

# **DRAKE JOURNAL** *of* **AGRICULTURAL** **LAW**

## **Thirty-First Annual American Agricultural Law Association Agricultural Law Symposium & Meeting**

### **PRESIDENTIAL ADDRESS**

*Theodore A. Feitshans*

### **AALA SYMPOSIUM PRESENTERS**

A Lease-based Approach to Sustainable Farming, Part II: Farm Tenancy Trends and the  
Outlook for Sustainability on Rented Land

*Edward Cox*

Why Rural Policy Now Matters to Agriculture: Rural Development,  
Regional Innovation, and the Next Farm Bill

*Charles W. Fluharty*

Protecting Equine Rescue from Being Put Out to Pasture: Whether Ranches Dedicated to Abused,  
Abandoned, and Aging Horses May Qualify for "Agricultural" Classifications Under Florida's Greenbelt Law

*Michael T. Olexa, Joshua A. Cossey & Katherine Smallwood*

Mudslinging on the Missouri: Can Endangered Species  
Survive the Clean Water Act?

*Sandra Zellmer*

### **ESSAY**

Moving Toward Food Democracy: Better Food, New Farmers, and the Myth of Feeding the World

*Neil D. Hamilton*

### **NOTES**

Wanted: Farmer-Friendly Climate Change Legislation

*Erin Benoy*

From Farm to School Through the Statehouse: The Importance of State Legislation  
for Iowa's Farm to School Program

*Ashley Leyda*

Pigs-In-A-Blanket: How Current Meat Inspection Regulations Wrap America in False Security

*Andrea M. Repphun*

# A LEASE-BASED APPROACH TO SUSTAINABLE FARMING, PART II: FARM TENANCY TRENDS AND THE OUTLOOK FOR SUSTAINABILITY ON RENTED LAND

*Edward Cox\**

I.	Introduction.....	6
II.	General Qualities of a Sustainable Farm Lease .....	7
	A. Meeting the Needs of Landlord and Tenant.....	8
	B. A Focus on Tenure Security .....	9
	C. Not Necessarily a Conservation Lease.....	11
	D. It Doesn't Always Have All the Answers .....	12
III.	Principal Factors for Encouraging Sustainable Practices on Leased Land .....	12
	A. Tenure Security .....	13
	1. The Lease Term .....	13
	2. Termination and Renewal Procedures .....	16
	3. Remedies for Breach.....	20
	4. Recording the Lease .....	20
	B. Reimbursement for Improvements.....	21
	C. Landlord-Tenant Communications .....	21
	D. Cost-Sharing.....	22
	E. Risk-Sharing.....	23
IV.	Mandatory Conservation Provisions.....	24
	A. Good Husbandry Provisions.....	24
	B. Conservation Plans.....	26
	C. Establishing Thresholds and Monitoring .....	27
	D. Removal of Crop Residue .....	27
V.	Conclusion .....	29

---

\* Agricultural Law Center Fellow, Drake University Law School; J.D., Drake University Law School, 2009.

## I. INTRODUCTION

The preceding Article outlined current trends regarding farm tenancy and the impact of these trends on sustainable agriculture in the United States, provided an overview of existing conservation and environmental policy regarding agriculture, and asserted the value of working within the landlord-tenant relationship to encourage sustainable practices on leased farmland.<sup>1</sup> The primary tool to work with in the landlord-tenant relationship is the farm lease agreement. Without fully reevaluating the subject of the first Article, it may be helpful to provide a brief overview of the value, as well as the limitations, in addressing sustainable issues through farm lease agreements. As America's farmland continues to change hands, landowner expectations and values regarding the land also change. The development of farm lease agreements that address changing landowner characteristics can harness the impetus of a variety of landowner concerns regarding the on and off-farm environment, tenure security, and community development to improve the sustainability of the agricultural sector. Further, the use of private agreements can help establish sustainable practices without the economic and political costs that limit public policy efforts such as government-incentive programs, regulatory measures, and farm-tenancy laws.<sup>2</sup>

The ability of private lease agreements to promote the sustainability of agricultural land and the agricultural system as a whole presents some caveats. The lease agreements are dependent on the motivations of landowners and are limited to leased farmland. As discussed in the previous Article, this results in a dilemma similar to that faced by using incentive-based conservation programs<sup>3</sup>—reliance on “random acts of conservation.”<sup>4</sup> Thus, in order to achieve a fully sustainable agricultural system, public policy must still address education to increase awareness of sustainable issues, promote a duty of stewardship, and empower landowners to act. The promotion and utilization of sustainable farm leas-

---

1. See Edward Cox, *A Lease-Based Approach to Sustainable Farming, Part I: Farm Tenancy Trends and the Outlook for Sustainability on Rented Land*, 15 DRAKE J. AGRIC. L. 369 (2010).

2. Despite pressure to create regulatory laws protecting property rights, current regulatory mechanisms are difficult to enforce and efforts should therefore focus on encouraging private lease arrangements. *Id.* at 390.

3. *Id.* at 386 (discussing various factors that affect a tenant's inclination to adopt conservation practices).

4. *Dead Zone Action Needed: EWG Remarks to Hypoxia Task Force*, ENVTL. WORKING GROUP (Sept. 2009), <http://www.ewg.org/2009/hypoxia-task-force/dead-zone-action-needed>.

es also leaves room for incentive-based programs to provide needed assistance, landlord-tenant laws to increase tenure stability, and for enforcement of environmental regulations where other methods prove inadequate. However, due to the various constraints on these budgetary and political policy tools, private lease agreements provide an appealing method for the promotion of sustainable practices.

With an understanding of the benefits and limitations of using private arrangements between landowner and tenant to promote sustainable agriculture, we can now breach the topic of what a sustainable farm lease might look like. First, it is necessary to discuss the holistic character of agricultural sustainability and account for practical difficulties that might arise in pursuing such a holistic approach in the context of a lease arrangement. Next, the Article will look at how lease arrangements can be developed to address principle considerations for encouraging the adoption of conservation practices by the tenant. These considerations include tenure and investment security, landlord-tenant communications, cost-sharing, and risk-sharing. Finally, the Article will address the use of mandatory conservation provisions, including both the use of required specific practices and the establishment of thresholds and monitoring.

## II. GENERAL QUALITIES OF A SUSTAINABLE FARM LEASE

A sustainable agricultural system must address a variety of issues.<sup>5</sup> Production is the ultimate purpose of agriculture, so it is an essential element to such a system.<sup>6</sup> In a sustainable system, though, maximizing production must be balanced with the long-term needs of the land; the operation's effects on the off-farm environment; the financial and personal needs of landowners and farm op-

---

5. See 7 U.S.C. § 3103(19) (Supp. III 2009) (defining sustainable agriculture as "an integrated system of plant and animal production practices having a site-specific application that will, over the long-term—(A) satisfy human food and fiber needs; (B) enhance environmental quality and the natural resource base upon which the agriculture economy depends; (C) make the most efficient use of nonrenewable resources and on-farm resources and integrate, where appropriate, natural biological cycles and controls; (D) sustain the economic viability of farm operations; and (E) enhance the quality of life for farmers and society as a whole"); see also John Ikerd, *On Defining Sustainable Agriculture*, N.C. SUSTAINABLE AGRIC. RESEARCH & EDUC. PROGRAM (2007), <http://www.sustainable-ag.ncsu.edu/onsustainableag.htm#top> (discussing the different means by which the common goal of sustainable agriculture may be achieved); *What is Sustainable Ag?*, NAT'L SUSTAINABLE AGRIC. COAL., <http://sustainableagriculture.net/about-us/what-is-sustainable-ag/> (last visited Apr. 14, 2011) (pointing to common themes in defining sustainable agriculture's purpose); *What is the Sustainable Ag?*, LEOPOLD CTR. FOR SUSTAINABLE AGRIC., <http://www.leopold.iastate.edu/about/sustainableag.htm> (last visited Apr. 14, 2011) (offering several definitions, components, and sources used to define sustainable agriculture).

6. See LEOPOLD CTR. FOR SUSTAINABLE AGRIC., *supra* note 5.

erators; and the well-being of the community, national, and global economies.<sup>7</sup> Achieving an agricultural system capable of meeting our food demand, and part of our energy demand, on a sustainable basis depends on the health of all of these factors. However, expectations regarding the ability, and sometimes the desire, of landowners to promote such a holistic approach on leased farmland should be tempered.<sup>8</sup> This does not necessarily diminish the value of promoting sustainability through private arrangements, but it does precipitate the need to address the general nature of a sustainable lease agreement giving consideration to accessibility and to broad landowner appeal before proceeding to specifics. So, what do we mean by a sustainable lease?

#### *A. Meeting the Needs of Landlord and Tenant*

As with any contract, a sustainable lease must meet the expectations of the parties involved. Giving consideration to the interests of both parties and the sustainability of the operation requires a flexible approach with creative options, while maintaining a familiar and accessible format. It is not realistic, for instance, to expect a retired farm owner or an investor to enter a piece of land into a ninety-nine year lease. While such approaches do have a place in the promotion of secure tenure and sustainable agriculture, and are worth examination for unique circumstances, it is important to ensure sustainable leases are realistically geared to a wide range of landowners. Much of the discussion that follows is based on balancing the immediate demands and limitations of the parties against provisions that promote the sustainable operation of the farm.

Again, this makes flexibility critical. No piece of land is created the same and neither landowner nor tenant has the same needs and values. Therefore, it is necessary to provide a multitude of options that can balance the needs of the landowner and tenant against those of the land and community as a whole. The variety of circumstances also makes it imperative that landowners determine their own priorities and discuss a variety of options with potential tenants in de-

---

7. See generally *id.* (quoting the 1990 U.S. Farm Bill's definition of sustainable agriculture, which states, "[O]ver the long term, [it should] satisfy human needs, enhance environmental quality and natural resource base, make the most efficient use of nonrenewable resources and integrate natural biological processes, sustain economic viability, and enhance quality of life.").

8. See J. GORDON ARBUCKLE, JR., IOWA STATE UNIV. EXTENSION, LANDOWNERS AND OPERATORS CARING ABOUT THE LAND (LOCAL): IOWA FARMLAND OWNER AND OPERATOR SURVEY 4, 9, 10 (2010), 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) (indicating that a reliance on rental income could diminish a landowner's ability to participate in creative forms of cost-sharing, finding that over 25% of landowners live more than 50 miles from the land they own and over 14% live more than 300 miles, and finding that less than half of landowners are sole owners).

veloping lease agreements. As will be discussed in the following sections, communication is critical at the outset as well as during the lease term. Developing a flexible lease that accounts for variations in landowner, tenant, and geographic circumstances can best be accomplished through a combination of direct and indirect incentives, as well as provisions requiring and prohibiting specific practices. This means many of the terms of the lease are meant to encourage rather than require the adoption of sustainable practices; but in most circumstances, a combination of the two will achieve the best result for the landowner, tenant, and farmland.

### B. A Focus on Tenure Security

Particular attention is paid to increasing tenure stability as the primary method for encouraging sustainable practices on leased farmland. Tenure security is not a new issue in the U.S., having been addressed since the years of the Dustbowl and the Great Depression.<sup>9</sup> While federal efforts have focused on transforming tenant-operators into owner-operators,<sup>10</sup> it has been recognized that some amount of tenancy is integral to the American agricultural system, thereby necessitating efforts to increase tenure stability for tenant farmers.<sup>11</sup> Encouraged by the federal government during and after the Dustbowl years, states have adopted landlord-tenant laws with the specific purpose of promoting stable tenure on leased farmland.<sup>12</sup> While providing some degree of additional security, or at least advance notice of the need to relocate, the success of these efforts has been somewhat stymied due to economic conditions and political restraints stemming from deep-seeded American ideals regarding land ownership and control.<sup>13</sup>

However, tenure security is again coming to the forefront of issues involving American agriculture.<sup>14</sup> This is due to the increasing average age of current landowners, the demographics of those inheriting land, increased demand on

9. See SPECIAL COMM. ON FARM TENANCY, FARM TENANCY, H.R. Doc. No. 75-149, at 3 (1937).

10. See, e.g., 7 U.S.C. § 1935 (Supp. III 2009) (establishing one of the federal efforts geared toward helping new farmers eventually own land—the Down Payment loan program); see also H.R. Doc. No. 75-149, at 10-11 (outlining Committee “recommendations for Federal action . . . to facilitate farm-home ownership”).

11. See Neil D. Hamilton, *Adjusting Farm Tenancy Practices To Support Sustainable Agriculture*, 12 J. AGRIC. TAX’N & L. 226, 226-28 (1990).

12. See, e.g., IOWA CODE §§ 562.5-562.7 (2011) (requiring notice of termination on or before September 1, otherwise the tenant’s term is extended for another year).

13. See generally Cox, *supra* note 1 (discussing legislative acts and economic factors surrounding farmland ownership and control the need for promoting private sustainable lease contracts to augment public policy).

14. See *id.* at 370.

land resources, rising land prices, and a growing public awareness of the negative effects many conventional agricultural practices have on the local, regional, and global environment.<sup>15</sup> Based on the continued prevalence in tenancy rates on America's most productive farmland,<sup>16</sup> limitations of public policy tools to regulate tenure stability and ensure the sustainability of the nation's agricultural system, and increasing awareness of the interaction of agricultural practices with local and global environmental integrity, a focus on promoting tenure security through private contract arrangements is worth further examination. The use of private lease contracts has the potential to aid traditional public policy efforts to stabilize farmland tenure by addressing not only tenure security for tenant operators, but to a lesser degree, access to farmland ownership.

This is not to say attempts have not been made to encourage landowners to adopt longer lease terms or to use other mechanisms that promote tenant interests in farm resource conservation. Educational materials and form lease explanations state the tenant's preference for longer lease terms, resulting in a higher commitment to the conservation of farm resources.<sup>17</sup> Many form leases and lease guides also provide provisions specifically addressing conservation and sustainability concerns.<sup>18</sup> However, it is the purpose of this examination to not only provide information on what is needed substantively, but also to provide guidance for those concerned with promoting tenure security and sustainability to overcome potential obstacles created by following these suggestions. Particular attention is paid to promoting long-term leases (ideally five years or more), discouraging lease renewals on a yearly basis, providing methods to alleviate landowner concerns about entering long-term leases, and explaining alternatives for landowners unwilling or unable for one reason or another to enter a long-term lease.

---

15. See *id.* at 372-73, 376-78, 388.

16. See NAT'L AGRIC. STAT. SERV., USDA, 2007 CENSUS OF AGRICULTURE 262, 268 (2009), available at [http://www.agcensus.usda.gov/Publications/2007/Full\\_Report/usv1.pdf](http://www.agcensus.usda.gov/Publications/2007/Full_Report/usv1.pdf); see also J. GORDON ARBUCKLE, JR., IOWA STATE UNIV. EXTENSION, RENTED LAND IN IOWA: SOCIAL AND ENVIRONMENTAL DIMENSIONS 2 (2010), available at [http://www.soc.iastate.edu/extension/farm\\_poll/PMR1006.pdf](http://www.soc.iastate.edu/extension/farm_poll/PMR1006.pdf) [hereinafter ARBUCKLE, RENTED LAND] (showing that Iowa's most productive land has a high tenancy rate).

17. See ANNETTE M. HIGBY ET AL., HOLDING GROUND: A GUIDE TO NORTHEAST FARMLAND TENURE AND STEWARDSHIP 58-59 (2004); JAMES D. LIBBIN, N.M. STATE UNIV. EXTENSION SERV., FARM RENTAL AGREEMENTS 5 (2004), available at [http://aces.nmsu.edu/pubs/\\_circulars/CR-598.pdf](http://aces.nmsu.edu/pubs/_circulars/CR-598.pdf).

18. See *Leasing Checklist*, CTR. FOR ABSENTEE LANDOWNERS, 5-6, <http://www.absentee-landowners.org/images/pdf/Leasing%20Checklist.pdf> (last visited Apr. 14, 2011); *Sample Multi-Year Lease Agreement*, LAND FOR GOOD, 8-9 att.C, <http://www.landforgood.org/assets/pdfs/Lease%20example%20multiple%20yearBB.pdf> (last visited Apr. 14, 2011).

The ease of extension or renewal of an existing lease can also affect tenure security. With this in mind, a great deal of attention is given to decreasing the transaction costs for future renewals in terms of finances, time, and social capital. It should be noted that this may require additional effort and planning at the outset of the lease arrangement, but it should create a more sustainable landlord-tenant relationship in the long term. This continuity promotes tenure confidence, stability, and generally encourages the adoption of sustainable practices.<sup>19</sup> It is also important to recognize the impact of state law on this topic, particularly in states such as Iowa with mandatory lease termination procedures.<sup>20</sup>

Tenure confidence is closely related to tenure security. A tenant's confidence in the lease relationship does not ensure his continued use of the land, but it can play a role in his decision making relating to the sustainability of the operation. There are a number of factors that influence tenant confidence.<sup>21</sup> One factor within the control of landowners that plays a critical role in a tenant's tenure confidence: communication between the landowner and tenant.<sup>22</sup> For this reason, communication within the lease agreement must be emphasized.

### C. *Not Necessarily a Conservation Lease*

A sustainable lease is not necessarily the same as a conservation lease. Conservation and stewardship are critical elements of sustainability and are given the lion's share of attention in this Article because of the need for long-term productivity by our agricultural system, their impact on the global environment, and increasing public and landowner concern over agriculture's environmental impact. However, there are other important aspects of sustainability that can also be addressed in a farm lease. Sustainability certainly encompasses conservation, recognizing and addressing the needs of the environment both on the farm and off; but a sustainable lease might also focus on providing a new farmer access to land, increasing the diversity of the local economy by allowing on-farm sales, ensuring humane conditions for the workers on the farm, or providing recreational opportunities for children and adults to experience nature firsthand and witness the origins of their food.

---

19. See ARBUCKLE, RENTED LAND, *supra* note 16, at 12-13 (examining the relationship between tenancy continuation and farmer confidence).

20. IOWA CODE §§ 562.5-562.7 (2011).

21. ARBUCKLE, RENTED LAND, *supra* note 16, at 12-13 (examining variables that affect tenant confidence in tenure, including the distance the landowner resides from the property, the type of owners and their connection to agriculture, and the social ties between the landlord and tenant).

22. *Id.* at 11-12; Cox, *supra* note 1, at 380.

D. *It Doesn't Always Have All the Answers*

Thus, despite the holistic nature of sustainable agriculture, a sustainable lease should not be viewed as a guarantee that all aspects of sustainable agriculture are being fulfilled, or even being addressed, in the farm operation. Rather, a sustainable lease should be viewed as a tool to further the sustainability of the property. While the true nature of sustainability may not be fulfilled, to consider it otherwise runs the danger of discouraging those unable to adopt a completely sustainable lease from attempting to contribute to the sustainability of the overall system, as well as alienating those desiring to focus only on particular elements of a sustainable system.

Thus, this Article discusses provisions that address a multitude of issues in promoting sustainability, while recognizing the need to tailor leases to individual circumstances and conceding that there is no one sustainable lease. To do this, careful attention must be paid to the effects that altering or deleting one provision can have on the sustainable value of the lease as a whole and external legal matters, such as taxes, estate planning, and social security benefits. This Article attempts to point out additional considerations that need to be addressed based on the decision to include or omit a particular provision. It highlights the need for a flexible approach, which provides several options to address the varied aspects of sustainable agriculture.

III. PRINCIPAL FACTORS FOR ENCOURAGING SUSTAINABLE PRACTICES ON  
LEASED LAND

Tenant farmers are engaged in a fierce competition to obtain farmland.<sup>23</sup> This increases the ability of landowners to set the terms of the rental arrangement.<sup>24</sup> However, as tenants acquire more land and maintain a profitable operation, they may be less inclined to enter a lease arrangement that has restrictive conservation provisions or requires unfamiliar practices and specialized equipment. Therefore, it may be more practical, as well as beneficial to the long-term security of the contract, to provide incentives within the lease that motivate the tenant farm operator to adopt sustainable practices on his own. In order to accomplish this, consideration should be given to adopting provisions that address these principal factors: tenure security, landlord-tenant communications, reimbursement for unused investments, cost-sharing, and risk-sharing. The examina-

---

23. Rod Swoboda, *Cropland Rent Is Holding Steady in 2010 in Iowa*, WALLACES FARMER (May 11, 2010), <http://www.wallacesfarmer.com/story.aspx/cropland/rent/is/holding/steady/in/2010/in/iowa/38068>.

24. *Id.*

tion below addresses the effect of such provisions on the tenant operator's ability and motivation to adopt sustainable practices. It also includes a discussion of practical factors that might limit landowner adoption of optimal provisions, as well as remedial provisions that might be used to alleviate landowner reticence. Effects these provisions may have on other important matters that might influence a landowner's decision to adopt them, such as income and self-employment taxes, social security, and the division of farm program payments, will be discussed where relevant.

### A. *Tenure Security*

As has been discussed, the ability of a farmer to remain on the land is a crucial element in encouraging the adoption of sustainable practices. This is due both to the motivating effect of increasing a tenant's stake in the long-term productivity of the property and to the long-term planning necessary for many sustainable practices. There are a number of provisions that affect tenure security. Some of these provisions are placed within a lease to directly address tenure security, while others have a less direct impact. Provisions that affect tenure security address matters such as the term of the lease, termination and renewal or extension procedures, remedies for breach, and recording the lease agreement.

#### 1. *The Lease Term*

The term of a lease agreement plays a crucial role in promoting tenure security. A longer lease term allows tenants to plan for the future and provides a stake in the long-term productivity of the farm. It also permits tenants to capture the benefits of long-term conservation improvements, increases their connection with the surrounding community, and reduces the transaction costs and deterioration of the landlord-tenant relationship caused by yearly terminations and renewals. In short, the longer the lease term is, the greater the tenant's stake will be in the sustainability of the operation, the land, and the community. However, there are legitimate concerns that limit the motivation of landowners to adopt long-term lease arrangements.

One of the prominent concerns regarding long-term lease arrangements is the inability to adjust the rent on a yearly basis. Fluctuations in the price of commodities and in land values create concern that a long-term lease might result in rental amounts that are below the production value of the land.<sup>25</sup> Landowners

---

25. WILLIAM EDWARDS & E.G. STONEBERG, IOWA STATE UNIV. EXTENSION, IMPROVING YOUR FARM LEASE CONTRACT: A GUIDE TO HELP YOU BETTER UNDERSTAND THE BUSINESS OF

cite this as a major impediment to the adoption of long-term lease arrangements.<sup>26</sup> However, there are ways to allow for yearly adjustments in the rental amount during a multi-year lease. The parties may simply agree to renegotiate the rent each year. While this accommodates yearly adjustments, there are many factors that can be considered in establishing a fair rental amount, which increases the potential for disagreement.<sup>27</sup> In order to avoid this situation, the parties might agree that a third party will determine the rent for the next year if the parties are unable to decide.

However, the potential confrontation and added expense of using a third party can be avoided by providing a mechanism within the lease agreement to determine the yearly rent. This can be accomplished by providing an option to use an index each year. Such an index can simply be based on inflation according to the consumer price index,<sup>28</sup> or the parties can establish an index that more accurately reflects the value of the agricultural production on the farm by taking into account the price of inputs and commodities, the value of the land, or any other factors the parties wish to use. As with other provisions, it is important to include the agreement or reference it in a written lease contract and provide details that establish the markets and time period upon which the index is based.<sup>29</sup> This method not only enables yearly adjustments, but it also has the benefit of allowing the parties to set the rent at a later time instead of agreeing on a rental amount at the beginning of the lease term based, at least partially, on speculation about the year's revenue.

Another method for dispensing of concerns regarding yearly rent adjustments is to adopt a crop share or a flexible cash lease arrangement. As the landowner receives a specified percentage of the crop, there is no need for yearly renegotiations of the rental amount. The same holds true for flexible cash leases, which base the rental amount on yield, the market price for the commodities raised, or both. In both cases, the value of the farm's productivity and the yearly fluctuations in crop prices are inherently bound to the rental amount each year. This precludes any need for yearly negotiations regarding the rental amount. It is important to note, however, that careful attention should be paid to the nature of cost-sharing and risk-sharing associated with these leases. Allocating a portion

---

FARMLAND LEASES 4 (2003), available at <http://www.extension.iastate.edu/Publications/FM1564.pdf>.

26. See, e.g., Interview with William Edwards, Economist, Iowa State Univ. Extension, in Ames, Iowa (Nov. 11, 2010).

27. William Edwards & Don Hofstrand, Iowa State Univ. Extension, *Computing a Cropland Cash Rental Rate*, AG DECISION MAKER, April 2010, at 1, available at <http://www.extension.iastate.edu/publications/fm1801.pdf>.

28. See, e.g., *Sample Multi-Year Lease Agreement*, *supra* note 18, at 1-2.

29. See, e.g., *id.*

of the cost, the risk, or both to the landowner can further aid the tenant's motivation to adopt sustainable practices, which is discussed in greater detail below.<sup>30</sup> Some landowners will lack the ability or willingness to enter such arrangements though, and modifications to typical crop share and flexible lease provisions should be considered.

The marketability of the farm is another reason landowners are reticent to adopt long-term lease arrangements. Once entered and properly recorded, a long-term lease subjects any purchasers of the land to the terms of the lease agreement. This could limit the market price of the land. However, it should be recognized that landowners and tenants can negotiate the termination of the lease agreement at any time. Further, the lease can contain provisions that address early terminations, such as including a predetermined fee to be paid to the tenant in the case of early termination. In such a situation, particular attention should also be paid to provisions regarding reimbursement for improvements—a topic discussed in more detail below.<sup>31</sup> Provisions that give tenants the right to purchase the property can also be used to protect the tenant's tenure security. Providing the tenant with the right of first refusal does not obligate a landowner, who may be undecided regarding long-term plans when the lease is adopted, to sell the property. In case the landowner does sell, the tenant will have the opportunity to purchase the property. If such a provision is included, an enforceable description of the property should be used in the lease agreement.<sup>32</sup>

Landowners are also concerned about entering long-term lease arrangements with untested tenants. Such a situation could be deleterious for both the landowner, if the tenant cannot pay rent, and the land, if the tenant engages in harmful farm practices. Again, this concern can be ameliorated with specific lease provisions. Here, fears regarding a tenant's lack of ability to pay or unknown farming skills can be dealt with in the default provisions, such as including a provision allowing either party to terminate the lease, which would protect both of the parties as well as the land. The details of such a provision in a sustainable farm lease are examined below. While there are provisions that can be used to alleviate landowner concerns regarding long-term lease arrangements, not all landowners will possess the ability to enter a long-term lease. If such is the case, the importance of adopting alternative provisions to make up for the tenant's lack of tenure security is increased. Compensation for lack of security can be attempted through a variety of cost-sharing and risk-sharing mechanisms, di-

---

30. See *infra* Part III.D-E.

31. See *infra* Part III.B.

32. See *Gerstenberger Farms, Inc. v. Grimes*, No. 291318, 2010 WL 1629587, at \*3 (Mich. Ct. App. Apr. 22, 2010) (holding that specific performance of a lease will be denied if the lease lacks an adequate description of the property subject to the lease agreement).

rect financial incentives, reimbursement for unrealized benefits from tenant investments, and mandatory conservation provisions. These methods are discussed in the following sections, and again, particular attention should be paid to these provisions as tools that can be utilized where the tenant's tenure remains insecure.

## 2. Termination and Renewal Procedures

Options for renewal and procedures for termination of the lease can also have significant impacts on tenure stability and the sustainability of the farm operation. Provided the tenant operator is farming in a sustainable manner and in accordance with the wishes of the landowner, it is most likely in the best interest of the parties and the land to continue the existing relationship at the end of the term. Despite the short nature of agricultural lease terms, landlord-tenant relationships generally extend beyond the initial term.<sup>33</sup> While a continuous relationship means an overall increase in tenure stability, the manner in which farm leases are typically extended does not optimize the tenant's continued tenure security.<sup>34</sup> Typical form lease provisions and farm tenancy laws contribute to the insecure nature of farm lease renewals by establishing year-to-year tenancies at the expiration of the original lease term.<sup>35</sup> If the parties do enter an initial term of several years, a provision allowing for the automatic extension of the original lease term may better facilitate the continuance of amenable landlord-tenant relations, reduce unnecessary transaction costs, and promote stable tenure. Including this type of provision would facilitate the adoption of sustainable practices. The tenant gains certainty that if notice is not provided, their interest in the property and its long-term sustainability, due to the extension of the lease for an additional

---

33. See generally Michael Duffy, Iowa State Univ. Extension, *Survey of Iowa Leasing Practices, 2007*, AG DECISION MAKER, Sept. 2008, at 2-3, available at <http://www.extension.iastate.edu/Publications/FM1811.pdf> (demonstrating that tenants' actual time on the land extends well beyond initial lease terms for both cash rent and crop share leases).

34. Compare ARBUCKLE, RENTED LAND, *supra* note 16, at 10-11 (finding a strong landlord-tenant relationship where the landlord is committed to the tenant's continuation on the land, which often results in a relationship spanning decades), with *Steele v. Murphy*, 650 S.W.2d 573 (Ark. 1983) (exemplifying a typical year-to-year tenancy situation and the problems that may arise, such as issues with notice, in these tenuous relationships).

35. See, e.g., IOWA CODE §§ 562.5-562.7 (2011). But cf. David L. Hunter et al., Univ. of Tenn. Agric. Extension Serv., Farm Lease Agreement § B, available at <http://economics.ag.utk.edu/publications/landuse/lease.pdf> (last visited Apr. 14, 2011) (requiring written extensions of lease terms for the tenant to avoid having to surrender possession); Univ. of Ill. Extension, Illinois Cash Farm Lease § 1(B), available at [http://www.farmdoc.illinois.edu/legal/Farmdoc\\_Form\\_CL01\\_0912.pdf](http://www.farmdoc.illinois.edu/legal/Farmdoc_Form_CL01_0912.pdf) (last visited Apr. 14, 2011) (requiring lease terms to be extended in writing otherwise the tenant would have to surrender possession).

term of several years, will continue. To illustrate, such a provision might look like the following:

The Term of this lease shall be \_\_\_\_\_ year(s) from \_\_\_\_\_, 20\_\_\_\_ to \_\_\_\_\_, 20\_\_\_\_. This lease shall continue thereafter as a periodic lease for the same period of years as the original term upon the same terms and conditions as the original lease, unless either party gives proper notice of termination or the parties sign a renewal of this lease one (1) year or more prior to the expiration of this lease term or any extension or renewal thereof. Proper notice of termination is written notice served in a manner prescribed by state law one (1) year or more prior to the expiration of this lease term or any extension or renewal thereof.

The annual cash rent of any extension or renewal, unless otherwise agreed in writing, shall be the fixed rent identified for the original term but adjusted annually according to the following index: \_\_\_\_\_.

In the same manner as the original long-term lease, this extension encourages the tenant to continue using farming methods that build up the soil over a period of time rather than deplete it in the name of short-term production.

Iowa case law requires the terms of an automatic extension to include "definite and certain" terms.<sup>36</sup> The provision above, with the exception of rent, expressly relies on the terms of the original lease, including the length of the term. While the rent is undetermined as to amount, the method for configuring the rent is established using the index. Rent adjustment methods can be based simply on the Consumer Price Index or on a more complex, agriculturally relevant formula using factors such as specified market prices, average land values, and the price of farm inputs. Another example, used by the farm management company, U.S. Farm Lease, indexes the rent based on the Iowa State University Cash Rental Survey rates.

Once the new cash rent is determined then this rate as a percentage of the average rental rate for the county will be used as an annual adjustment system. For instance ... farm leases in Story County showed a \$196/acre average in 2009. If a farm [was] leased thorough [sic] USFL for \$250/acre for the 2010 crop year then this would be 127.55% of the Story County average. If the ISU Story [C]ounty survey average showed \$210/acre in 2010 then the lease would adjust to \$267.85/acre for 2011.<sup>37</sup>

There are, however, a variety of divergent concerns that can arise at the expiration of a lease term that must be addressed to facilitate such an extension.

36. See, e.g., *Petty v. Faith Bible Christian Outreach Ctr., Inc.*, 584 N.W.2d 303, 306 (Iowa 1998).

37. *US Farm Lease Questions and Answers*, US FARM LEASE, <http://www.google.com> (search "US Farm Lease Questions and Answers" to access document).

The tenant most likely will want assurance that any notice to quit will be given far enough in advance to allow adequate planning regarding farm operations, and perhaps, residential accommodations. This is particularly important for certain sustainable farm practices, such as planting fall cover crops. Providing for an automatic extension of the lease if notice of termination is not delivered by a specified time gives the tenant some time to plan for the following year. Six months is the common law period required for notice of termination of a periodic lease from year-to-year, though states have developed a variety of laws regarding notice requirements for farm lease arrangements.<sup>38</sup> While Iowa does require notice of termination for nearly all farm leases, regardless of whether the lease term specifies an end date, many states do not require notice of termination to conclude farm tenancies for a term.<sup>39</sup> This period should, depending on the expiration date of the lease, coincide with fall preparations for the following crop year. A six-month notice period is recommended if either party is unable or unwilling to use a one-year notice period, or if the term of the lease is only for one year. However, a one-year notice period would have a greater impact on tenure security, allowing the tenant operator to make decisions regarding farm practices in the final year that promote the farm's long-term sustainability. It is also worth noting that while some state laws provide specific dates by which notice must be given,<sup>40</sup> a general time period may be appropriate for standardized form leases due to variations in agricultural practices in the various states.

The tenant's desire for adequate notice of termination in order to plan effectively must be balanced with the landowner's desire to renegotiate lease terms, particularly rent, on an annual basis. This conflict can be resolved by allowing the rent to be adjusted at a later time than the extension or renewal. This can be accomplished in a cash rent lease by including an option for indexing. As discussed previously, such an option allows the parties to establish a method for determining rent based on specified markets. Without a mechanism allowing for adjustment of rent closer to the beginning of the crop year, the landowner is often motivated to give notice of termination and then renegotiate with the tenant at a later time. This frequently occurs in leases that, by law or the terms of the lease agreement itself, such as those found in many form leases available to the public,

---

38. See 735 ILL. COMP. STAT. ANN. 5/9-206 (West 2003) (requiring written notice of termination four months prior for Illinois year-to-year farm leases); IND. CODE ANN. § 32-31-1-3 (LexisNexis 2002) (requiring notice to quit three months prior to the expiration of the year for year-to-year farm leases); *Steele v. Murphy*, 650 S.W.2d 573, 574-75 (Ark. 1983) (interpreting the 1981 version of ARK. CODE ANN. § 18-16-105 (2010), which requires notice of termination of oral farm leases on or before June 30 for the following calendar year).

39. See, e.g., 5/9-206.

40. See §§ 562.5-562.7 (requiring notice of termination be given on or before September 1 and establishing March 1 as the termination date).

establish year-to-year tenancies if notice of termination is not provided.<sup>41</sup> This results in an overall decrease in tenure confidence and security. Using termination as a method of enabling renegotiation does provide greater flexibility and, perhaps, leverage for the landowner, but it puts the sustainability of the operation at risk, creates additional transaction costs for both parties, and deteriorates the landlord-tenant relationship. Inclusion of an index for adjusting rent lessens the likelihood of termination for rent negotiation by permitting the landlord to receive rent that is in accord with the circumstances of the current crop year.

The parties might also include a separate provision regarding renewals. While extension and renewal are often used interchangeably, and the courts of many states do not recognize the distinction,<sup>42</sup> it is important for our purposes to understand the difference and examine the inclusion of both to effectively take advantage of their varying characteristics. An extension, in the traditional sense, simply prolongs the lease with the same terms.<sup>43</sup> This is the most convenient way to extend the tenant's tenure. In the automatic extension clause above,<sup>44</sup> a method for adjusting the rent is provided. With that one exception, the extension clause provides a method for continuing a long-term lease with little effort. A renewal, on the other hand, involves a greater change in the terms of the former lease or a new lease.<sup>45</sup> Flexibility is not only important in the original development of a sustainable lease but also in the continuity of a sustainable lease. It is crucial for the parties to be able to address changing circumstances, values, and technologies in relation to the sustainability of a farm operation. Using automatic extension and renewal clauses as distinct devices allows the parties to continue the lease without adjustment through extension if the arrangement is meeting the needs of both parties and the sustainability of the operation, or they may effectuate a renewal by altering the terms of the agreement if changed circumstances demand it.

Thus, while the automatic extension, in conjunction with a rent index for a new lease term, provides ease of continuity, the Extension and Termination provision above<sup>46</sup> also recognizes the parties' desire or need to alter the terms of the arrangement through inclusion of the renewal clause. The parties are, of course, at liberty to do this with or without an express provision on the matter.

41. § 562.6; *see, e.g.*, Ind. State Bar Ass'n, Cash Farm Lease Agreement § I(5) (on file with author); Univ. of Md. Extension, Cash Lease of Farm Land, Buildings and Equipment ¶ 10, available at <http://garrett.umd.edu/Agnr/Farmland%20Cash%20Lease.pdf>.

42. Woodard Tire Co. v. Hartley Realty Inc., 596 So.2d 1114, 1116 n.2 (Fla. Dist. Ct. App. 1992); Idol v. Little, 396 S.E.2d 632, 634 (N.C. Ct. App. 1990).

43. 52 C.J.S. *Landlord & Tenant* § 69 (2011).

44. *See supra* p. 17.

45. 52 C.J.S. *Landlord & Tenant* § 69 (2011).

46. *See supra* p. 17.

However, the inclusion of a clause regarding a renewal prior to one year before the termination of the lease, along with renewal forms attached to the lease, encourages early negotiations and allows for alterations regarding certain matters while maintaining the majority of the lease terms. This is particularly important for parties that initially entered short-term leases but later feel comfortable adopting a longer term. It is important to note that as with the automatic extension the parties can agree to a renewal, perhaps altering the duration of the lease or other terms, but use the index to determine the cash rent at a later time closer to the crop year.

### 3. *Remedies for Breach*

Including a provision allowing the parties to terminate the lease protects both of the parties as well as the land. However, it is also important to balance the need to terminate the lease with the benefits of continuity. In this vein, it may be beneficial to include a timeframe during which the breaching party can remedy their mistake. It should also be noted that the typical remedy for a violation of the covenant of good husbandry by the tenant is damages to the landlord.<sup>47</sup> Without an express provision in the lease allowing for termination due to breach, the landlord traditionally has to wait to collect damages at the end of the lease period.<sup>48</sup> However, some courts have allowed landlords to terminate the lease due to a good husbandry violation after the tenant has had the opportunity to harvest the year's crop.<sup>49</sup>

### 4. *Recording the Lease*

Like the other provisions discussed in this section, ensuring the lease is recorded helps ensure the stability of the lease. If the lease is not recorded in accordance with state laws, it is more vulnerable to termination by third parties. While laws often require recording the lease or a memorandum of the lease,<sup>50</sup> many form leases do not contain provisions regarding this procedure. A provision requiring the parties to record leases of a year or more is yet another safeguard to help protect tenure stability.

---

47. See *Olson v. Bedke*, 555 P.2d 156, 162 (Idaho 1976).

48. See *id.*

49. See *McElwee v. DeVault*, 120 N.W.2d 451, 454 (Iowa 1963).

50. IOWA CODE § 558.44 (2011) ("Every conveyance or lease of agricultural land, except leases not to exceed five years in duration with renewals . . . shall be recorded by the . . . lessee with the county recorder not later than one hundred eighty days after the date of conveyance or lease.").

### B. Reimbursement for Improvements

It is not uncommon for farms to need substantial improvements at the beginning of a lease term. New owners should pay particular attention to needed improvements in soil fertility, soil conservation practices, and infrastructure. Often, landowners and farmers can work together to improve the farm operation, including its long-term productivity. However, without agreements providing otherwise,<sup>51</sup> any permanent improvements will become the property of the landowner.<sup>52</sup> Again, this emphasizes the need for long-term leases that allow tenants to reap the benefits of their investments. It is also beneficial for the lease to contain an established method to reimburse tenants for any unused or undepreciated value of improvements in addition to, or in lieu of, an extended lease term. Reimbursement for improvements, while not ensuring the tenant will enjoy the long-term profits from investments as a long-term lease does, at least protects the tenant from losing the capital or effort invested in improving the property. These are common provisions found in form leases. Such lease provisions typically require approval of the landlord prior to construction, contributions by each party for specific improvements, a formal date on which the improvement was completed, the subsequent rate of depreciation, and the signatures of each party.<sup>53</sup> When examining this aspect in terms of sustainability, the parties should consider establishing a means for quantifying the benefits of sustainable practices that might not typically be included in lease reimbursement provisions, such as increased soil fertility from using green manures or crop rotations.

### C. Landlord-Tenant Communications

Landlord-tenant communications can have a significant impact on tenure security. As discussed in the previous article, tenants that have more contact with their landlords have a higher degree of confidence in the landowner's commitment to the relationship. Communications between landowner and tenant can, of course, be done informally, but periodic communications can be assured by requiring formal reports and monitoring within the lease agreement. Such com-

---

51. See, e.g., *Helvering v. Bruun*, 105 F.2d 442, 444 (8th Cir. 1939) ("The lease in the instant case clearly reserved the title in the lessee with right to remove the building" before the end of the lease, but it would revert to the landlord at the expiration of the lease); Univ. of Ill. Extension, *Illinois Crop-Share Cash Farm Lease 6*, available at [http://www.farmdoc.illinois.edu/legal/Farmdoc\\_Form\\_CSL01\\_0911.pdf](http://www.farmdoc.illinois.edu/legal/Farmdoc_Form_CSL01_0911.pdf).

52. *Quade v. Heiderscheit*, 391 N.W.2d 261, 264-65 (Iowa Ct. App. 1986) (rejecting the tenant's argument that the landlord owed him damages for alleged improvements made to the leased land that reverted back to the landlord when the lease was terminated early).

53. See, e.g., Ind. State Bar Ass'n, *supra* note 41, at 13.

munications could be annual or semi-annual reports on farm operations. For instance, a provision might require tenants to send a report explaining the year's crop plan, detailing how many and which acres will be planted to different crops. Provisions could also require monitoring of soil nutrients or soil loss with subsequent reports.

#### D. *Cost-Sharing*

Sharing the costs of the farm operation can encourage or enable tenants to try sustainable practices that would otherwise be too expensive. Typically, the parties share more of the expenses in crop share leases than in cash rent leases. However, the parties are free to agree to cost-sharing arrangements in a cash rent lease as well. This can be particularly useful where specialized equipment, additional labor, or certification must be obtained. There are a few different ways in which landowners can share the costs of sustainable production with tenants.

As is typical of crop share leases, the parties can simply agree to the division of farm inputs. This option can be especially useful where the tenant lacks the capital needed to invest in the desired conservation practices. There are a variety of expenses the parties might consider sharing. These range from typical farm inputs, such as seed and fertilizer, to specialized equipment needed for sustainable farm practices or additional fees and paperwork for organic certification. However, it may require additional time and effort to calculate each party's contribution. This is particularly relevant in a crop share agreement where the parties deviate from typical cost-sharing arrangements to promote sustainable farming. Some landowners may not have the capacity or desire to engage in management decision-making.

If a landowner is not interested in altering the typical contributions of each party, another option is to simply reduce the rent in order to promote sustainable practices. This can be done in a couple of ways. First, a graduated rent provision can be included. A graduated rent will allow for a lower initial rental amount that will gradually increase in the years after sustainable practices are adopted. This can assist in alleviating a tenant operator's concern that sustainable practices, such as reducing synthetic fertilizers or eliminating herbicides and pesticides, will lower initial yields. As discussed in the final section of this article, graduated rent provisions can also be useful in assisting a beginning farmer by slowly bringing the farmer up to full payments.

Another option is to simply reduce the rent by a specific amount in the first year to account for the tenant's cost in improving the land. Yet another way to share the costs of building up the soil and improving the resources of the farm is to reduce the rent to encourage specific practices. For instance, a lease might reduce the rent paid for cropland acres when planted in a cover crop. The tenant

receives the benefit of decreased rent while the landowner helps ensure the long-term productivity of the property.

### E. Risk-Sharing

Farming can be a risky business, and the more farmers can reduce the amount of risk they face, the more willing they may be to try alternative farming practices. The primary way landlords can help reduce the risk faced by their tenants is adjusting the rent based on the amount of yield produced on the farm, the price received for the farm product, or both. The crop share lease and flexible cash rent lease both provide ways to do this.

Adopting a crop share lease is a traditional method of distributing risk between tenant and landowner. Because the rent is simply a portion of the crop produced on the property, which the landowner then must sell on the market (or have the tenant sell), the landowner assumes a portion of the risk for both the farm's yield and the price received for that yield. This means if the tenant has a poor yield or prices are low, theoretically they do not pay as much rent. Therefore, the tenant has less to lose from the adoption of sustainable practices, even if they do result in an initial yield decrease. There are, however, additional considerations that must be taken into account when entering a crop share lease. Typically, landowners contribute a share of the farm inputs and are more involved in land use decision making. This added involvement and risk can affect social security payments, taxes, estate planning, and the distribution of farm program payments. Simply stated, landowners would be more likely to be viewed as self-employed and more likely to be eligible for a share of any farm program payments.

Flexible or adjustable cash leases set the rent based on the crop yield, the crop price, or a combination of these attributes. The risk in these arrangements can be based on the actual yield and revenue received from the farm, or it can be based on a county yield average and a predetermined market price. If the tenant perceives added risk stemming from the adoption of sustainable practices, it will be appropriate to ensure that the rent is based on the actual farm yield in order to reflect the tenant's increased risk. However, again, this will impact the division of farm program payments between landlord and tenant. If the rent is adjusted based on factors on the farm, then the payments are divided.<sup>54</sup>

---

54. *Fact Sheet Payment Limitations and Financing Provisions: Frequently Asked Questions*, FARM SERV. AGENCY (July 2008), [http://www.fsa.usda.gov/Internet/FSA\\_File/pl\\_qa\\_fact\\_sheet\\_08.pdf](http://www.fsa.usda.gov/Internet/FSA_File/pl_qa_fact_sheet_08.pdf) (stating that a tenant's payment limitation is affected by the landlord financing the farming operation).

## IV. MANDATORY CONSERVATION PROVISIONS

Giving a tenant a stake in the long-term productivity of the land or encouraging sustainable practices through cost-sharing and risk-sharing can assist in protecting the natural resources of a farm. However, just as there are some owner-operators that do not farm in a sustainable manner, there are also tenant-operators that will not adopt sustainable practices despite incentives that reduce or eliminate the costs and risks of doing so. Therefore, consideration should be given to the use of lease provisions that require specific practices or thresholds to be met in order to avoid such situations. Landowners can require specific conservation standards or methods through land use provisions. Absent specific requirements, tenants are granted the right to use the land for agricultural purposes as they see fit, and they are free from penalty unless they violate the common law covenant of good husbandry or constitute waste. However, the landowner can specifically limit this right within the lease agreement. This can be particularly important if there is no conservation plan attached to the lease. Land use provisions can be used to specify the fields that are available for cultivation, the crops that can be planted on cultivated fields, the maximum number of acres planted to a specific crop, or the crop rotations the tenant is expected to follow. Conservation provisions can be more specific regarding land use practices, addressing routine maintenance of existing conservation improvements, limiting the use of genetically modified crops, or prohibiting the spreading of manure on frozen ground.<sup>55</sup> While there are endless possibilities for provisions that enhance the sustainability of farmland, there are some provisions worth particular attention. It should be noted that while provisions directly mandating specific conservation practices can be useful, it is necessary to take practical considerations into account before completing such a lease. For instance, certain practices need special skills, additional labor, or specialized equipment. This may require additional discussions with the tenant and modifications to the lease terms in order to ensure an equitable and sustainable lease.

A. *Good Husbandry Provisions*

Standard form leases often contain language creating a duty of the tenant to farm the rented property consistent with a general standard of good husbandry. The exact words used to establish the standard often vary, as does the context in

---

55. See, e.g., KENNETH D. MULLER, IOWA STATE UNIV. EXTENSION, LEASE SUPPLEMENT FOR USE IN OBTAINING CONSERVATION PRACTICES AND CONTROLLING SOIL LOSS (2003), available at <http://www.extension.iastate.edu/Publications/FM1814.pdf>; *Leasing Checklist*, *supra* note 18, at 5-6.

which the standard is created.<sup>56</sup> This may have varying effects on the interpretation of a tenant's duties regarding stewardship. Courts have typically interpreted these provisions as establishing a duty to protect the productivity of the property and to prevent waste.<sup>57</sup> However, interpretations have not always been aligned with sustainable practices and sometimes focus more on productivity than stewardship.<sup>58</sup> Further, many of the clauses themselves emphasize efficiency and productivity and could easily be construed by the tenant as not only allowing, but requiring, maximum production at the cost of stewardship.<sup>59</sup> Also, the measure of good husbandry, or a roughly equivalent term, is often based on the common farming practices of the community, which are likely to be conventional agricultural practices that place less of an emphasis on sustainability than desired.<sup>60</sup> Thus, the precise language and context of the standard of conservation is im-

56. See, e.g., Farm Serv. Agency, USDA, Crop-Share-Cash Farm Lease, FSA-1940-51, § C(2) (June 6, 2002), available at <http://forms.sc.egov.usda.gov/efcommon/eFileServices/eForms/Admin/FSA1940-0051.pdf> ("The tenant will operate the farm in an efficient and husbandlike way, will do the plowing, seeding, cultivating, and harvesting in a manner that will conserve the landlord's property."); Iowa State Bar Ass'n, Farm Lease—Cash or Crop Shares § 5 (June 2005) (on file with author) ("Tenant shall farm the Real Estate in a manner consistent with good husbandry, seek to obtain the best crop production that the soil and crop season will permit, properly care for all growing crops in a manner consistent with good husbandry, and harvest all crops on a timely basis."); Iowa State Univ. Extension, Iowa Farm Lease § 6(c) (Feb. 1999), available at <http://www.extension.iastate.edu/agdm/wholefarm/pdf/C2-12.pdf> ("Farm the land in an efficient and husbandlike manner. Land planted to corn, soybeans or other row crops shall not exceed \_\_\_\_\_ acres each year, unless by mutual agreement."); Univ. of Md. Extension, *supra* note 41, ¶ 7(b) ("To improve the land, conserve its resources, and maintain it in a high state of cultivation, the two parties agree as follows: . . . b. The tenant will operate the land in an efficient and husbandlike way.").

57. *Olson v. Bedke*, 555 P.2d 156, 161-62 (Idaho 1976) (citations omitted).

58. See *Keller v. Bolding*, 678 N.W.2d 578, 583 (N.D. 2004) (finding a failure to practice good husbandry where weeds were not eliminated); *Bussard v. Binder*, 558 P.2d 845, 846 (Or. 1977) (holding an implied covenant of husbandry exists in a crop share lease); see generally GEORGE WINGROVE COOKE, TREATISE ON THE LAW AND PRACTICE OF AGRICULTURAL TENANCIES 189 (1850) (providing a historical perspective that leases impliedly impose a duty of good husbandry on tenants in addition to focusing on efficiency and production).

59. Iowa State Bar Ass'n, *supra* note 56, § 5 (emphasizing production by stating, "Tenant shall farm the Real Estate in a manner consistent with good husbandry, seek to obtain the best crop production that the soil and crop season will permit, properly care for all growing crops in a manner consistent with good husbandry, and harvest all crops on a timely basis."); Univ. of Ill. Extension, *supra* note 35, § 4.A.1 (emphasizing production by stating that one of the Tenant's duties is "[t]o cultivate the farm faithfully and in a timely, thorough, and businesslike manner").

60. See *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 904-05 (Iowa 1981) (Reynoldson, C.J., dissenting) (noting that straight up-and-down-hill cultivation and fall-plowing were not conservation practices, yet are "a generally accepted practice"); *Turner v. McNutt*, 197 S.W.2d 143, 145 (Tex. Civ. App. 1946) (finding that early pasturing was common and considered necessary in the local community).

portant to any discussion regarding the creation of lease forms that further sustainable agricultural practices.<sup>61</sup>

The inclusion of a good husbandry clause with a more precise purpose gives greater preference to stewardship over short-term production through the language used. Further, providing a clause regarding good husbandry allows the parties to not only establish a standard, but to establish how the operation will be measured. The clause below not only provides a standard, but it sets the standard higher than the average farmer in the community. This goes beyond the general implied covenant common throughout the states, and requires a court to apply the higher standard to the tenant. Further, the clause sets forth the standard in order to achieve a distinct purpose.

The tenant will farm in accord with the highest standards of good husbandry and will take all first-class farmer-like steps to ensure the conservation of the natural resources and the long-term productivity of the farm.

The example provided here intentionally sets a high standard. However, before using such a provision, consideration should be given to the tenant's background and experience. This may create an intimidating situation for a beginning farmer. An alternative might be to use the common standard of good husbandry, but retain the purpose of the covenant as providing for the conservation of resources and the sustainability of the operation. It should also be noted that the purpose of this covenant is to provide a broad catch-all to protect the sustainability of the property. More specific clauses should be utilized to set forth precise requirements regarding sustainable practices.

### B. Conservation Plans

A simple way to include specific conservation practices in a lease is to incorporate a conservation plan. Conservation plans are sometimes required for participation in certain farm programs,<sup>62</sup> but NRCS staff are available to assist any landowner wishing to develop a plan. These plans can be used to address a number of conservation concerns, including soil erosion, nutrient depletion, pollution from runoff, and water use and control. There is no set plan that works for every piece of land, but a conservation plan should be based on the circumstances of the land and the farm operation. The incorporation of a conservation plan developed under the guidance of NRCS staff provides the opportunity to estab-

---

61. See Hamilton, *supra* note 11, at 234.

62. See, e.g., Conservation Plans on Conservation Systems, 7 C.F.R. § 12.23(d) (2010) (requiring a conservation plan for highly erodible land that was formerly enrolled in the Conservation Reserve Program).

lish customized conservation practices that are required as part of the lease. Requiring the plan to be developed by the tenant and landowner also increases communication between the two parties and ensures both are introduced to the required conservation practices and to NRCS personnel. These objectives increase the likelihood for adoption of sustainable practices and promote tenure confidence.<sup>63</sup>

### C. Establishing Thresholds and Monitoring

Rather than mandate specific practices, conservation provisions can simply require that certain thresholds be maintained or conservation objectives be achieved. This helps ensure the landowner's concerns are addressed while providing flexibility to the tenant. For example, a lease can require a tenant to conduct annual soil tests of crop nutrients and restore the level of nutrients in the soil to the level which existed at the commencement of the lease.<sup>64</sup> Similarly, a provision can require that soil loss not exceed sustainable soil loss limits.<sup>65</sup> However, it is important that a lease ensure the methods used to meet the objectives do not harm the sustainability of the operation in other aspects. Thus, requiring the testing and maintenance of nutrient levels in the soil might be supplemented by provisions limiting the manner in which nutrients are applied to achieve the desired levels, such as limiting the application of nitrogen and phosphorous to certain amounts or at certain times.

### D. Removal of Crop Residue

There are some provisions of particular importance to a sustainable farm system, or of significance due to a landowner's personal values, that might not be adequately addressed by establishing thresholds. Provisions regarding crop residue are specifically discussed due to the importance of the plant remains on soil nutrition, conservation, and the increased attention and value of crop residue as a source for biofuel production. Crop residue, the part of a plant remaining after harvest, is important to the sustainability of the land in a number of ways. Leaving a portion of the residue on the land decreases soil erosion by lessening the impact of falling rain, slowing the flow of runoff, increasing water retention in

---

63. See Peggy Petrzalka et al., *Engaging Absentee Landowners in Conservation Practice Decisions: A Descriptive Study of an Understudied Group*, 64 J. SOIL & WATER CONSERVATION 94A, 98A (2009) (finding that increased interaction with conservation personnel promotes the likelihood for adoption of conservation practices).

64. See, e.g., Ind. State Bar Ass'n, *supra* note 41, § V(13).

65. See, e.g., *id.* § V(9).

the soil, reducing the need for inputs, and improving soil quality. However, the value of crop residue for off-farm purposes has increased with the development of second-generation biofuels, such as cellulosic ethanol.<sup>66</sup>

Most states rely on the common law to govern the rights of the parties in relation to crop residue. However, the Iowa legislature has codified a law delineating ownership of crop residue under a farm lease.<sup>67</sup> Bestowing on the tenant the right to take "any part of the aboveground part of a plant associated with a crop" likely allows the complete removal of crop residue.<sup>68</sup> The tenant may take the residue at harvest or any other time before the tenancy expires.<sup>69</sup> The predominance of year-to-year leases, which offer little tenure security, may encourage tenant farmers to sell post-harvest residues because the tenant's motivation for short-term profits will win out over the sustainability of land he may not have any interest in the following year. This makes it particularly important for landlords using short-term and year-to-year leases to ensure residue stays on the land.

As set forth in the statute, the tenant's right to the residue may be overcome by agreement of the parties to the lease.<sup>70</sup> This agreement must be placed in writing to be enforceable.<sup>71</sup> However, many landlords and tenants continue to rely on oral agreements. The leases that are written may be informal contracts that have not been drafted in consultation with a licensed attorney. The terminology used in those written leases may play a critical role in litigation over residue ownership and removal.<sup>72</sup> An Iowa court, in determining the coverage of an insurance policy relating to specific types of crop residues, found a difference between stover and stubble.<sup>73</sup> In light of the varying language of lease provisions, the specificity required by Iowa courts, and the Iowa Legislature's adoption of a statute on the matter, particular attention should be paid to the precise language referencing ownership and removal of crop residues in written farm leases.

---

66. See W.W. Wilhelm et al., Am. Soc'y of Agronomy, *Corn Stover To Sustain Soil Organic Carbon Further Constrains Biomass Supply*, 99 AGRONOMY J. 1665 (2007), available at <http://ddr.nal.usda.gov/bitstream/10113/14703/1/IND44011589.pdf>.

67. IOWA CODE § 562.5A (2011) ("Unless otherwise agreed to in writing by a lessor and farm tenant, a farm tenant may take any part of the aboveground part of a plant associated with a crop, at the time of harvest or after the harvest, until the farm tenancy terminates as provided in this chapter.").

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. See, e.g., *Stamp v. Western Iowa Mut. Ins. Ass'n*, No. 06-1825, 2007 WL 2255460, at \*2 (Iowa Ct. App. Aug. 8, 2007).

73. *Id.*

Further, the Iowa crop residue statute deals with the taking of crop residues, but does not address the ownership of the residue.<sup>74</sup> It is worth noting that ownership of all parts of the plant, not just the grain, is vested in the tenant by the common law of Iowa, despite lease provisions prohibiting the removal of the residue.<sup>75</sup> This does not mean the tenant is allowed to remove the residue without breaching the lease, but rather that the tenant will be liable to the landlord only for the damage resulting from the removal or the value of the residue for on-farm purposes, not the market value of the residue.<sup>76</sup>

It is possible the common law provides a means for keeping crop residue on the property, or at least compensating the landlord for damages if it is removed, even without a written agreement limiting residue removal. A covenant of good husbandry, or a similar provision included in a written lease, might prevent residue removal. However, it is not at all clear this approach would prevail. In fact, the existence of such an implied covenant in Iowa is uncertain, and the Supreme Court of Iowa has expressly stated that straw, even after the removal of the grain, belongs to the tenant and that "its ownership is not controlled by any custom that the landlord is entitled to the straw, unless such custom has in some way become a part of the contract."<sup>77</sup> Therefore, a covenant of good husbandry, typically based on customary practices within the community, might not be applied to cases involving crop residue without an express provision in the lease agreement. The safest route to prevent crop residue removal is the use of the written agreement clause required in the statute.

## V. CONCLUSION

As mentioned previously, the list of possible conservation provisions is endless, as are the effects of common lease provisions on the security of land tenure and the sustainability of a farm operation. In light of the holistic nature of sustainable agriculture, differences in landowner needs and values, and the varied effects of lease provisions on tenure security, confidence, and continuity, it is important to cater to the needs of the landowner and tenant, the land, and the environmental and economic health of the greater community. Farm lease agreements, as a binding legal instrument, have the potential to play an important

---

74. IOWA CODE § 562.5A (2011).

75. Moser v. Thorp Sales Corp., 312 N.W.2d 881, 900 (Iowa 1981) (holding that straw, which was produced as a byproduct of a crop, should also be treated as owned by the tenant like the grain of the crop); Munier v. Zachary, 114 N.W. 525, 527 (Iowa 1908) ("Straw from which the grain has been threshed . . . is a part of the crop, and belongs to the tenant in the same way and to the same extent as the grain . . .").

76. Munier, 114 N.W. at 527.

77. *Id.*

role in protecting the country's natural resources, but only if those drafting the lease contract provide counsel on the benefits of long-term planning, stable land tenure, and an overall sustainable agricultural system.