ACCESS TO LAND

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Equitable partition of land is the necessary basis of all self-sustaining agriculture. This partition and use of land may be in the form of ownership or in the form of right to hold the land for a specified time. The ownership may be of different degrees: The owner may have unlimited right to sell and to bequeath, or he may be bound by certain statutory restrictions. Likewise, the rental of land may be of different degrees and kinds, and in some cases it may amount to practical ownership. These varying forms of land partition have arisen with the evolution of society.

Liberty Hyde Bailey
Cyclopedia of American Agriculture
Volume IV Farm and Community
Chapter V Land and Labor
1909

History

Nearly a century ago the famous horticulturalist Liberty Hyde Bailey captured the essence of agricultural land tenure. Today as in 1909, farmland ownership and tenancy are complex issues, laden with cultural, political, economic and emotional "baggage".

Before the colonists arrived, Native Americans thrived under a complex system of land use based on hunting, fishing, gathering, and farming. Their land boundaries were dictated by the change of seasons, movement of game, and a need to move on once their agricultural plots became worn out. The early colonists did not understand or respect the Native Americans' mobility and disinterest in acquiring possessions. They believed that private ownership was the best way to make sure that land would be improved and used fully.

Later the colonists developed a system of legal description for land and a recording system that made it possible to buy and sell real estate. Once land could be traded like any other commodity, it could also be used to store and accumulate wealth. And that, as they say, has made all the difference. The value of farmland as an appreciable asset, quite apart from its productive value, has more than any other factor dictated who owns it, who works it, and who inherits it.

Agricultural and tenure patterns in the U.S.--who owns and controls our productive land base--have shaped our economic, social, and political history--even our landscape. Our Constitution, laws, and public policies have long favored, though not always successfully fostered, the Jeffersonian ideal of widely dispersed ownership of farmland by family farmers. Jefferson saw this model of ownership as essential to democracy. He believed that only with security of tenure and the economic security that it provided could there be freedom to speak one's mind.

If dispersed ownership was the ideal, concentration of land ownership was its evil antithesis. The founders of this new democracy were determined to avoid the poverty and political oppression they had experienced under a landed aristocracy in Europe. Many of the English legal strictures that allowed land to stay in the hands of a few wealthy families for perpetuity were outlawed.

Beliefs about the importance of private ownership of property had an indelible impact on the nation's settlement policies. The Homestead Acts are probably the most significant example of a public policy favoring dispersed ownership. The first of these was passed in 1862 and promised 160 acres of public land free to any family willing to live on it for five years and improve it. The Homestead Acts settled 250 million acres of the United States.

While our public policies have fostered the freedom to own land, they have not guaranteed freedom from debt and foreclosure. By the late 1930s, the Jeffersonian ideal was in serious trouble. High levels of absentee ownership combined with the dust bowl created displacement, landlessness, and poverty among the nation's small farmers as well as the environmental degradation. By 1940, tenant farmers, rather than landowners, tilled nearly 40% of the nation's farmland. A study found that tenants were less likely to contribute time and energy to community institutions and as a result, the communities were not as economically or socially vibrant as those where land ownership was the norm

Policy makers also responded to the dust bowl by developing federal programs to help tenant farmers purchase farms of their own. The programs were also intended to help resettle farm families who had lost their farms through foreclosure. In the late 1930s the federal Farm Security Administration put 12,000 landless families onto their own farms. Today's Farm Services Agency, which provides agricultural credit and credit guarantees, is the modern-day offspring of the Resettlement Administration. Land ownership, seen as the best way to conserve agricultural resources and promote economic democracy, has always been the heart of its mission.

Issues

Land ownership is a dominant cultural value in the U.S. Yet, it is increasingly difficult and often impossible for people who want to farm, particularly in urbanized and rapidly developing areas of the Northeast U.S., to purchase a farm. And, while cultural biases and public policies have emphasized private ownership as the "highest" form of farmland tenure, it is not the only, and perhaps not necessarily the best option to get onto farmland. Some people, including some farmers, believe that private land ownership is a spiritually and ethically problematic framework. Organizations such as the New England Small Farm Institute, Equity Trust, the E.F. Schumacher Society, the Intervale

Foundation and others, are exploring less traditional farmland tenure models -- creative and often more appropriate ways for farm businesses and farmland to transfer to willing and capable new farmers.

Traditional methods of farm succession and transfer -- passing the farm to the next generation -- are no longer adequate to address contemporary legal and financial complexities. In many cases, exiting farm owners cannot afford to pass the farm to the next generation in a way that will ensure that it is farmed. And, as more young people leave the family farm, there are fewer farming heirs to take over the farm. When they do, it is often burdened with debt. Plus, the next generation is likely to want to farm differently than their parents, which may require additional investment for new infrastructure or new enterprise development. If there is no farming heir, the family is burdened with several concerns. They must find a way to keep the land in farming, if that is their wish, while providing for heirs and adequately financing their own retirement.

These days, more and more "next generation" farmers are coming from non-farm backgrounds. They are not going to inherit a farm. So the challenge for them is to find land that is suitable, affordable and provides adequate security.

Here in the Northeast U.S., farm succession and secure land tenure are additionally challenged by the high price of good farmland -- some of the highest farmland values in the country. There is additional pressure on good farmland from development which escalates its cost. And, land prices are highest where direct markets for farm products have the most potential. The majority of new farmers do not have the resources to purchase land, even with attractive financing such as offered by the USDA Farm Service Agency.

Competition for good farmland makes it difficult to own, and it also makes it difficult to rent. Rental land is less and less available, and in some areas, rental rates have sky-rocketed. But even more problematic is the insecurity inherent in most farmland rental arrangements. With the typical annual, hand-shake rental agreement, farmers are less likely to invest in the land, grow their enterprises, or contribute to the community.

So, while landownership becomes less and less of a possibility, traditional rental tenure agreements fall short of fostering the values associated with land stewardship. Landowners and land users need tenure agreements that address their values and goals regarding the care of the farm. Non-ownership tenure should not be an obstacle to long-term stewardship of the resource -- the agricultural soils, water, vegetation and other natural features of the farm property.

We -- farmers, farmland owners and farming advocates -- need to rethink farmland tenure. We need a new ethic that fosters farmland access, security, affordability and investment. We need models that enable secure tenure for those who do not choose to purchase farmland. As important, we need models that encourage and reward stewardship on all farmlands, regardless of tenure. We need to create the tools for these arrangements and build the skills of professionals who help people to negotiate them.

Holding Ground: A Guide to Northeast Farmland Tenure and Stewardship, *a new publication from the New England Small Farm Institute, offers a comprehensive look at non-ownership tenure models, with practical information, worksheets, lease templates, resources and more. Available Spring 2004. Check www.smallfarm.org.*

Tenure models and solutions

The word tenure comes from the *tenir* which means "to hold". There are different ways to hold land, including but not limited to ownership. Many of the rights that are associated with land ownership can be achieved or approximated without ownership. A farmer needs: access; adequate security; return on investment; and clear and equitable distribution of rights and responsibilities. These requirements can be met through short-term rentals, long-term leases or various agreements that can pave the path to eventual ownership. In the U.S., about 45% of farmers rent some or all of the land they farm. Some farmers rent at first and then purchase land as they are able to. Others do not choose to own the land they farm, or will never be able to purchase land.

Short-term leases.

The majority of agricultural leases are for short -- one to three -- year periods. In fact, most are from year to year and can be annually renewed or terminated by giving notice. Farmers and landowners often treat leases casually, based on a verbal agreement. However it is usually advised, even with a friendly year-to-year agreement, to put it in writing.

There are advantages and disadvantages to short-term rentals. Some landowners favor short-term leases because they are unwilling to tie up the land for long periods of time. Farmers who favor short-term arrangements like the opportunity they give to experiment with new enterprises or locations without requiring a long-term commitment. This flexibility is particularly useful for start-up farmers. A short-term lease can allow you as tenant a trial period to see if your farm plans are financially feasible and personally satisfying. A short-term lease will also allow you to limit your financial risk since a long-term lease would obligate you to continue to pay rent regardless of the success of your operation. And from the point of view of both parties, a short-term lease allows them to get to know one another and decide if a longer-term arrangement would be beneficial.

Advantages for the Landowner

- Receives a cash return on land
- Retains the asset while land is being used

- Can take advantage of tax benefits
- Can enjoys the aesthetic values of managed land
- Can control stewardship practices
- Property is occupied

Disadvantages for the landowner

- Can have limited cash returns
- Cannot personally use land
- Can miss the higher returns other uses might give
- Can experience farming sights, noises and odors
- Tenant can contaminate waterways and soils
- Can lose capital on improvements

Advantages for the Tenant

- Can have lower costs than purchasing would entail
- Can take tax-deductions for leasing costs
- Has termination rights
- Can save or invest in short-term capital needs
- Can test enterprises, locations, and markets without committing to them

Disadvantages to the tenant

- Cannot recover lease costs as equity in land
- Can experience lease costs as a reduction in net income
- Cannot benefit from appreciation of land
- Can have limited control over land
- Can suffer serious inconveniences and inefficiencies if landowner is unwilling to cover maintenance
- Can lose lease
- May be unable to get credit from lenders who require security of tenure
- Can lose investments in infrastructure and land if lease is terminated.

The flexibility offered by a short-term lease can also mean financial uncertainty and difficulty in making long-term business planning or personal decisions. Lenders may balk at financing long-term assets like equipment or livestock without a written lease covering the loan period. By instinct and by necessity, many farmers operating under a short-term lease will farm that land differently than land they own. They have no financial incentive to rotate crops, invest in perennial crops or permanent structures, or install conservation structures.

There are several types of short-term lease arrangements including cash rent and crop or livestock share. In cash rent, the tenant pays a fixed rent. In crop or livestock share, the landlord shares the risk of the tenant's enterprise by agreeing to a percentage of the revenue from the rented land. There are many instances where rent is paid in kind, meaning that the tenant agrees to perform certain activities -- for example, keeping adjacent trails or vistas maintained or snow-plowing in lieu of some or all cash exchange.

Long-term leases

Farm seekers as well as private landowners and organizations such as land trusts are increasingly interested in long-term leases. A long-term lease adds significant dimensions beyond those of a short-term agreement. For the tenant, long-term leases can approach a number of the environmental, social, and economic benefits of outright ownership. By lengthening the planning horizon, a long-term lease gives the farmer time to develop and implement a more comprehensive, whole-farm planning approach and capture the benefits of investments in soil productivity and farm structures.

If the lease runs for long enough and is renewable and inheritable, it allows a farm family multi-generational use and enjoyment as well as an opportunity to leave something of value to their heirs. Long-term leases also provide an opportunity for the farm family to sink deep roots in the community.

On the down side for the tenant, the lease payments will result in a reduction of net income without contributing to any long-term accumulation of wealth in property. They must find means other than land appreciation to fund retirement. Issues posed by a long-term lease may also lead to greater complexity in the lease document and therefore greater legal costs. A typical ground lease can run anywhere from 30 to 40 pages of legalese.

The landowner may experience tax advantages from a long-term lease. A long-term lease

Advantages for the landowner:

- Can result in better stewardship of the farm.
- Can provide income in retirement.
- Can avoid or reduce the tax consequences of a sale of the property.
- Can result in a reduction of real estate taxes.
- Can allow the land to remain an inheritable asset in the family.

Disadvantages for the landowner:

- Ties up land for a long-term and prevents its being put to a higher economic use.
- Rental income will have tax consequences.

Advantages for the tenant:

- Lengthens a farmer’s planning horizon.
- Allows for long term business and resource stewardship planning.

- Allows the farmer to capture the long term benefits of good stewardship and to enjoy the full useful life of investments made in the farm's infrastructure.
- Can serve as a legacy to the next generation if it is renewable and inheritable.
- Can allow a family an intergenerational planning horizon if it is renewable and inheritable.
- Gives a farm family a compelling incentive to fully participate in community life and community institutions.
- May increase borrowing capacity when the value of the lease is used for security along with improvements on the property that the tenant owns.

Disadvantages for the tenant:

- Reduce net income without contributing to long-term accumulation of wealth in property.
- Prevents reliance on land appreciation as a retirement fund.
- May entail complex legal documents and consequent higher legal costs.
- Can make loans more difficult or impossible to get. The land will not be available to serve as security for a loan and getting credit to fund other assets may become more complicated.

A longer-term lease has most of the provisions of a short-term lease, but adds factors such as a procedure for periodically re-evaluating the rental fee. Typically such leases assign the responsibility for making major repairs, maintaining the property, building improvements, and paying real estate taxes to the tenant. Many long-term leases divide ownership of the land and the improvements: the tenant owns and pays for constructing improvements but does not own the land on which they are built.

<u>Public land and land trusts</u>

Long-term leases can be negotiated with public entities such as municipal governments and private organizations such as land trusts, as well as private landowners. Public open space can be made available for farming. These arrangements can offer win-win solutions for farmers and public land managers.

Secure tenure for a farmer offers the public many benefits. The land is maintained, vandalism and dumping are virtually eliminated, and the costs associated with management can be dramatically reduced. At the same time, while a farmer on protected public land will never own the land, she can reap all the benefits of a secure tenure arrangement. In addition, the parties to such an agreement can divide rights and responsibilities to meet the unique interests of both parties, just as in a lease between private parties. For example, a municipality may be willing to reduce cash rent in exchange for the farmer keeping abutting recreational trails maintained. Tenure agreements can also stipulate stewardship requirements.

Some land trusts are increasing their participation in farm and farmland protection. In one model, a tenant may own a house and/or other improvements on land owned by a land trust and leased to a farmer or farmers. Such leases are used by land trusts as a way of making land available to members of the local community while giving the community as a whole a degree of control over the long-term use of the land. Some land trust ground leases have provisions to limit the appreciation of the improvements by capping the resale price, thereby assuring continued affordability for future farmers.

Land trusts might also hold a conservation easement on land that is still in private ownership. The easement (also known as a conservation restriction) removes the right to develop the land forever. This can make the land more affordable for new farmers. Typically, the easement has standards and requirements for how the land is managed to protect the environmental and cultural values of the conserved property.

<u>Paths to Ownership</u>

Several tenure arrangements can pave the path to eventual ownership, either because they legally bind the parties to an eventual transfer of title or because a farm family uses them as a tool to transfer ownership.

Usually, a *purchase and sale agreement* leads to the actual purchase within a short period of time. However, the agreement can allow the "time of performance" -- that is, the actual transfer of title and dollars -- to be any length. That means that the purchaser could operate on the land, with the agreement to purchase at a date in the future. The conditions of an agreement can be crafted to operate like a lease. The agreement sets out the responsibilities of the parties, based on a belief that performance will result in ownership.

Leasing is an excellent tenure tool to enable a successful, gradual transfer of farm assets to another party, whether a family heir or a transferee outside the family. Leasing allows a gradual transfer of management and ownership from the farmer to the successor. This gives both parties substantial financial advantages and also allows the owner to mentor the successor. The successor does not have to purchase a farm asset to obtain managerial control. A lease can be a vehicle to enable possession and control of land, buildings, machinery and equipment, or livestock.

A *land contract* is a type of purchase and sale agreement with an extended performance term. It’s a way to transfer ownership with the current owner financing the purchase. The agreement depends on installment payments, and sometimes a small down payment. The buyer has possession of the property while paying the contract, and the title remains with the seller until payment is complete.

In a *lease with option to purchase*, the lease grants the tenant an option to purchase the property. The price and the terms of the purchase must be set forth in the lease for the option to be valid. The option may run for the length of the lease or for only a portion of the lease period. The lease payments are not part of the purchase price of the property, unless the terms specifically allow for all or a part of the lease payment to be a credit against the purchase price.

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Despite the challenges, there *are* ways to obtain secure, affordable tenure on Northeast farmland. There are programs, organizations and publications to help. (See other articles in this issue.) With persistence, creativity and flexibility, farmers can find and get onto farmland to realize and develop their farming vision.