examination of current landowner assistance programs, which, depending on the structure of the program, will also allow exploration of crucial considerations for landowners in providing land access for beginning farmers. For instance, both Iowa and Nebraska's Beginning Farmer Tax Credit programs provide greater credits for landowners that enter a crop-share arrangement an element of the program that improves a new farmer's likelihood for success and emphasizes the importance of risk-sharing in a landlord-tenant relationship.¹⁰ Finally, the Article will examine the important elements of legal transactions that

8. See generally JIM MONKE, CONG. RESEARCH SERV., R41433, EXPIRING FARM BILL PROGRAMS WITHOUT A BUDGET BASELINE (2012) (identifying thirty-seven programs authorized by the 2008 Farm Bill—five of which are conservation programs—that are set to expire in 2012 unless further congressional action is taken to extend funding).

9. See ROBERT PARSONS ET AL., UNIV. OF VT., THE FARMLASTS PROJECT: RESEARCH REPORT AND RECOMMENDATIONS FROM THE FARMLASTS PROJECT 10–11, 14 (2010), available at <http://www.uvm.edu/farmlasts/FarmLASTSResearchReport.pdf>.

10. IOWA CODE § 175.37 (2011); NEB. REV. STAT. §§ 77-5201 to 5215 (2010).

are not addressed by current public policy but, nonetheless, have the potential to benefit new farmers.

II. LANDOWNER BENEFITS FOR ASSISTING NEW FARMERS

A. *Intrinsic Motivations to Assist New Farmers and the Rural Community*

Many landowners are retired farmers, or widows of farmers.¹¹ These landowners often continue to live on the land or in the community.¹² They may know a specific young person in their community that is trying to begin a farming career and can identify with the challenges of beginning a farm operation. Further, in many cases these landowners are witnessing the emptying of the rural social landscape.¹³ They are faced with the sometimes conflicting desires to assist beginning farmers and promote a rejuvenated rural community compared with the need for a reliable and steady source of income from cash-rent lease arrangements.¹⁴

Changing landowner demographics, at first glance, may lessen the intrinsic motivation to assist beginning farmers. Land owned by absentee landowners, persons living away from the farm, is increasing.¹⁵ Land owned by persons without an agricultural background is increasing.¹⁶ When compared to the traditional arrangement of landowner operators, new non-farming, non-local landowners have different characteristics and concerns.¹⁷ While on the whole the geographic

11. J. GORDON ARBUCKLE, JR., IOWA STATE UNIV. EXTENSION, RENTED LAND IN IOWA: SOCIAL AND ENVIRONMENTAL DIMENSIONS 9 (2010), *available at* <http://www.soc.iastate.edu/extension/farmpoll/PMR1006.pdf> [hereinafter ARBUCKLE, RENTED LAND IN IOWA]; MICHAEL DUFFY & DARNELL SMITH, IOWA STATE UNIV. EXTENSION, FARMLAND OWNERSHIP AND TENURE IN IOWA 2007, at 19 (2008), *available at* <http://www.extension.iastate.edu/publications/pm1983.pdf>.

12. ARBUCKLE, RENTED LAND IN IOWA, *supra* note 11, at 10.

13. ECON. RESEARCH SERV., USDA, RURAL POPULATION AND MIGRATION: TREND 6—CHALLENGES FROM AN AGING POPULATION, (2007), *available at* <http://www.ers.usda.gov/Briefing/Population/Challenges.htm>.

14. J. GORDON ARBUCKLE, JR., LANDOWNERS AND OPERATORS CARING ABOUT THE LAND (LOCAL): IOWA FARMLAND OWNER AND OPERATOR SURVEY 3–4, 11, 13 (2010) [hereinafter ARBUCKLE, LOCAL]., *available at* [http://www.soc.iastate.edu/staff/arbuckle/LOCAL_Landowner_Operator_Survey_Final_Report_12Nov10%20\(2\).pdf](http://www.soc.iastate.edu/staff/arbuckle/LOCAL_Landowner_Operator_Survey_Final_Report_12Nov10%20(2).pdf).

15. DUFFY & SMITH, *supra* note 11, at 12.

16. *Id.* at 30 (indicating twenty-six percent of landowners have never farmed).

17. *Compare* J. GORDON ARBUCKLE, JR., IOWA STATE UNIV. EXTENSION, NON-OPERATOR LANDOWNERSHIP AND CONSERVATION (2011) [hereinafter ARBUCKLE, NON-OPERATOR LANDOWNERSHIP], *available at* http://www.soc.iastate.edu/staff/arbuckle/Non_operator_Landownership_and_Conservation.pdf

distance separating landowners and their land may increase and the landowners' experience with the agricultural profession and rural community may be lessened,¹⁸ many new landowners do possess additional resources¹⁹ and even personal values that may provide increased land access for beginning farmers. Examples of these new landowners consist of the child heirs of deceased farmers and landowners and, to a lesser extent, farmland investors.²⁰ Children beneficiaries and land investors may be more likely to have alternative sources of income, making them less reliant on rental income from the newly acquired farmland. This creates the opportunity for additional cost-sharing and risk-sharing between landowner and tenant, two factors that can significantly impact a beginning farmer's chances of success.

B. *Increased Potential for Creative and Flexible Arrangements*

Research also shows that non-farming heirs and investor landowners place conservation as a higher priority than other landowner groups.²¹ While beginning farmers do not necessarily possess a greater desire to implement conservation on the ground they farm, additional opportunities exist for these owners to ensure a more customized operation on leased land and to access conservation programs if the land is leased to a beginning farmer.²² Landowners may want specific farm practices, conservation concerns, or crop rotations addressed in the lease contract. New farmers, having only one or two landlords, may have an

(discussing tendencies and attitudes of non-operator landowners to conservation), *with* DUFFY & SMITH, *supra* note 12 (discussing landowner behavior and trends).

18. See ARBUCKLE, NON-OPERATOR LANDOWNERSHIP, *supra* note 17.

19. DUFFY & SMITH, *supra* note 11, at 8, 12–13 (such resources include a corporate business structure, less debt, and more education).

20. *Id.* at 9, 30 (explaining that inheritance presently accounts for approximately twenty-three percent of Iowa farmland transfers, and that the instance of investor ownership has increased in recent years).

21. ARBUCKLE, NON-OPERATOR LANDOWNERSHIP, *supra* note 7, at 13 (indicating that investors and inheritors of land generally are more concerned with the impacts of farming on wildlife, water quality, and tile drainage).

22. 16 U.S.C. § 3841(a)(1)(B), (g) (Supp. IV 2010) (providing special funding to beginning farmers for EQIP and CSP); *id.* § 3839aa-2(d)(2)(A) (providing certain funding to beginning farmers for the EQIP program, with limitations); *id.* § 3835(c)(1)(B)(iii), (f) (outlining the CRP Transition Incentives Program for beginning farmers); see generally CYNTHIA NICKERSON & MICHAEL HAND, USDA, ECON. RESEARCH SERV., ECON. INFO. BULL. NO. 62, PARTICIPATION IN CONSERVATION PROGRAMS BY TARGETED FARMERS: BEGINNING, LIMITED-RESOURCE, AND SOCIALLY DISADVANTAGED OPERATORS' ENROLLMENT TRENDS (2009), <http://www.ers.usda.gov/Publications/EIB62/EIB62.pdf> (reviewing conservation program participation statistics and conservation contract data for beginning farmers).

increased ability and drive to provide customized operations.²³ In addition, landowners may be able to receive labor for needed improvements in exchange for part of the rent.

C. Financial Incentives

Landowners can receive financial benefits for providing land access to beginning farmers in a number of ways. State and federal incentives exist for both leasing and selling land to a qualifying beginning farmer.²⁴ These programs consist primarily of state level beginning farmer tax credits available in Iowa, Nebraska, and a few other states, USDA's Transition Incentives Program, Aggie Bonds for landowners entering installment sale contracts, and the USDA Beginning Farmer and Rancher Land Contract Program.²⁵ These programs are the focus of the following section.

III. INCENTIVE PROGRAMS AND KEY CONSIDERATIONS FOR BEGINNING FARMER LAND ACCESS ARRANGEMENTS

Demonstrated by the previously mentioned incentive programs, and simply ascertainable through common sense, the most obvious way landowners can assist beginning farmers is by providing access to farmland. This principally means leasing or transferring ownership. While farmland is often transferred through estate planning instruments and probate,²⁶ the examination in this section will focus on leases and landowner sales, as this is the primary focus of public

23. Drake Univ. Agric. Law Ctr., *Leasing to a New Small Farmer*, VIMEO (2011), <http://vimeo.com/20184407> (suggesting beginning farmers should focus on a small-scale, management-intensive approach to competing for farmland to lease as opposed to a capital-intensive approach).

24. See, e.g., 16 U.S.C. § 3835(c)(1)(B), (f) (outlining the CRP Transition Incentives Program for qualifying agreements with beginning farmers); IOWA CODE §§ 175.12-.13, .30, .37 (2011); NEB. REV. STAT. §§ 77-5209, -11 to -13 (2010); see also Edward Cox, Drake Univ. Agric. Law Ctr., *Assisting Beginning Farmers*, SUSTAINABLE FARM LEASE (Feb. 24, 2012), <http://www.sustainablefarmlease.org/2011/02/assisting-beginning-farmers/>.

25. See generally 7 U.S.C. § 1936 (Supp. IV 2010) (outlining the Beginning Farmer or Rancher and Socially Disadvantaged Farmer or Rancher Contract Land Sales Program); 26 U.S.C. § 147(c)(2) (2006 & Supp. IV 2010) (outlining the Aggie Bonds Program); IOWA CODE § 175.37 (2011) (outlining Iowa's beginning farmer tax credit); NEB. REV. STAT. §§ 77-5201 to -15 (2010) (authorizing Nebraska's beginning farmer tax credit); WIS. STAT. § 93.53 (2012) (authorizing Wisconsin's beginning farmer tax credit program); 7 C.F.R. § 1410.64 (2011) (outlining the CRP Transition Incentives Program).

26. DUFFY & SMITH, *supra* note 11, at 9.

policy efforts.²⁷ A brief discussion about the effect of wills, trusts, and intestate succession on land access for beginning farmers will follow this section.

The regulations governing landowner incentive programs contain specific eligibility requirements for both landowners and beginning farmers, and often have limitations regarding the type of agricultural operation involved;²⁸ the use of program financing for attached improvements, such as a residence;²⁹ and the amount of financing made available through the programs.³⁰ The eligibility criteria and limitations in large part seek to eliminate abuse of the programs, but also serve to promote a secure and profitable farm operation for the benefit of both beginning farmer and landowner.³¹ For instance, both Iowa and Nebraska's Beginning Farmer Tax Credit offer higher incentives for crop-share lease arrangements than cash-rent arrangements due to the advantages bestowed a beginning farmer from the cost- and risk-sharing elements of a crop-share lease.³² As mentioned previously, these rules will be examined not merely to help ensure an understanding of eligibility and compliance, but to also illustrate considerations that should be addressed in any land transaction and corresponding legal contracts between landowners and beginning farmers. Additional matters, not addressed within the program rules, that should be given special consideration when discussing the potential benefits and challenges of providing land access to a beginning farmer and drafting corresponding documents, will also be addressed to help ensure both a complete discussion and to measure the adequacy or potential for improvements of the examined programs.

27. See Edward Cox, *A Lease-Based Approach to Sustainable Farming, Part II: Farm Tenancy Trends and the Outlook for Sustainability on Rented Lands*, 16 DRAKE J. AGRIC. L. 5, 6 (2011).

28. See, e.g., 7 C.F.R. § 1410.64 (2011) (setting out eligibility requirements for farmers and landlords to participate in the CRP Transition Incentives Program).

29. E.g., IOWA CODE §§ 175.2, .12 (setting out the guidelines for Iowa's Beginning Farmer Loan Program, which allows use of program financing for "agricultural improvements," including "a single-family dwelling located on agricultural land which is or will be occupied by the beginning farmer" as well as accessory structures); see generally PARSONS ET AL., *supra* note 9, at 10, 38 (stating that over half of retiring farmers plan to continue living on the land, thus creating a shortage of housing for the next generation of farmers).

30. E.g., IOWA CODE § 175.37(5) (indicating the basis by which the amount of an Iowa Beginning Farmer Tax Credit is calculated).

31. 7 C.F.R. § 1410.64 (2011).

32. IOWA CODE § 175.37(5); NEB. REV. STAT. § 77-5213(1) (2010); see also DUFFY & SMITH, *supra* note 12, at 16.

A. Leasing to a Beginning Farmer

Leasing farmland is a popular entry point for beginning farmers and has been embraced by public policy efforts to provide access to the next generation of farmers.³³ The concept of farmers operating on rented land, however, is not in line with common public conceptions of the American farmer and perhaps even antithetical to Thomas Jefferson's Agrarian ideal.³⁴ Thomas Hart Benton, Missouri Senator from 1821 to 1851,³⁵ provided the following scathing review of farm tenancy and the need for public land policy to promote freehold estates:

Tenantry is unfavorable to freedom. It lays the foundation for separate orders in society, annihilates the love of country, and weakens the spirit of independence. The farming tenant has, in fact, no country, no hearth, no domestic altar, no household god. The freeholder, on the contrary, is the natural supporter of a free government; and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply tenants.³⁶

The notion of farmers working their way up from farm laborer to tenant farmer, however, and eventually to owner-operator is not a new one and is referred to as the "agricultural-" or "tenure ladder" since at least the late 1800s.³⁷ Further, acceptance of farm tenancy as an intrinsic part of the agricultural economy and even promotion of tenancy arrangements for beginning farmers, while perhaps not the publicly favored form of agricultural land tenure, has been recognized as a legitimate public policy endeavor.³⁸ Iowa and Nebraska have both developed Beginning Farmer Tax Credits to encourage landowners to lease land

33. See, e.g., 7 C.F.R. § 1410.64 (conditioning eligibility for program benefits on participation in a long-term lease with a beginning farmer); see also Edward Cox, *Government Incentives for Sustainable Farm Leases*, SUSTAINABLE FARM LEASE (Mar. 15, 2011), <http://sustainablefarmlease.org/2011/02/government-incentives-for-sustainable-farm-leases/>.

34. See generally Linda A. Malone, *Reflections on the Jeffersonian Ideal of an Agrarian Democracy and the Emergence of an Agricultural and Environmental Ethic in the 1990 Farm Bill*, 12 STAN. ENVTL. L.J. 3 (1993) (providing a contextual discussion of Jefferson's vision for a nation of independent farmer-landowners).

35. Benton, *Thomas Hart*, (1782–1858), BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000398> (last visited June 3, 2012).

36. 1 THOMAS HART BENTON, THIRTY YEARS' VIEW: OR, A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS, FROM 1820 TO 1850, 103–04 (1854).

37. Jeremy Atack et al., *Northern Agriculture and the Westward Movement*, in THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES, VOLUME II: THE LONG NINETEENTH CENTURY 285, 319 (Stanley L. Engerman & Robert E. Gallman eds., 2000).

38. See, e.g., IOWA CODE § 175.37 (2011); NEB. REV. STAT. § 77-5211 (2010) (offering economic incentives to landowners who enter into multi-year leases with qualifying beginning farmers); 7 C.F.R. § 1410.64 (2011).

to beginning farmers, and the federal government recently developed the Transition Incentives Program (TIP) as part of the Conservation Reserve Program (CRP) administered by USDA Natural Resources Conservation Service (NRCS).³⁹

1. *State Tax Credits*

Iowa and Nebraska are two examples of states offering a tax credit to landowners that lease farmland, as well as farm equipment, to a beginning farmer.⁴⁰ Both states have established eligibility requirements and restrictions that protect both parties and help ensure productive operations and secure tenures. Iowa's Beginning Farmer Tax Credit is available to landowners who enter a lease of two to five years with a qualifying beginning farmer.⁴¹ Nebraska's tax credit requires a three year lease term.⁴² These lease terms may not be considered long-term in relation to many commercial leases, or in comparison to the actual life of many farm lease arrangements, but when compared to the year-to-year lease terms that dominate farm lease arrangements they can offer significant benefits to a beginning farmer.⁴³ Most obviously, long-term lease arrangements allow beginning farmers to securely invest in the farm's long-term productivity, help ensure recoupment for improvements, and may improve a new farmer's potential to access capital.⁴⁴

Landowners, however, often have legitimate concerns about leasing land to an untested tenant, especially under longer contract terms. Provisions for termination for default can address this barrier. Inclusion of a grace period to remedy the breach can benefit the tenant's tenure while ensuring protection of the landowner's interests.⁴⁵ The lease should clearly set forth specific breaches that

39. IOWA CODE § 175.37; NEB. REV. STAT. § 77-5211; 7 C.F.R. § 1410.64.

40. IOWA CODE § 175.37; NEB. REV. STAT. § 77-5211.

41. IOWA CODE § 175.37(4)(b).

42. NEB. REV. STAT. § 77-5211(3); *see also id.* § 77-5209 (defining "beginning farmer" for purposes of the tax credit).

43. Michael Duffy et al., Iowa State Univ. Extension, *Survey of Iowa Leasing Practices, 2007*, AG DECISION MAKER, 2 tbl.3 (2008), <http://www.extension.iastate.edu/Publications/FM1811.pdf> (finding the average length of tenure for Iowa farm tenants is 11.3 years, and that seventy-five percent of Iowa's farm lease contracts are year-to-year tenancies).

44. *See* William Edwards, Iowa State Univ. Extension, *Improving Your Farm Lease Contract: A Guide to Understanding the Business of Farmland Leases*, AG DECISION MAKER, 1 (June, 2011), <http://www.extension.iastate.edu/agdm/wholefarm/pdf/c2-01.pdf>; Debra Heleba, *Access to Farm Land*, VERMONT AGRICULTURE, <http://www.vermontagriculture.com/agdev/new%20farmers/aland.htm> (last visited June 3, 2012).

45. *See generally* Donna R. Roper, Comment, *Forfeiture Clauses in Land Installment*

warrant early termination. State laws often view lack of rental payment as justification for termination of a lease contract without notice, but failure to comply with certain farming practices specified in the contract or failure to abide by a covenant of good husbandry may require continuation of the lease for at least the remaining crop year and notice of termination for the following year.⁴⁶

State tax credit programs also place significant value on whether the lease contract provides a crop-share or cash-rent arrangement. Iowa provides five percent credit for cash-rent leases and fifteen percent for crop-share and live-stock-share lease agreements.⁴⁷ Similarly, the Nebraska credit is ten percent for cash-rent leases and fifteen percent for crop-share arrangements.⁴⁸ This demonstrates the significant advantage derived from the typical cost-sharing provisions and intrinsic risk-sharing included in crop-share leases. Flexible leases, which provide the convenience of cash-rent payments to landowners while sharing the risk of the operation by basing the rent on yields, market prices, or both should be considered,⁴⁹ and according to Iowa's Agricultural Development Authority, will fall under the crop-share credit as long as the risk is allocated between the parties.⁵⁰

Beginning farmers also benefit from the cost-sharing provisions commonly found in crop-share arrangements.⁵¹ Landowners can further help reduce a

Contracts: Time for Equitable Foreclosure, 8 U. PUGET SOUND L. REV. 85 (1984) (discussing the use of grace periods after a contract breach to promote an equitable result between parties to land installment contracts); Michael J. Saltz, *Your Rent: Due Date, Grace Periods and Late Fees*, LAWYERS.COM, <http://real-estate.lawyers.com/landlord-tenant-law/your-rent-due-dates-grace-periods-and-late-fees.html> (last visited June 3, 2012) (offering an overview of grace periods and late fee clauses).

46. *Compare* Riggs v. Meka, 17 N.W.2d 101, 104 (Iowa 1945) (holding that failure to pay rent excused the landlord from the required statutory notice of termination provision), *with* McElwee v. DeVault, 120 N.W.2d 451, 454 (Iowa 1963) (holding the landlord was able to cancel a three year lease after the first year due to violations of lease provisions regarding the manner in which the property was to be farmed, but the landlord in that case had provided notice of the violations in June and notice of termination in August. The court noted it would have been inequitable for the landlord "to oust the tenant in the middle of the crop year.").

47. IOWA CODE § 175.37(5) (2011).

48. Neb. Rev. Stat. § 77-5213(1) (2011).

49. *See generally* Edward Cox, Drake Univ. Agric. Law Ctr., *The Landowner's Guide to Sustainable Farm Leasing*, SUSTAINABLE FARM LEASE, 12-13 (2010), <http://sustainablefarmlease.org/wp-content/uploads/2010/08/The-Guide2.pdf> [hereinafter Cox, *The Landowner's Guide*] (identifying flexible cash-rent leases as a "middle ground" alternative to traditional cash-rent or crop-share leases).

50. Telephone Interview with Denise Ashley, Administrative Assistant, Iowa Agric. Dev. Auth. (Sept. 13, 2010).

51. *See, e.g.*, Edward Cox, Drake Univ. Agric. Law Ctr., *Sharing Expenses*, SUSTAINABLE FARM LEASE (Mar. 16, 2011), <http://sustainablefarmlease.org/2010/10/landowners->

new farmer's expenses in a number of ways. Retired farmers can include the use of equipment in the lease contract. A reduced or graduated rent can be used to ease the beginning farmer into full rental payments. For instance, a provision for graduated rent might read: "The total rental amount for the first year shall be reduced by twenty percent. This reduction shall be applied to the total for each subsequent year, but the reduction shall be decreased by five percent each year until the full rental amount is being paid."⁵²

As stated, the programs are also set up to help ensure a successful operation and long-term tenure. For example, in Nebraska beginning farmers must complete financial management programs, which include "course work on the creation and proper use of record-keeping systems, periodic private consultations with financial management personnel, monthly and year-end cash flow analysis, [and] detailed enterprise analysis . . ."⁵³ Beginning farmers must also demonstrate "an adequate farming or livestock production experience," knowledge in the type of agricultural operation pursued, and submit a "nutrient management plan and soil conservation plan prepared for the Farm Service Agency or the Department of Environmental Quality."⁵⁴

State tax credit programs include additional requirements to help ensure the credits are only used to the extent needed to help get the beginning farmer off to a good start and to protect against abuse and fraud.⁵⁵ In both Iowa and Nebraska the credit is not available when the agricultural assets operated by the beginning farmer exceed those needed to support a beginning farmer or the rent is substantially higher or lower than the market rate for similar assets in the community.⁵⁶ In Nebraska, family members are prohibited from participation unless the lease is part of a written, binding succession plan.⁵⁷ The succession plan must set forth "a process and time table for the transfer of: (1) the farm or ranch physical labor to the beginning farmer; (2) the farm or ranch management and decision making to the beginning farmer; and (3) the farm or ranch assets listed in the rental agreement to the beginning farmer."⁵⁸ This helps protect against abuse or fraud and also illustrates the additional assistance needed for beginning farmers that lack access to family land and emphasizes the importance of pursuing an enforceable succession plan.

decision-tool-sharing-expenses/ (providing an example of a cost-sharing schedule that can be incorporated into the lease contract).

52. Cox, *The Landowner's Guide*, *supra* note 49, at 43.

53. 91 NEB. ADMIN. CODE § 010.00 (2010).

54. *Id.* § 004.05-.06, .09.

55. IOWA CODE § 175.37(8)(c)-(d) (2011); NEB. REV. STAT. §§ 77-5211 to 5212 (2011).

56. IOWA CODE § 175.37(8)(c)-(d); NEB. REV. STAT. §§ 77-5211 to 5212.

57. 91 NEB. ADMIN. CODE § 004.10.

58. *Id.* § 004.10A.

Landowners in Iowa and Nebraska, as well as other states, may receive tax credits for leasing equipment as well.⁵⁹ While not applicable to all landowners, the existence of such credits is worth mentioning in relation to retired farmers who may retain some agricultural equipment. Wisconsin has such a statute.⁶⁰ The Wisconsin credit requires approval by the Department of Agriculture of beginning farmer and established farmer applications, which includes the beginning farmer's business plan.⁶¹ This provides an incentive for experienced farmers to ensure the beginning farmers have a sound business plan as part of the application. In essence, this encourages the development of at least some degree of mentorship, which is a significant opportunity for retiring farmer landowners to assist the next generation. The parties should, however, be careful to avoid any appearance of a partnership and each party must state their intent to form a landlord-tenant relationship and behave accordingly.⁶² Both parties ultimately benefit as the beginning farmer is provided additional knowledge that helps ensure a profitable farm business and secure future income for the landowner.

2. *USDA Transition Incentive Program*

USDA's Transition Incentives Program (TIP) provides two years of additional CRP payments to retired farmers with expiring CRP land.⁶³ This program is available to a national audience, but is still rather narrow in application as it only applies to retiring farmers with expiring CRP land.⁶⁴ The program is available to landowners who sell qualifying land to a beginning farmer or enter a lease of at least five years.⁶⁵ Here, the required five-year tenure provides even greater security to the farm tenant than the Iowa and Nebraska tax credits.⁶⁶ The

59. IOWA CODE § 175.37(4); NEB. REV. STAT. § 77-5203(1); *e.g.*, WIS. STAT. § 93.53(1)(a) (2012).

60. WIS. STAT. § 93.53.

61. *Id.* § 93.53(4)–(5).

62. *See* *Wilson v. Fleming*, 31 N.W.2d 393, 401 (Iowa 1948) (“Courts are reluctant to construe an arrangement such as [a crop share lease] between a farm owner and occupant as a partnership unless such relation is clearly shown.”); *see also* *Florence v. Fox*, 188 N.W. 966, 967–68 (Iowa 1922); Edward Cox, *The Legal Relationship of the Parties*, SUSTAINABLE FARM LEASE (Mar. 17, 2011), <http://sustainablefarmlease.org/2010/08/1354/#more-1354> (identifying factors commonly considered by courts in evaluating legal relationships in the agricultural context).

63. 7 C.F.R. § 1410.64(e) (2011).

64. *Id.* § 1410.64(a)(1).

65. *Id.* § 1410.64(a)(2).

66. *Compare id.* § 1410.64(a) (requiring a term of “at least 5 years”), *with* IOWA CODE § 175.37(4)(b) (2011) (providing credit when the lease term of “at least two years, but not more than five years”), *and* NEB. REV. STAT. § 77-5211(2) (2011) (specifying a three-year term for a qualifying rental agreement).

lack of a maximum lease term, a feature not present in the state tax credits,⁶⁷ presents additional considerations to address. First, it is necessary to ensure that long-term lease arrangements comply with state law. For instance, the Iowa Constitution specifically limits agricultural leases to no more than twenty years.⁶⁸ This likely does not present an issue for most landowners, but there are cases of attempts to create a perpetual lease at the discretion of the tenant⁶⁹ as well as growth in the use of agricultural ground leases for terms of up to ninety-nine years by community land trusts and other non-profit organizations.⁷⁰

Second, while tenure security remains a key feature for the success of beginning farmer enterprises, long-term lease arrangements can present additional challenges and risks. For instance, inexperienced farmers may be unable to manage a profitable operation, and depending on the terms of the lease, may find themselves defaulting on the contract, losing access to the land, and owing back rent, fees, or damages. Therefore, it may be necessary to include provisions to ensure the beginning farmer can terminate the lease early if needed. Such provisions will need to balance the tenant's potential need for early termination with the landowner's need for secure income. Possible remedial provisions could include requiring advanced notice of termination in order to find a replacement tenant, a fixed termination fee, or inclusion of a named assignee. Provisions are also needed to address the tenant's rights regarding improvements if the lease is terminated early, or simply if the landowner is unwilling or unable to enter a long-term lease arrangement.

To be eligible for TIP participation the landowner must also (1) allow the beginning farmer to begin organic certification, (2) allow the beginning farmer to develop a conservation plan for the land, and (3) allow the beginning farmer to install conservation practices and improvements in accordance with the conservation plan during the last year of the contract.⁷¹ The farmer must (1) have been a

67. Compare 7 C.F.R. § 1410.64(a) (indicating no maximum lease term), with IOWA CODE § 175.37(4)(b) (2011) (agreement shall not be for "more than five years"), and NEB. REV. STAT. § 77-5211(2) (2011) (requiring a term of three years).

68. IOWA CONST. art. I, § 24.

69. *E.g.*, *Stream v. Grow*, No. 0-094/09-1011, 2010 Iowa App. LEXIS 310, at *2 (Apr. 21, 2010).

70. *See, e.g.*, S. OF THE SOUND COMMUNITY FARM LAND TRUST, <http://communityfarmlandtrust.org> (last visited June 3, 2012) (a Washington-based community land trust, which holds title to land for the purpose of improving farmland access through long-term lease arrangements with local farmers); *Land Tenure Issues and Preserving Farms for Farmers*, EQUITY TRUST, INC., <http://www.equitytrust.org/WholeFarm.html> (last visited June 3, 2012) (a national non-profit organization promoting long-term lease arrangements to improve access to farmland).

71. 7 C.F.R. § 1410.64(a)(4)–(6).

farmer or rancher for ten years or less,⁷² (2) obtain a conservation plan and implement sustainable grazing or crop production in accordance with that plan, and (3) not be a family member of the landowner.⁷³

B. Land Sales to a Beginning Farmer

Incentives also exist for landowners seeking to sell farmland to a beginning farmer. It should be noted again that the CRP Transition Incentives Program applies not only to leasing land to a beginning farmer but also to the sale of land to a beginning farmer.⁷⁴ Most of the financial incentive programs available to landowners, however, involve owner financing of the sale through an installment land contract, or contract for deed.⁷⁵ An installment land contract (also referred to as an installment sale contract, land contract, and contract for deed) is a conditional sales transaction in which the vendee makes a down payment followed by periodic payments and the vendor retains title to the property until all payments have been made.⁷⁶ The vendee is considered to have equitable title to the land and all rights accorded thereto, including possession, quiet enjoyment, and exclusion, but is also expected to pay taxes, maintain insurance, and keep the premises in good repair.⁷⁷ The vendor retains legal title until the final payment is made.⁷⁸ One of the principle features of the installment land contract is the remedy of forfeiture, which allows the vendor to terminate the contract, regain possession, and retain the vendee's prior payments if the vendee defaults on the contract.⁷⁹

An installment land contract holds appeal for many beginning farmers as it provides the opportunity to purchase land with a smaller down payment and to purchase land they would not otherwise be able to finance. This is due to the traditional lower down payment required and the often close, if not familial, rela-

72. *Id.* § 1410.2(b).

73. *Id.* § 1410.64(b), (e).

74. 7 C.F.R. § 1410.64 (2011).

75. *E.g.*, 26 U.S.C. § 147(c)(2) (2006 & Supp. IV 2010) (outlining the Aggie Bonds Program); 7 U.S.C. § 1936 (Supp. IV 2010) (outlining the Beginning Farmer or Rancher and Socially Disadvantaged Farmer or Rancher Contract Land Sales Program); *see also* EDWARD COX, DRAKE AGRIC. LAW CTR., LAND CONTRACTS FOR BEGINNING FARMERS (2012) [hereinafter COX, LAND CONTRACTS], available at <http://www.leopold.iastate.edu/sites/default/files/pubs-and-papers/2012-04-land-contracts-beginning-farmers.pdf>.

76. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 3.4 (1997); BLACK'S LAW DICTIONARY 343 (8th ed. 2004).

77. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 3.4 cmt. a.

78. *Id.*

79. *Id.*

tionship between vendor and vendee.⁸⁰ Landowners benefit from installment land contracts by spreading income and tax liability over a period of years, by receiving interest on the sale, and by avoiding the debtor protections provided in other financing vehicles.⁸¹ The principle programs providing incentives for landowners to enter installment contracts with beginning farmers are the Aggie Bond programs⁸² and the relatively new Beginning Farmer or Rancher and Socially Disadvantaged Farmer or Rancher Contract Land Sales Program.⁸³ Again, the present examination of these programs is intended not only to provide information on their availability to landowners, but also to shed light on important considerations for land access arrangements for beginning farmers regardless of participation in an incentive program and to examine the adequacy and potential for improvement of the individual programs.

1. *Aggie Bonds*

The Aggie Bonds program allows states to provide lenders, including landowners that enter installment sale contracts, a tax exemption on interest from financed purchases by beginning farmers.⁸⁴ State Agricultural Development Authorities issue tax-exempt private activity bonds to lenders to finance the loans or sale contracts.⁸⁵ The exemption on interest is intended to create a lower interest rate on loans or contract sales for beginning farmers.⁸⁶ Therefore, landowners willing and able to receive installment payments for their land are able to receive principle payments as well as interest on their sale, reduce their federal income tax and, in some cases, state income tax, avoid other land transaction fees, and finance a beginning farmer's farmland purchase.⁸⁷ While certainly not a budget neutral program for the federal government or the states that provide similar tax exemptions and administer the program, there is no pool of either federal or state

80. COX, LAND CONTRACTS, *supra* note 75, at 2.

81. *Id.*

82. 26 U.S.C. § 147(c)(2) (2006 & Supp. IV 2010). State-level "Aggie Bond" Programs are also available. *Types of State Agricultural Finance Programs*, NAT'L COUNCIL OF STATE AGRIC. FIN. PROGRAMS, www.stateagfinance.org/types.html (last visited June 3, 2012).

83. 7 U.S.C. § 1936 (Supp. IV 2010).

84. 26 U.S.C. § 147(c)(2) (2006 & Supp. IV 2010); *Types of State Agricultural Finance Programs*, *supra* note 82 (listing the following states with Aggie Bond programs: Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Maryland, Minnesota, Missouri, Montana, Nebraska, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Washington).

85. *Types of State Agricultural Finance Programs*, *supra* note 82.

86. *Id.*

87. *Id.*; *Beginning Farmer Loan Program: Program Guidelines*, MO. AGRIC. AND SMALL BUS. DEV. AUTHORITY 2 (2012), <http://mda.mo.gov/abd/financial/pdf/begfarmloanguidelines.pdf>.

funding, the program is not a loan guarantee, and the risk associated with the loan or contract is said to remain with the respective lender and landowner.⁸⁸ Precisely how risky this is for landowners using installment contracts, however, depends on the remedies provided by state law in case of default as well as fluctuations in the agricultural economy and the difference in land values at the time of purchase and the time of default.⁸⁹

In relation to remedies in case of default, the common law provides for forfeiture of the land, returning the land to the landowner with a clear title and retention of the previous payments.⁹⁰ The states have developed a diverse array of procedures and protections, however, before forfeiture can be effected.⁹¹ Although, traditionally land contract forfeitures were strictly enforced, regardless of the equity and improvements the vendee had built, courts have recently placed, albeit to different extents, restrictions on forfeitures.⁹²

Landowners also face a certain amount of risk in installment sale contracts from fluctuations in land values, as well. For instance, the use of installment contracts grew a great deal during the late 1970s.⁹³ This was a particularly popular method of land transfer for retired farmers.⁹⁴ Then, during the farm crash of the 1980s, many farmers were unable to make their payments and were forced to forfeit the land.⁹⁵ While the landowners regained possession of the land, it was only worth a fraction of what they sold it for and were potentially left without

88. 26 U.S.C. § 147(c)(2); *see also* Lori J. Shipman & Damona G. Doye, *Oklahoma Beginning Farmer Loan Program*, OKLA. COOPERATIVE EXTENSION SERV. (2009), <http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-1807/F-234web.pdf> (discussing these benefits in relation to the Oklahoma aggie bond program).

89. *See* COX, LAND CONTRACTS, *supra* note 75.

90. *See id.*

91. *See, e.g.*, IOWA CODE §§ 809A.6, .8 (2011) (setting out procedural and notice requirements for forfeitures); *see also* COX, LAND CONTRACTS, *supra* note 75 (providing examples of state law protections against forfeiture).

92. IOWA CODE §§ 809A.6, .8 (setting out notice requirements for forfeiture actions); OHIO REV. CODE § 5313.07 (2011) (requiring the vendor to acquire property through the process of foreclosure and judicial sale if the vendee of the land installment contract has paid in accordance with terms for five years, or has paid towards purchase price a total sum of twenty percent or more); *Sebastian v. Floyd*, 585 S.W.2d 381, 383 (Ky. 1979) (stating that “[t]he modern trend is for courts to treat land sale contracts as analogous to conventional mortgages, thus requiring a seller to seek a judicial sale of the property upon the buyer’s default”).

93. CHARLES J. JACOBUS, REAL ESTATE PRINCIPLES 131–32 (2009) (indicating that installment contracts were particularly favored as a means of avoiding the high interest rates on conventional mortgages available during this period).

94. *See* DAN LOOKER, FARMERS FOR THE FUTURE 9 (1996); COX, LAND CONTRACTS, *supra* note 75.

95. LOOKER, *supra* note 94, at 9.

any source of immediate income.⁹⁶ Many economists are optimistic that recent increases in land values are not supporting a similarly dangerous farmland bubble,⁹⁷ but, nonetheless, landowners do face a certain amount of risk should land values drastically drop and the vendee is unable to make payments. Thus, the Aggie Bond program, as it relates to landowner installment land contracts, provides significant benefits to both landowner and beginning farmer.⁹⁸ Since there is no loan guarantee, however, it does leave a certain amount of risk in case of forfeiture.⁹⁹

2. *Beginning Farmer or Rancher Land Contract Guarantee Program*

The USDA Beginning Farmer or Rancher Land Contract Guarantee Program, as its name implies, takes a different approach to encouraging land transition to beginning farmers through installment land contracts.¹⁰⁰ Administered by the Farm Service Agency (FSA) the program offers two types of guarantees, both available at the request of the vendor.¹⁰¹ First, is the “prompt payment guarantee.”¹⁰² This guarantee provides payment, which covers up to the amount of three amortized annual installments or three annual installments plus the cost of any related real estate taxes and insurance.¹⁰³ Second, the “standard guarantee plan” covers “an amount equal to 90 percent of the outstanding principal of the loan.”¹⁰⁴ Significantly, if the loan guarantee is only available at the request of the landowner, the program focuses the benefits exclusively on the landowner, albeit with the express purpose of incentivizing landowners to transition land to beginning farmers.¹⁰⁵ While potentially increasing the number of installment contracts made to beginning farmers, the program affords additional protections against forfeiture and loss of the beginning farmer’s equity in the land.¹⁰⁶

96. *Id.* at 79.

97. *See, e.g.,* Michael D. Duffy, Iowa State Univ. Extension, *2011 Farmland Value Survey*, AG DECISION MAKER, 2–3 (2012), <http://www.extension.iastate.edu/agdm/wholefarm/pdf/c2-70.pdf> (advocating cautious monitoring of farmland prices, but indicating that current values correlate to current gross farm incomes, and that overall farm debt has not substantially increased as it did in the lead up to the farm crisis of the 1980s).

98. *See* LOOKER, *supra* note 94, at 9; COX, LAND CONTRACTS, *supra* note 75.

99. COX, LAND CONTRACTS, *supra* note 75.

100. 7 U.S.C. § 1936 (Supp. IV 2010).

101. *Id.* § 1936(e).

102. *Id.* § 1936(e)(1)(A).

103. *Id.*

104. *Id.* § 1936(e)(1)(B).

105. *See id.* § 1936(e).

106. *See id.* § 1936.

It is also worth mentioning that the USDA guarantee does provide greater incentive for the government to take a more active role in assuring the beginning farmer's ability to make payments.¹⁰⁷ For instance, the program requires an acceptable credit history and underwriting criteria, as determined by the USDA, as well as a down-payment of at least five percent of the purchase price.¹⁰⁸

IV. CONCLUSIONS

Landowners are situated in a unique and critical situation in relation to assisting the next generation of farmers and helping ensure a safe and reliable food supply for the nation. While there are intrinsic and financial benefits available to landowners for assisting beginning farmers, it is in the public interest to provide additional incentives and at least share in the real risks, or assuage landowners of the perceived risks, that can potentially arise in leasing and financing land contracts with a beginning farmer. The existing policy programs provide a variety of tools and protections for doing so. They also afford the opportunity to examine the key considerations that can benefit landowners and beginning farmers in any legal arrangement they may enter. These considerations primarily include secure tenure—though with an equitable exit strategy if needed, cost-sharing arrangements, and risk-sharing through crop-share and flexible lease contracts.

107. *See id.* § 1936(b)–(c) (conditioning eligibility upon the farmer's possession of a sufficiently satisfactory credit history and history of debt repayment, and upon the loan meeting USDA underwriting criteria).

108. *Id.*