CORPORATE AND TRUST OWNERSHIP OF FARMLAND: AN EXAMINATION OF FIDUCIARY DUTIES APPLIED TO SOIL HEALTH AND CONSERVATION

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ABSTRACT

Land ownership by entities, like corporations and trusts, is a growing trend. According to Iowa State University studies, ownership by trusts has increased from 1% in 1982 to 20% in 2017. Though a less dramatic increase, land ownership by corporations has also increased since 1982. This trend, however, has resulted in the fractionation of ownership amongst multiple parties with different interests. This fractionation can alienate certain parties and decrease the land owner participation in conservation and soil management. For many of the trusts and corporations owning farmland, the land is the primary asset and often the sole source of income. The principal element necessary for production of this income

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is the soil. Soil erosion leads to lower profits and the devaluing of an asset speaks directly to the duties owed by fiduciaries managing property for the benefit of others. No law, whether statutory or case law, can be found addressing soil within the context of fiduciary duties. The lack of challenges to fiduciaries over proper soil management may be caused by the disconnection of ownership interests where owners simply don't know there may be a problem and are placing trust in, perhaps, multiple other parties situated between them and the practices in place on the land. This Article examines (1) the increase in farmland ownership by trusts and corporations; (2) soil as a valuable asset of these entities; (3) soil conservation opportunities arising from fiduciary duties concerning asset management; and (4) proactive soil conservation opportunities available in the creation of trusts and corporations.

I. INTRODUCTION

There has been a great deal of concern about the separation effects of land ownership from the possession and land operation. This is for good reason, as has been noted for centuries.

> "[H]e must be too improvident a man to be a good farmer, who should invest in the land capital sufficient for high cultivation, without some security that a change in the ownership of the estate . . . may not at any moment bring a notice to give up farm, improvements, and capital, and leave it all, uncompensated, to a stranger." — George Wingrove Cooke, Attorney, 1850.[1]

> "The tenant who expects to remain but a short time on a farm has little incentive to conserve and improve the soil; he has equally little incentive to maintain and improve the wood lot, the house, barn, shed, or other structures on the farm." — Report of the President's Committee on Farm Tenancy, February 1937.[2]

> "From the tenant's standpoint, I'm not going to want to put in hundreds of hours of sweat-equity into soil that I may not have next year. Why should I as a tenant build up the soil fertility in land that is not even mine? Just so he

1. GEORGE WINGROVE COOKE & G. PRIOR GOLDNEY, A TREATISE ON THE LAW AND PRACTICE OF AGRICULTURAL TENANCIES iv (2018).

2. L.C. GRAY & HENRY A. WALACE, FARM TENANCY: REPORT OF THE PRESIDENT'S COMMITTEE (1937).

> can rent it to someone else for more than I am paying—so that person can benefit from the dirt I built up?"— tenant (male, age 56, 475 acres rented).[3]

This general recognition and concern derived from the separation of land ownership from land management has been examined recently in several sociologic and economic studies.[4] However, recent land tenure studies show that trends continue to change, and so should our examination of the impact of those trends on soil health and conservation.

One of the most significant trends is the increase in land ownership by various entities, primarily trusts and corporations. This shift towards entity ownership of land adds complications due to the potential increase in the number of parties involved and also due to the various rules, whether established by law or the entity's governing documents, controlling the various parties' rights and remedies involved. While complications in land ownership, such as fractionation of ownership amongst multiple parties with different interests, can alienate certain parties and decrease landowner involvement in conservation and soil management, it also adds more concerns, priorities, and ethics from multiple parties, as well as rules with which to leverage conservation. This Article examines (1) the increase in farmland ownership by trusts and corporations; (2) soil as a valuable asset of these entities; (3) soil conservation opportunities arising from fiduciary duties concerning asset management; and (4) proactive soil conservation opportunities available in the creation of trusts and corporations.

It is important to note at the outset; the terms trust and corporation are both general and include many different forms with varying effects on the issues discussed in this Article. This matter is addressed in more detail in relevant sections below. However, when discussing trusts, this Article is concerned primarily with irrevocable trusts, as opposed to revocable, life-time, or inter vivos trusts, the latter largely having the same parties acting as trustee and beneficiary, used primarily as a means to transition farmland from one generation to the next. The former, irrevocable trusts, have different parties as trustee and beneficiaries,

3. Michael Carolan, *Barriers to the Adoption of Sustainable Agriculture on Rented Land: An Examination of Contesting social Fields*, 70 RURAL SOC. 387, 398 (2005).

4. *See generally* FRANK CLEARFIELD & BARBARA T. OSGOOD, SOIL CONSERVATION SERV., SOCIOLOGICAL ASPECTS OF THE ADOPTION OF CONSERVATION PRACTICES 9 (1986), https://perma.cc/79AV-SGJQ; J. Gordon Arbuckle Jr. et al., *Non-Operator Landowner Interest in Agroforestry Practices in Two Missouri Watersheds*, 75 AGROFOREST SYS. 73 (2009); Meredith J. Soule et al., *Land Tenure and the Adoption of Conservation Practices*, 82 AM. J. AGRIC. ECON. 993 (2000); WENDONG ZHANG, ET AL., IOWA FARMLAND OWNERSHIP AND TENURE SURVEY 1982-2017: A THIRTY-FIVE YEAR PERSPECTIVE (July 2018) ; Carolan, *supra* note 3; Linda K. Lee & William H. Stewart, *Landownership and the Adoption of Minimum Tillage*, 65 AM. J. AGRIC. ECON. 256 (1983) (noting tenure arrangements that separate ownership from operation can hinder conservation).

and potentially last for multiple generations. Similarly, this Article is largely addressing corporations and limited liability companies (both addressed as corporations hereafter) with multiple shareholders or members, some with management control and others primarily possessing minority interests or otherwise in non-management roles. This is in contrast to corporations completely owned by those making the management decisions.

II. LAND TENURE TRENDS GIVING REASON FOR CONCERN

Iowa State University economists and sociologists have shed a great deal of light on the changing land tenure trends and landowner characteristics regarding ownership of farmland.[5] Significantly, this information is not available in the same detail in other states. While similar trends are likely to be occurring in other areas with agriculture as the primary land use, the trends identified in Iowa's studies may not be applicable to high-density areas or those with greater demand from other land uses. In agricultural states, there is a growing disconnection between landowners and the land, both geographic and cultural. Iowa's periodic survey shows part-time residents and non-residents increased from 6% in 1982 to 21% in 2007.[6] The cultural disconnect is a result of ownership by more individuals that are not farming and have an increasingly tenuous knowledge of agricultural operations. Owners living on the land have steadily decreased from 57% in 1982 to 44% in 2017.[7] This raises concerns about separation of land ownership and land management, particularly where a knowledge gap exists between landowners, culturally and geographically separated from the land, and tenants to whom the landowners provide little tenure security to properly manage the land and soil.

More specifically, and the reason for this Article, Iowa surveys show a dramatic increase in farmland ownership by entities, such as trusts and corporations, rather than individuals. Ownership by trusts has increased from 1% in 1982 to 20% in 2017, with a 10% rise in just the last ten years.[8] The 2012 Iowa Farmland Ownership and Tenure Survey included a section dedicated to delving deeper into trust ownership given the dramatic rise in the use of trusts.[9] A closer examination of trust ownership is important simply due to the significant increase, but also because of the inherent nature of trusts. In general, trusts are a form of

5. *See* ZHANG, ET AL., *supra* note 4.

6. *Id.* at 22. It should be noted this trend has appeared to have leveled off with 20% of owners reporting to live in Iowa part-time or not in Iowa at all in the 2012 and 2017 surveys.

7. *Id.* at 23.

8. *Id.* at 15.

9. *See* MICHAEL DUFFY & ANN M. JOHANNES, IOWA STATE UNIV. EXTENSION & OUTREACH, FARMLAND OWNERSHIP AND TENURE IN IOWA 2012 35 (2012), https://perma.cc/B4AP-ATA8.

ownership in which legal title to the property is given to a trustee, who controls the assets for the benefit of another party or parties, known as beneficiaries. The person who places the property into a trust, or creates the trust, is called the trustor or settlor. Thus, trusts introduce additional parties as ownership and control is separated from the beneficial interests. It is, therefore, important to understand not only who the trustees are but also what their relationship is to the land and to the beneficiaries.

The significance of the growth of trusts depends to a large degree on the type of trust into which the land is placed. There are many types of trusts with varied and often very specific purposes, but generally trusts can be categorized as revocable or irrevocable.[10] An irrevocable trust is one in which the settlor no longer exercises control over the property that has been placed in the trust.[11] This means that both ownership and control of the property has passed from the individual owner to the trustee and will be managed solely by the trustee or trustees.[12] The beneficiaries or the trustee may be able to modify or terminate the trust only in very limited circumstances and with court approval.[13] This type of trust is often used to provide income to spouses, children, or others without burdening them with the management of the assets and protecting the assets from creditors.

A revocable trust allows the settlor to retain the right to amend or revoke the trust at any time.[14] It is often used as a substitute for a will in order to avoid the probate process and to plan for the potential incapacitation of the farmland owner. Because the settlor often retains control of the property as the trustee, the management decisions are no different than if the individual retained ownership instead of transferring it to the trust. Thus, the person who put the farmland into the trust still retains control over the land. This certainly limits the significance of trust ownership of Iowa's farmland as more than 57% of the land held in trust is of the revocable type, but, as discussed below, use of both types of trusts have grown and irrevocable trusts may present significant shifts in the characteristics of those managing Iowa's farmland.[15] For these reasons, this Article focuses much of its attention on irrevocable trusts.

10. Bonnie Kraham, *Revocable or Irrevocable Trust: Which One's Right for Your?,* TIMES RECORD HERALD (Mar. 30, 2019), https://perma.cc/83WT-P4LR.

11. *Irrevocable Trust*, INVESTOPEDIA, https://perma.cc/F54P-ZZBT (archived Apr. 27, 2019).

12. *Id.*

13. *Id.*

14. *Id.*

15. DUFFY & JOHANNES, *supra* note 9, at 35.

While in the minority, irrevocable trusts are still significant in Iowa and continuing to increase.[16] In the 2012 survey 33% of the trusts were irrevocable with an additional 10% of respondents not knowing whether they have a revocable or irrevocable trust.[17] Approximately 5% of all Iowa farmland is currently in an irrevocable trust.[18] It is also significant to note of the revocable trusts identified in the survey, nearly half will become irrevocable and continue for at least one generation after termination of the revocable trust, often at the death of the settlor.[19] Further, 36% of all revocable trusts surveyed reported the trust was established to continue for multiple generations.[20] For example, the trust is created with the settlor, and perhaps their spouse, as the beneficiary. Then, at their death the trustee will manage the property for their children, and in turn, for their grandchildren. It is possible for trusts to continue for additional generations, and trusts created in states without laws limiting "dynasty" trusts may continue in perpetuity.[21] Even setting the potential for perpetual dynasty trusts aside, 36% of trusts continuing for two or more generations poses a significant impact. Again, irrevocable trusts most often have at least three parties with different interests in the property,[22] but can all potentially monitor management of trust assets, as well as seek remedies, if necessary, in the case of mismanagement of assets. This creates additional opportunities to leverage conservation on privately owned ground. Instead of one individual making decisions and answering only to him or herself, there are now three parties, increasing the chances of someone with conservation priorities having some influence over the land and its management.

Corporations have seen a less dramatic increase from 8% in 1982 to 10% in 2017 and have not been the subject of more intensive examination in the farmland tenure survey.[23]Again, for the purposes of this Article, the term corporation encompasses businesses that have filed articles of incorporation as well as limited liability companies.[24] It does not include partnerships, which also have a multiple party ownership structure, control, and fiduciary duties owed to one another.[25] However, there are also significant differences and partnerships as owners of

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *See* S.D. Codified Laws § 43-5-8 (2019); Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 Harv. L. Rev. 2588, 2592-95 (2003).
22. *Irrevocable Trust*, *supra* note 11.
23. ZHANG, ET AL., *supra* note 4, at 11.
24. *Id.*
25. *Id.* at 10.

farmland have remained relatively stagnant rising from less than 1% in 1982 to only 3% in 2017.[26] While not rising as dramatically as trusts, corporate ownership of approximately 10% of the farmland subject to the survey accounts for substantial control over much of Iowa's soil.[27] Further, corporations share the same potential to leverage conservation from multiple parties. While some corporations are owned solely by the same individuals that manage the farmland, many others, like trusts, have individuals that possess an interest in the entity but lack management control. Like trusts, the individuals, whether minority shareholders or members that simply lack management authority, do have recourse to hold those managing corporate assets, including the soil owned by the corporation, accountable. However, regardless of whether the soil is owned by a trust or a corporation, in order for there to be a fiduciary duty to preserve and properly manage the soil, it must be established as an asset or resource of the entity with some value attached to it.[28]

III. RECOGNITION OF SOIL AS AN ASSET

A. Soil as the Essential Means of Production: A Practical Perspective

From a practical perspective, for many of the trusts and corporations owning farmland, the land is the primary asset and often the sole source of income, whether from renting it to a farmer for production of crops or from the entity raising and selling the crops itself. Either way the land is not only an investment that hopefully, increases in value but produces annual income as well. The principal element necessary for production of this income is the soil,[29] which certainly makes it difficult to argue soil is not an asset subject to protection by the fiduciary duties owed by trustees and corporate managers, discussed in further detail below.

1. The Value of Soil Health and Erosion: An Economic Perspective

Additionally, economists and agronomists have asserted that soil does have specific economic value, even if difficult to ascertain. First, the economic value of soil health has been examined and is viewed "in two ways: (1) the impact of the conservation system in reducing operational costs, and (2) its effect on improving the soil's biological, physical and chemical attributes as main

26. *Id.* at 11.

27. *Id.*

28. *See* WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 1102 (Apr. 2019 update).

29. Anna Krzywoszynska, *Soil: Private Assert or Public Good?,* SUSTAINABLE SOILS ALLIANCE (July 3, 2018), https://perma.cc/8BA2-YLYW.

components of soil health metrics."[30] Thus, soil-health economics are based on the savings from operational costs and the improvement of an income producing property. Additionally, the economics of soil loss or erosion have been studied in the context of the soil as an investment.

> We often discuss the value of soil erosion from the farmer or society cost. These costs are substantial. But, if we are to truly consider the impact of erosion, we need to consider what it does to the value of our investment. Too often we apply more fertilizer or other crop inputs, masking the impact of erosion. We fail to account for decreased value of the land asset due to soil erosion. Higher expenses for the same yield mean lower profits, which lowers the value of the asset.[31]

The assertion that soil erosion leads to lower profits and the devaluing of an asset speaks directly to the duties owed by fiduciaries managing property for the benefit of others.

2. The Landowner's Duty of Stewardship: An Iowa Perspective

While, as mentioned above, no law, whether statutory or case law, could be found addressing soil within the context of fiduciary duties. Iowa's legislature and courts have traditionally been leaders in establishing a duty of stewardship for landowners, regardless of fiduciary capacity.[32] This duty of stewardship is analogous to fiduciary duties of trustees and corporate managers, as Iowa's Supreme Court has, in the cases examined below, essentially established that owners of Iowa land hold soil in trust for the good of the general public.

The Iowa Supreme Court first recognized this duty in its 1943 ruling in *Benschoter v. Hakes*, which upholds Iowa's statute essentially requiring landlords to give six months termination notices of farm leases.[33] The Court held:

> It is quite apparent that during recent years the old concept of duties and responsibilities of the owners and operators of farm land has undergone a change. Such persons, by controlling the food source of the nation, bear a

30. Mahdi Al-Kaisi, *The Economics of Soil Health*, IOWA STATE UNIV.: INTEGRATED CROP MGMT. NEWS (May 23, 2017), https://perma.cc/2UK4-N9J8.

31. MICHAEL DUFFY, IOWA STATE UNIV. AG DECISION MAKER, VALUE OF SOIL EROSION TO THE LANDOWNER (Aug. 2012), https://perma.cc/TU62-GX2V.

32. *See* Neil Hamilton, *Feeding Our Green Future: Legal Responsibilities and Sustainable Agricultural Land Tenure*, 13 DRAKE J. AGRIC. 377, 390-91 (2008).

33. Benschoter v. Hakes, 8 N.W.2d 481, 485-87 (Iowa 1943). Iowa's lease termination statute was implemented in response to dustbowl and depression era concerns about the detrimental effects of tenure insecurity on soil conservation.

> 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 to soil exploitation and waste. The amendment aims at security of tenure and it is therefore within the police power of the State.[34]

The Court declared owners and operators of Iowa's land "bear a certain responsibility," or essentially owe a duty to the general public, allowing efforts to mitigate waste of Iowa's soil to fall under the purview of the state's police power.[35]

The Iowa legislature, in establishing Soil and Water Conservation Districts and, in turn, soil-loss limits, has specifically addressed the duty landowners have to protect Iowa's land.[36]

> 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.[37]

Here, the legislature specifically addresses the "value of the soil" and "the injurious effects of soil erosion."[38] In upholding State's soil loss limits, the Iowa Supreme Court again addressed the duty of stewardship for landowners, holding:

> 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.[39]

If landowners and operators owe this duty to the general public, and the soil is considered significant enough of a resource, to allow the state to potentially infringe upon citizens' rights to contract and upon their exclusive use and enjoyment of their property, it is not a great stretch to assert that soil is an asset

34. *Id.* at 487.
35. *Id.*
36. *See* IOWA CODE § 161A.43 (2018).
37. IOWA CODE § 161A.43.
38. IOWA CODE § 161A.43.
39. Woodbury Cty. Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 278 (Iowa 1979).

subject to the duties imposed on owners of such assets held specifically for the benefit of others.

3. The Covenant of Good Husbandry: A Landlord's Perspective

Many states have recognized an implied covenant of good husbandry requiring tenants to farm in a manner generally accepted in the community, including to varying degrees implementation of conservation practices.[40] This covenant of good husbandry is derived, in part, from the law of waste. The law of waste is a doctrine established to prevent a party in possession of property for a temporary duration from causing permanent harm to the property, prejudicing the succeeding party, whether that party is a landlord, heir, or remainderman.[41] The fiduciary duties owed by trustees and corporate managers is somewhat analogous to the law of waste and the covenant of good husbandry, therefore lending itself well to the examination of potential standards for fiduciary duties in the context of soil conservation.

As a leading agricultural state, Iowa courts have examined this issue in greater detail than many. Iowa case law has required all farm tenants to use leased property in a "proper and tenant[-]like manner" and to not commit waste.[42] It is important to note, however, the covenant is based on commonly accepted practices within the community.[43] This may result in the allowance of farming methods that fail to adequately conserve soil health but are, nonetheless, commonly used. As explained below, it is likely for such a standard would to be used when evaluating fiduciary duties relating to farm management.

However, while not adopted by Iowa's Supreme Court, Iowa's Chief Justice made a compelling dissenting argument that a covenant of good husbandry more closely aligned with conservation and stewardship practices, regardless of what may be deemed "acceptable" in a community should be recognized.[44]

> There is a strong public policy that should cause courts to scrutinize carefully testimony that farming practices are 'accepted' when general experience and

40. Eastham v. Crowder, 29 Tenn. 194, 196 (Tenn., 1849); *see also* Olson v. Bedke, 555 P.2d 156, 161 (Idaho 1976); *see also* Baker v. Praegitzer, 590 P.2d 751, 752 (Or. App., 1979); *see also* Green v. Kubik, 239 N.W. 589, 592 (Iowa 1931).

41. *Waste*, BLACK'S LAW DICTIONARY (10th ed. 2010); *see also Eastham*, 29 Tenn. at 196.

42. Verlinden v. Godberson, 25 N.W.2d 347, 350 (Iowa 1946).

43. *Green*, 239 N.W. at 592; s*ee also* Baker v. Praegitzer, 590 P.2d 751, 752 (Or. Ct. App., 1979).

44. Moser v. Thorp Sales Corp., 312 N.W.2d 881, 905 (Iowa 1981) (Reynoldson, J., dissenting).

> knowledge relating to the natural effect of wind and water on exposed soil red-flag the danger of soil erosion.[45]

This argument relies heavily on the state's interest in protecting its natural resources. Chief Justice Reynoldson quotes both the Iowa Supreme Court and the legislature to establish agriculture and the protection of soil as the "utmost importance" to the state and within the state's right to protect.[46] The Chief Justice goes on to state that where damage is established on hilly farmland, methods that are not classified as conservation practices should not be deemed "acceptable."[47] This sets forth the basis for recognition of an implied covenant of good husbandry more in line with conservation by measuring farm practices not based on what is accepted, perhaps even by a minority of farmers in a community, but rather on the duty of stewardship discussed above.

IV. FIDUCIARY DUTIES

It is necessary in order to examine the consequences of viewing soil health as an asset of trusts and corporations to understand the law surrounding fiduciary duties in general. Generally, fiduciary duties arise any time someone holds property for the benefit of another. This general duty is typically viewed as one of preservation. Trusts and corporations, however, have developed through the common law, and more recently through statutes based on uniform codes and acts, a unique set of duties for trustees and those responsible for management of corporate assets. Examined below is a brief synopsis of the duties in each entity and then a discussion on the application of these duties to soil health and conservation.

A. Trusts

The law governing trusts, including the duties of trustees, has traditionally been the common law as interpreted by individual state courts. However, in recent years, attempts have been made to standardize the laws governing trusts in the different states. The Uniform Trust Code (UTC) has been adopted by over thirty states, though often somewhat modified, with several other states having trust statutes similar to the Uniform Code. This Article will briefly examine the duties of trustees under the UTC. Article 8 of the UTC dictates the duties and powers of trustees.[48] The first duty stated reads, "[u]pon acceptance of a trusteeship, the trustee shall administer the trust in good faith and in accordance with its terms and

45. *Id.* at 904.
46. *Id.* at 904-05.
47. *Id.* at 905.
48. UNIF. TRUST CODE §§ 801–817 (UNIF. LAW COMM'N 2010).

purposes."[49] The reference to "terms and purposes" is significant to settlors in their efforts to establish trusts as it allows them to incorporate priorities, such as soil health and conservation, into the terms of the trust instrument. This will be examined further in the following sections.

Section 802 of the UTC establishes the duty of loyalty for trustees,[50] often referred to as the most fundamental duty of the trustee.[51] This duty is owed to the beneficiaries of the trust and requires the trustee to not place their own interests above those of the beneficiaries.[52] This may be a significant duty in relation to ensuring conservation of soil assets. Trusts owning farmland often have trustees who are also beneficiaries or possibly the operators of the farm owned by the trust.[53] Thus, beneficiaries, even those of a succeeding generation not yet receiving any direct benefits from the trust, may seek remedies from trustees using soil assets in a wasteful manner. One of the very few cases specifically addressing land as part of the corpus of a trust addresses such a situation. Here, the trustees held land they also farmed and the beneficiaries sought their removal for depleting the trust's value.[54] At trial it was found the trustees were not farming in accordance with good husbandry by planting too many acres of corn, committing waste, and should be removed.[55] Similar to the duty of loyalty is that of impartiality. This duty requires trustees to administer the trust with due regard to all beneficiaries' respective interests.[56]

Another significant duty is the duty of prudent administration. This duty requires that the trustee administer the trust as a prudent person exercising reasonable, care, skill, and caution.[57] This duty is similar to that found in the Uniform Prudent Investor Act.[58] It essentially establishes a requirement for the reasonable management of trust assets. While not appearing in case law within the context of soil assets, the application of the covenant of good husbandry standards, discussed above, could reasonably be applied in such a situation. It is significant to recall such a standard is often based on the commonly accepted farm practices in the community. This may not bode well for seeking conservation efforts beyond those currently employed on many farms, or even a minority of farms, if still

49. UNIF. TRUST CODE § 801.
50. UNIF. TRUST CODE § 802.
51. *Id.*
52. UNIF. TRUST CODE § 802 CMT.
53. DUFFY & JOHANNES, *supra* note 9, at 35.
54. Anderson v. Telsrow, 21 N.W.2d 781, 783 (Iowa, 1946).
55. *Id.*
56. UNIF. TRUST CODE § 803.
57. UNIF. TRUST CODE § 804.
58. *Id.*

commonly accepted. However, the UTC allows the settlor to alter this duty, providing additional opportunity to establish soil conservation as a priority for the administration of the trust and setting a higher bar for the trustee to meet.[59] Further, the UTC also requires the use of a trustee's special skills or expertise if so possessed by the trustee.[60] For instance, a farmer as a trustee may be held to a higher standard in relation to soil conservation.

The UTC also establishes duties relating to record keeping and transparency. Adequate records must be kept and beneficiaries must be reasonably informed about the administration of the trust.[61] This provides an oversight method for farming practices and soil conservation by one or more additional parties. As stated previously, the opportunities for advancement of soil health and conservation in the context of trust and corporate ownership of farmland largely lie in the leverage gained by additional parties.[62] Here, these additional parties are expressly given authority to at least monitor the trustee's activities.

B. Corporations

Corporations have similar duties in relation to those managing corporate assets, whether they are directors, officers, or managers.[63] However, corporations don't share the intrinsic fiduciary duties of trustees, who are in the most traditional sense fiduciaries.[64] Corporations largely seek to maximize profit, though they must do so under the fiduciary duty of care. Further, the duty of care, it has been asserted by scholars, lacks enforcement in general and is almost certainly non-existent in relation to the management of soil assets.[65]

Similar to a trustee's duty to report, corporations must also abide by their bylaws or operating agreements, as well as state law concerning oversight by shareholders. Most state laws provide some means for shareholders to obtain records of the corporation and to bring derivative suits on behalf of the corporation if they believe the corporation is being mismanaged. It is significant, however, that such suits are not brought on behalf of the shareholder themselves but on behalf of the corporation.

59. UNIF. TRUST CODE § 804.

60. UNIF. TRUST CODE § 806.

61. UNIF. TRUST CODE §§ 810, 813.

62. *See supra* part III.

63. Julian Velasco, *A Defense of the Corporate Law Duty of Care*, 40 J. CORP. LAW. 647, 667-668 (2015).

64. *See* Harold Marsh Jr., *Are Directors Trustees? Conflicts of Interest and Corporate Morality*, 22 Bus. Law. 35 (1966).

65. *Velasco*, *supra* note 63, at 649.

Overall, the fiduciary duties of both trustees and corporate managers provide some oversight and remedies for mismanagement of soil assets. However, given the lack of precedent concerning soil asset preservation within the context of trust and corporate farmland ownership and the resulting inability to rely on consistent enforcement by state courts, perhaps the best approach is a proactive one focused on educating landowners and their advisors of the importance of establishing soil health and conservation as a priority in the initial documents creating these entities.

V. PROACTIVE STEPS TO ADDRESS CONSERVATION AND ESTABLISH REMEDIES

As the trust's creator, the trustor is in the position to include provisions relating directly to trust asset management.[66] This may include provisions relating to stewardship of land. The UTC expressly places the terms of a trust as controlling over the trust code.[67] This gives settlors the ability to bestow important tools on their trustees when creating a trust.[68] This issue may become more important as farm owners pass their land to non-farming heirs with limited knowledge of, and time spent on, the land. In regard to language for trust instruments, the significant amount of work around conservation-oriented language in farm leases provides some guidance. It is, however, important to keep in mind the provisions of a lease most often control management of the leased farmland for only a year or two, while the terms of a trust can dictate management for a generation or more.[69] This means those creating trusts may want to allow greater flexibility accounting for changes in conservation practices and technology. Thus, in order to ensure proper stewardship while allowing the operations on the farm to adapt to future changes, general terms may be more appropriate in providing sufficient guidance to the trustee as well as standards enforceable by the trust's beneficiaries.

The trustee also has some discretion in management and may administer the trust in accordance with their own convictions relating to conservation of trust assets if it does not violate the trust terms or the statutory duties discussed above.[70] Further, the naming of a specific trustee within the provisions of a trust make it less likely that a court will remove that trustee.[71] The court will rather view the management of the assets by that particular trustee as an intention of the settlor.[72]

66. UNIF. TRUST CODE §§ 105, 801 (UNIF. LAW COMM'N 2010).
67. UNIF. TRUST CODE § 105.
68. UNIF. TRUST CODE § 801.
69. *See* Note, *supra* note 21, at 2592.
70. UNIF. TRUST CODE § 801; DUFFY & JOHANNES, *supra* note 9, at 36.
71. Schildberg v. Schildberg, 461 N.W.2d 186, 191 (Iowa 1990).
72. *Id.*

It is also the trustee entering into any lease arrangements and other contracts, such as state and federal conservation programs, concerning the land. The trustee may have some discretion in relation to the terms of such a lease and to whom the land is leased, or the trust terms may include specific provisions dictating these matters. An additional consideration for trustees is the potential use of such documents as evidence of the trustee's trust asset management skills.

There are, however, some limitations on the settlor's ability to influence soil health and conservation that should also be addressed. While the UTC does state that the terms of the trust shall prevail over that of the Code, including eliminating or altering the duties prescribed to the trustee, there are limits.[73] The terms may not authorize a trustee to act in bad faith, disregard the purposes of the trust, or disregard the interests of the beneficiaries.[74] Does this provide a limit on the degree to which trust provisions may place a priority on conservation over production? Additionally, what is the impact of trust terms that go beyond conservation related directly to the asset, such as soil preservation and health, to include off-farm conservation goals, including improving water quality, mitigating climate change, or providing wildlife habitat?

The beneficiaries probably have the least influence over trust management, but they are a party with potential for enforcement of the trust provisions and ensuring the trustee fulfills their fiduciary duties.[75] The incentive for such beneficiaries to bring a claim to ensure conservation, either as part of the terms of the trust itself or stemming from the trustee's fiduciary duties, is in large part dependent on continuing land tenure trends as well as public policy relating to trusts.

The default purpose of corporations is to provide a return on investment. This must be done in a responsible manner, but if conservation is to be given a priority, the corporate documents, the articles, bylaws, and operating agreements can specify this.[76] Specifying conservation as a priority allows management to prioritize conservation with less concern about members or shareholders complaining that productivity is being sacrificed for conservation. In addition, the development of public-benefit corporations (B corporations) provides a relatively new avenue for establishing flexibility for ensuring corporate managers take considerations other than profit, such as soil health and conservation into account in their decision-making.[77]

73. UNIF. TRUST CODE § 105 (UNIF. LAW COMM'N 2010).

74. UNIF. TRUST CODE § 105(2)-(3).

75. UNIF. TRUST CODE § 813 (UNIF. LAW COMM'N 2010).

76. *See* 18A AM. JUR. 2D *Corporations* § 169 (2019).

77. *See* Jack Markell, *A New Kind of Corporation to Harness the Powers of Private Enterprise for Public Benefit*, HUFFPOST (Sept. 21, 2013), https://perma.cc/F54T-QN93.

A B corporation, as defined by Delaware law, is "a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner."[78] More than thirty states have adopted similar legislation allowing for the incorporation of B corporations.[79] Delaware's law goes on to state, "a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation."[80] This effectively gives management the opportunity to take public benefits, which as supported above by the duty of stewardship established in Iowa, can certainly include soil health and conservation. It is significant to ensure the corporate documents specify the public benefit sought. Again, Delaware law provides guidance:

In the certificate of incorporation, a public benefit corporation shall:

> (1) Identify within its statement of business or purpose pursuant to § 102(a)(3) of this title 1 or more specific public benefits to be promoted by the corporation; and
> (2) State within its heading that it is a public benefit corporation.[81]

Conservation provisions within leases may provide some guidance for incorporation into corporate documents to establish soil health and conservation as a stated priority, but just as with trust instruments, general statements of purpose regarding soil conservation are more applicable in this situation than mandating conservation practices.

VI. CONCLUSION

There is little case law concerning fiduciary duties, whether stemming from a trust, corporation, or other situation creating such duties, as they apply to soil health. This could be interpreted as meaning the fiduciaries are properly managing soil assets and there simply is not a problem. In large part, this may be accurate, but it may also fail to recognize the growing separation of ownership and involvement on land. This separation stems from the fragmentation of interests discussed previously: distance from the land, geographically and temporally as land is passed to generation after generation; and a knowledge deficit between

78. DEL. CODE ANN. tit. 8, § 362 (2018).

79. B the Change, *The Benefits of Becoming a Benefit Corporation,* MISSION (Oct 10, 2018), https://perma.cc/832V-53W7.

80. DEL. CODE ANN. tit. 8, § 362.

81. *Id,*

those owning the land (increasingly being beneficiaries and shareholders), those controlling the land (trustees and corporate managers), and those operating the land (farm tenants). Thus, the lack of challenges to fiduciaries over proper soil management may be caused by disconnection of ownership interests where owners simply don't know there may be a problem and are placing trust in, perhaps, multiple other parties situated between them and the practices in place on the land. This situation requires additional outreach and education focused on potential soil health concerns and the need for owners to take an active role in ensuring the proper management of their assets as well as their potential role in protecting water quality and other off-farm environmental concerns. This is an area of significance for farm and environmental groups focused on landowner outreach and education to explore. It is also necessary for advisors of landowners planning the transition of farmland to take their client's concerns regarding soil health and conservation into account and incorporate provisions regarding this matter into the legal documents establishing both the duties of those managing the soil and the remedies of those with a beneficial interest.