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# Use and Protection of Land in the Countryside

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## Background

### Agricultural Land Use in the United States

In the United States, much of the total land area is used for agricultural purposes, and agricultural production adds significant value to the US economy.

The US has a total land area of about 2.3 billion acres (1 hectare is 2.469 acres); more than 60% of US land (and 99% of cropland) is privately owned.<sup>1</sup> In the 48 contiguous states, with about 1.9 billion acres, the federal government owns 402 million acres. Almost 1.4 billion acres are nonfederal rural land: rangeland (409 million), pasture (119 million), forest (406 million), and cropland (357 million, including 324 million acres of prime farmland). Urban uses are only about a small percentage of total US land.<sup>2</sup>

The 2007 Census of Agriculture estimated that the US has 2.2 million farms. Land in farms is 922 million acres, with an average farm size of 418 acres. The majority of US farms are small, both in size and in value of sales. About 1.7 million farms have sales of less than \$50,000, and 1.5 million are smaller than 180 acres; in contrast, about 116,000 farms have sales over \$500,000, and 173,000 are larger than 1000 acres.<sup>3</sup>

According to the US Census Bureau, the value of agricultural sector production in 2008 was \$364.9 billion. The value of crop production was \$182.5 billion; livestock production, \$139.7 billion; services and forestry, \$42.6 billion. After various expenses, gross value added to the economy from agriculture was \$164.4 billion, and net farm income was \$87.1 billion.<sup>4</sup>

### Constitutional and Administrative Provisions [Qs 3, 5]

Though the United States developed as an agrarian nation, with deep respect for the value and virtues of farmers,<sup>5</sup> the US Constitution has no special provisions for agriculture. Indeed, the

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<sup>1</sup> Ruben N. Lubowski et al., *Major Uses of Land in The United States, 2002*, at 35-36 (ERS, USDA, EIB 14, 2006).

<sup>2</sup> NRCS, USDA & CSSM, Iowa State University, *Summary Report: 2007 National Resources Inventory 6*, 44 (2009).

<sup>3</sup> NASS, USDA, *2007 Census of Agriculture*, vol. 1, at 7 (table 1) (2009).

<sup>4</sup> US Census Bureau, *Statistical Abstract of the United States: 2011*, at 541 (table 835) (2011).

<sup>5</sup> See, e.g., Thomas Jefferson's often-quoted statement: "Those who labour in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue." Thomas Jefferson, *Notes on the State of Virginia* 164 (William Peden ed., 1954), quoted in Linda A. Malone, "Reflections on the Jeffersonian Ideal of an Agrarian Democracy and the Emergence of an Agricultural and Environmental Ethic in the 1990 Farm Bill," 12 *Stanford Environmental Law Journal* 3, 5 (1993).

words agriculture and farmer do not appear in the Constitution or its Amendments. Farmers, of course, enjoy the same constitutional protections as other citizens.

Similarly, the complex judicial system in the US gives no preference to agriculture. Both federal and state courts decide cases and hear appeals. Jurisdiction of federal courts is limited mainly to cases that raise federal questions (that is, “civil actions arising under the Constitution, laws, or treaties of the United States”<sup>6</sup>) and cases between parties with diversity of citizenship.<sup>7</sup> State courts (in 50 states) have general jurisdiction, and state law often governs issues of land use. Agricultural disputes, like other cases, are heard in the appropriate federal or state trial court. With a few exceptions, courts do not normally specialize in agricultural or other areas.<sup>8</sup>

Administrative tribunals play a role in resolving some agricultural issues, particularly disputes connected with programs authorized by US agricultural legislation. For example, parties who receive an adverse decision from an agency in the US Department of Agriculture (USDA) have the right to appeal to the National Appeals Division. Federal district courts hear appeals of final NAD determinations.<sup>9</sup>

## **Rural Territory and Land Use**

### **Agricultural Land [Q 6]**

For purposes of the 2010 census, the US Census Bureau defined a rural area as “all population, housing, and territory not included within an urban area.”<sup>10</sup> Urban land included “urbanized areas” with 50,000 or more people, as well as “urban clusters” with at least 2,500 and fewer than 50,000 people. Despite this broad definition of rural land, not all rural areas are considered farms.

For statistical purposes, USDA and the Census Bureau define “farm” broadly as any place which produces or sells (or normally would produce or sell) \$1,000 of agricultural products.<sup>11</sup> The USDA categorizes farms by their total gross sales. Small family farms have yearly sales of less than \$250,000. Small family farms make up 88% of US farms and hold 63% of land in farms, but produce only 16% of total agricultural output.<sup>12</sup> By contrast, large family farms, with yearly sales over \$250,000, make up 9% of farms and hold 30% of U.S farmland, but produce over 65% of total agricultural output.<sup>13</sup> Non-family farms account for only 2% of farms, 7% of land in farms, and about 18% of production.<sup>14</sup>

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<sup>6</sup> 28 United States Code [USC] § 1331.

<sup>7</sup> *Id.* § 1332. Diversity cases require an amount in controversy of at least \$75,000.

<sup>8</sup> Specialized federal trial courts hear some cases -- e.g., tax and bankruptcy.

<sup>9</sup> See USDA, National Appeals Division, [www.nad.usda.gov](http://www.nad.usda.gov).

<sup>10</sup> US Census Bureau, 2010 Census Urban and Rural Classification and Urban Area Criteria (Aug. 17, 2010), <http://www.census.gov/geo/www/ua/2010urbanruralclass.html>.

<sup>11</sup> Robert A. Hoppe & David E. Banker, *Structure and Finances of U.S. Farms: Family Farm Report 1* (ERS, USDA, EIB 66, 2010).

<sup>12</sup> *Id.* at 1, 6.

<sup>13</sup> *Id.* at 1, 7.

<sup>14</sup> *Id.* at 6.

## Environmental Restrictions [Qs 7, 26]

Agriculture is vulnerable to pollution and environmental degradation, because farming depends on soil, water, and air for production of crops and livestock. But emissions from agriculture, especially intensive production, are a significant source of pollution. Nutrients and chemicals from crop production and wastes from livestock operations reach surface and ground waters, and intensive livestock production results in emission of regulated pollutants and odors.

Though the polluter pays principle suggests that agriculture should be subject to environmental regulation like other industries,<sup>15</sup> the US has exempted agriculture from some environmental regulation.<sup>16</sup> Under the Clean Water Act (CWA),<sup>17</sup> for example, many emissions from agriculture (e.g., from cropland and grazing livestock) are considered nonpoint pollution, which is subject to little direct regulation. Instead, the CWA requires state assessment, disclosure, and management programs for nonpoint pollution, but imposes no federal requirements.<sup>18</sup> A few states have enacted mandatory measures to limit erosion, but most states offer incentives to encourage best management practices, often identified or recommended by the federal EPA, to prevent nonpoint source pollution.<sup>19</sup>

Point sources of water pollution require permits under the National Pollutant Discharge Elimination System.<sup>20</sup> The CWA defines concentrated animal feeding operations as point sources of pollution; large operations must comply with effluent limitation guidelines, but relatively few livestock facilities actually require permits under provisions of EPA regulations.<sup>21</sup> Moreover, in connection with arable farming, “agricultural stormwater discharges and return flows from irrigated agriculture” are excluded from the CWA definition of point sources and do not require permits.<sup>22</sup>

Air emissions from animal feeding operations come from animal confinement buildings, manure storage facilities, and land application of waste; they include particulate matter, gases, vapors, and odors. Though air emissions from livestock facilities include several pollutants (e.g., ammonia) regulated by the federal Clean Air Act (CAA),<sup>23</sup> few facilities have been required to

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<sup>15</sup> Margaret Rosso Grossman, “Agriculture and the Polluter Pays Principle: An Introduction,” 59 *Oklahoma Law Review* 1, 42 (2006).

<sup>16</sup> See generally J.B. Ruhl, “Farms, Their Environmental Harms and Environmental Law,” 27 *Ecology Law Quarterly* 263 (2000).

<sup>17</sup> 33 USC §§ 1251-1387.

<sup>18</sup> 33 USC §§ 1288, 1329. The CWA’s Total Maximum Daily Load provision, 33 USC § 1313(d), applies to both point and nonpoint pollution. It requires state identification of impaired water bodies and their maximum loads of pollutants, followed by state planning for reduction of point and nonpoint sources of pollution. See *Pronsolino v. Nasti*, 291 F.2d 1123 (9th Cir. 2002) (holding that TMDLs apply to pollution from nonpoint sources). States have been reluctant to apply TMDLs to govern runoff from agriculture.

<sup>19</sup> Grossman, *supra* note 15, at 41. See also David Zaring, “Best Practices as Regulatory Regime: The Case of Agricultural Nonpoint Source Pollution,” 34 *Environmental Law Reporter (Envtl. Law Inst.)* 11025, at 11025-27 (2004).

<sup>20</sup> 33 USC § 1342(a).

<sup>21</sup> *Id.* § 1362(14); 40 Code of Federal Regulations [CFR] parts 122 & 412 (governing effluent limitation guidelines, NPDES permits). Recent litigation will require amendment of CAFO regulations. *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011).

<sup>22</sup> 33 USC § 1362(14).

<sup>23</sup> 42 USC §§ 7401-7671q.

obtain operating permits.<sup>24</sup> Calculating air emissions from livestock facilities is difficult, but recent research, pursuant to a voluntary Air Compliance Agreement with livestock producers, may result in more accurate estimation of emissions and facilitate identification of livestock facilities that must obtain operating permits.<sup>25</sup>

These examples indicate that US environmental laws often exclude agriculture from requirements that apply to other industries. Instead, both the federal government and states often rely on incentives to encourage good environmental practices. Public recognition of the environmental effects of intensive agricultural production, however, may lead to stricter regulation.

### **Land Use Planning [Qs 5, 8, 10, 16, 27, 28]**

Land use planning in the US depends in part on ownership of land. The federal government owns almost 30% of the land in the United States, especially in the western states and in Alaska. Federal land use plans govern the use and development of this federal land. Under the Federal Land Policy and Management Act,<sup>26</sup> for example, land use plans for federal land must take into account “principles of multiple use and sustained yield,” protection of environmentally sensitive areas, potential public uses of the land, and scarcity of resources, among other factors.<sup>27</sup> Four agencies -- the Bureau of Land Management (Department of the Interior), the US Forest Service (USDA), Fish and Wildlife Service (DoI) and the National Park Service (DoI) -- manage the majority of federal land. Statutes impose specific planning and management requirements, tailored to the function of the lands, for these agencies.<sup>28</sup>

For privately-owned land, both urban and rural, land use is a matter of local control. States have authority to govern land use under the “police power,” the authority to protect the health, safety, and general welfare of citizens. A few states have enacted state-wide land use planning laws, and comprehensive state land use plans impose requirements (sometimes including preservation of agricultural land) for local government planning. Most states, however, delegate zoning authority to local governments -- that is, counties and municipalities, which enact ordinances for their own jurisdictions. Zoning schemes are often based on a comprehensive land use plan that articulates the community’s vision and goals for future growth and development. In accordance with the plan, a zoning map identifies land use districts and defines uses and density permitted in each

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<sup>24</sup> Grossman, *supra* note 15, at 44-45. Major sources of air pollution must obtain permits.

<sup>25</sup> EPA, Call for Information, 76 Federal Register 3060 (Jan. 19, 2011). For more information, see [http://www.epa.gov/agriculture/air\\_monitoringstudy.html](http://www.epa.gov/agriculture/air_monitoringstudy.html). See also Perry Hagenstein et al. [including M.R. Grossman], National Research Council, *Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs* (2003).

<sup>26</sup> Federal Land Policy and Management Act, Pub. L. 94-579, 90 Stat. 2743 (1976), codified at 43 USC §§ 1701-1787. FLPMA applies to land managed by the Bureau of Land Management, Department of Interior. *Id.* § 1702(e).

<sup>27</sup> *Id.* § 1712(c). US policy prescribes that

the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

*Id.* § 1701(8).

<sup>28</sup> See generally Carol Hardy Vincent, *Federal Land Management Agencies: Background on Land and Resource Management* (CRS RL32393, 2004).

district.<sup>29</sup> Normally the process of adoption of zoning ordinances will provide public notice and the opportunity for interested citizens to make their views heard.

Some jurisdictions limit the power of zoning officials to restrict agricultural activities. In Illinois, for example, county zoning authority may not be exercised to “impose regulations, eliminate uses, buildings, or structures, or require permits with respect to land used for agricultural purposes.”<sup>30</sup> Counties may require agricultural buildings and structures to comply with building or set-back lines. Other states have similar provisions.<sup>31</sup> A few states also protect some activities related to agriculture from zoning restrictions. For example, Massachusetts limits regulation of agricultural activities, “including those facilities for the sale of produce, wine and dairy products” under certain conditions.<sup>32</sup>

The majority of rural land, including agricultural land, is not zoned. Nonetheless, some jurisdictions have enacted agricultural protection zoning to restrict land uses, particularly activities incompatible with agriculture, in agricultural zones. Several approaches exist: exclusive agricultural zoning, which prevents development of agricultural land; area-based zoning, which sets density restrictions; cluster zoning, which governs density, but allows development on a small parcel; and minimum lot size zoning.<sup>33</sup>

Areas protected for agriculture can be identified in several ways. For example, the state statute that authorizes zoning may define agriculture, possibly in the context of limiting zoning authority over agricultural land.<sup>34</sup> A comprehensive zoning plan may identify factors that determine whether land should be reserved for agricultural use. These factors vary among jurisdictions, but might include the suitability of the soil for agriculture, the presence of existing agricultural uses, the presence of open land that is free from conflicting land uses, and the necessity of protecting agricultural uses by preventing non-farm activities.<sup>35</sup> Other means of identifying agricultural areas also exist in other contexts.<sup>36</sup>

State and local governments alike have “embraced the rhetoric of sustainability” in light of climate change and other environmental problems.<sup>37</sup> Therefore, some states have amended statutes that delegate zoning authority to counties and municipalities. These amendments require

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<sup>29</sup> See generally Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law* §§ 2.9 to 2.13 (2d ed. 2007).

<sup>30</sup> 55 ILCS 5/5-12000. Agriculture, defined broadly, includes the growing of farm crops, truck garden crops, animal and poultry husbandry, apiculture, aquaculture, dairying, floriculture, horticulture, nurseries, tree farms, sod farms, pasturage, viticulture, and wholesale greenhouses when such agricultural purposes constitute the principal activity on the land.

<sup>31</sup> E.g., Iowa Code Ann. § 358A.2.

<sup>32</sup> Mass. Gen. Laws chap. 40A, § 3.

<sup>33</sup> See generally Linda A. Malone, *Environmental Regulation of Land Use* §§ 6.28 to 6.32 (2009).

<sup>34</sup> See the Illinois definition in note 30.

<sup>35</sup> See, e.g., Marion County (Oregon) Comprehensive Plan, Agricultural Lands II A-3, link from <http://www.co.marion.or.us>.

<sup>36</sup> For example, statutory criteria for formation of voluntary agricultural districts identify land suitable for protection, often in terms of minimum size, established agriculture use, viability of farming, and county needs and land-use patterns. E.g., 505 ILCS 5/8 (factors to be considered for the formation of an agricultural district).

<sup>37</sup> Patricia E. Salkin, “Sustainability and Land Use Planning: Greening State and Local Land Use Plans and Regulations to Address Climate Change Challenges and Preserve Resources for Future Generations,” 34 *William & Mary Environmental Law & Policy Review* 121, 124 (2009).

or encourage local governments to focus on sustainability in their comprehensive land use plans and to adopt sustainable planning techniques. For example, state statutes have required that comprehensive plans incorporate renewable energy sources such as solar or wind power, consider conservation elements to account for the effect of land development on natural resources and public lands, or encourage energy-efficient land use patterns and prevent sprawl. Some states, however, impose these requirements only on heavily-populated cities and counties, effectively exempting more sparsely-populated rural areas from sustainable planning requirements.<sup>38</sup>

### **Farm Tenancy [Qs 11,12]**

The 2007 Census of Agriculture indicated that full owners farmed 69% of farms; part owners, 24.5%; and full tenants, 6.4%. Part owners, who rent some land, operated the largest farms, with an average size of 915 acres; full tenants had farms with an average size of 582 acres, and full owners, only 226 acres.<sup>39</sup> Rented land (about 38% of total land in farms) is thus critical for US agriculture, particularly for larger grain and oilseed operations.

Farm leases, which convey a possessory interest to the tenant, are governed primarily by private law -- that is, by contract. Common-law principles and state statutes, which reflect the practical requirements of farming, govern some issues to protect both landlord and tenant. For example, state statutes establish a landlord's lien on crops to secure payment of rent and govern notice of termination.<sup>40</sup>

Generally, landlords and tenants are free to structure leases by contract; no government agency controls rent, duration, or other lease terms. One-year leases are common, and either party is free to terminate the lease at the end of the lease term. In practice, landlord-tenant relationships often last for many years. Though written leases provide more certainty, some farm leases are oral. Written leases normally require the tenant to practice "good husbandry" and may impose environmental conditions stricter than normal requirements of good husbandry. Even without a specific lease term, the common law requires good husbandry, and a lease can be terminated for failure to apply good agricultural practices.<sup>41</sup>

The existence of a lease may affect the tenant's ability to participate in various federal farm programs, including conservation programs. The lease itself may address the issue. For example, a crop-share lease form used in Illinois states that "Lessor and Tenant shall decide each year whether to enter into governmental programs designed to aid agriculture and how payments for doing so and the cost involved shall be shared between them."<sup>42</sup> Moreover, federal regulations that govern conservation programs impose protective requirements. For example, enrollment of

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<sup>38</sup> For an overview of these comprehensive plan requirements, including examples from specific state statutes, see *id.* at 125-40.

<sup>39</sup> NASS, *supra* note 3, at 262, table 65.

<sup>40</sup> E.g., Illinois farm tenancy provisions at 735 ILCS 5/9-205 to -213; 5/9-316 to -319.

<sup>41</sup> See generally Margaret Rosso Grossman, "Leasehold Interests and the Separation of Ownership and Control in U.S. Farmland" in *Property and Values: Alternatives to Public and Private Ownership* 119-148 (Charles Geisler & Gail Daneker eds., 2000). See also Margaret Rosso Grossman, "Agricultural tenancy law in the United States," 52 *Agrarisch Recht* 337-346 (1992).

<sup>42</sup> Illinois Crop-Share Cash Farm Lease, Farmdoc Form CSL 01-0911 (2001), link from <http://www.farmdoc.illinois.edu>.

rented land in the Conservation Reserve Program, discussed below, requires signatures of both landowner and tenant, and regulations require an equitable division of payments.<sup>43</sup> Operators of farms, including tenants, are eligible to enter contracts under the Conservation Stewardship Program and the Environmental Quality Incentives Program.<sup>44</sup> Tenants with short-term leases may have little incentive to adopt conservation practices that offer only long-term rewards.

## Rural Development and Related Issues

### Rural Development [Qs 13-15]

Rural development has long played an important role in the US, and it is prominent in USDA's Strategic Plan for 2010-2015. USDA's first strategic goal is to "assist rural communities to create prosperity so they are self-sustaining, repopulating, and economically thriving."<sup>45</sup> Objectives connected with this strategic goal are to enhance rural prosperity (broadband access, renewable energy, regional food systems, ecosystem markets, and green jobs), to create thriving communities, and to "support a sustainable and competitive agricultural system."<sup>46</sup>

In June 2011, President Obama established a cabinet-level White House Rural Council. His executive order recognized that 16% of the US population lives in rural counties and that these counties experience serious challenges but offer potential for economic growth. The White House Rural Council, chaired by the Secretary of Agriculture and supported by USDA, will "coordinate development of policy recommendations to promote economic prosperity and quality of life in rural America."<sup>47</sup> The Council will coordinate federal programs in rural areas and facilitate cooperation with rural stakeholders, agricultural organizations, small businesses, and governments. The Council's focus will be "key factors for growth," with emphasis on jobs, expanding markets for agriculture, ecosystem markets, access to credit, healthcare, education, infrastructure, and technology.<sup>48</sup>

USDA is the lead agency for rural development in the US, but other federal agencies also play a role, particularly in rural economic development. USDA administers more than half of the 88 federal programs for rural development.<sup>49</sup> Authorized by several statutes and implemented through numerous regulations,<sup>50</sup> USDA rural development programs are an important, but complicated, component of national policy to support the economic viability of rural areas.

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<sup>43</sup> 7 CFR §§ 1410.5, 1410.32, 1410.56.

<sup>44</sup> See regulations at 7 CFR part 1470 & part 1466. For some practices under EQIP, consent of the landowner is required.

<sup>45</sup> USDA, *Strategic Plan FY 2010-2015* at 1 (2010). Three other goals focus on conservation of forests and working lands; agricultural production, biotechnology exports, and food security; and nutrition for children.

<sup>46</sup> *Id.* at 2-13 (quotation, at 8).

<sup>47</sup> Barack Obama, Executive Order 13575, Establishment of the White House Rural Council, 76 Federal Register 34,841, 34,842 (June 14, 2011). The American Recovery and Reinvestment Act of 2009, div. A, tit. I, Pub. L. 111-5, 123 Stat. 115, provided significant funding for agriculture and rural areas, including rural development (e.g., housing, utilities, business).

<sup>48</sup> Press Release, USDA, Obama Administration Establishes White House Rural Council to Strengthen Rural Communities (No. 0238.11, June 9, 2011).

<sup>49</sup> Tadlock Cowan, *An Overview of USDA Rural Developments Programs* (CRS RL31837, 2010).

<sup>50</sup> For a list of statutes, see *id.* at 2-7. One important statute, for example, is the Consolidated Farm and Rural Development Act, 7 USC §§ 1922-2009dd-7, as amended most recently by the Food, Conservation, and Energy Act of 2008, tit. VI, Pub. L. 110-234, 122 Stat. 923 [2008 Farm Bill].

These programs are designed as a “‘venture capitalist for rural America’ . . . [providing] ‘equity, liquidity and technical assistance to finance and foster growth’ and preserve rural communities.”<sup>51</sup> The various programs offer loans and grants for businesses, cooperatives, single and multi-family housing, community facilities, electricity, water and sewer facilities, telecommunications, and community and economic development.<sup>52</sup> To foster sustainable industries, USDA programs also support the development of alternative and renewable energy in rural areas.<sup>53</sup> Each rural development program has criteria for eligibility. Population limits for the various programs range from 2,500 to 50,000 inhabitants, and other requirements apply.<sup>54</sup>

## **Nature Conservation [Q 17]**

In the US, many nature conservation areas exist on public land. National parks and wildlife areas, for example, are predominately federal land; states also own parks and other natural areas.

Under the US Constitution, governments may exercise the power of eminent domain to take privately-owned land, including agricultural and rural land, if the condemnation is for a public use and the owner receives just compensation.<sup>55</sup> Courts have interpreted the public use requirement broadly to include uses for a “public purpose.”<sup>56</sup> Conservation of natural habitat qualifies as a public purpose for the exercise of eminent domain.<sup>57</sup> Thus, when the exercise of eminent domain is properly authorized (usually by statute) and just compensation is paid, agricultural and other rural land may be vulnerable to condemnation for conservation uses.

In some states, statutorily-authorized agricultural districts and conservation easements allow owners to protect agricultural land, either temporarily or permanently, from development. Though many statutes do not address the issue of eminent domain, and some state that eminent domain is not restricted, others impose additional procedural requirements before eminent domain can be used to take protected agricultural land.<sup>58</sup>

Landowners who enter agricultural districts agree to limit the use of their land to agricultural purposes for a term of years, in exchange for statutorily-prescribed protections.<sup>59</sup> Most state agricultural district statutes impose additional burdens before eminent domain can be used to acquire protected land -- for example, the right to notice and a hearing before condemnation, a

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<sup>51</sup> Gilbert M. Gaul & Sarah Cohen, *Rural Aid Goes to Urban Areas*, Washington Post (April 6, 2007) (quoting Thomas Dorr, former Undersecretary, Rural Development).

<sup>52</sup> See generally USDA Rural Development, <http://www.rurdev.usda.gov/home.html>.

<sup>53</sup> *Id.* Some elements of USDA energy programs were addressed in Title IX of the 2008 Farm Bill, *supra* note 50.

<sup>54</sup> See Cowan, *supra* note 49.

<sup>55</sup> US Const. amend. V: “. . . nor shall private property be taken for public use, without just compensation.”

<sup>56</sup> *Kelo v. City of New London*, 545 U.S. 469, 479-80 (2005).

<sup>57</sup> See *U.S. v. Union County 16.29 Acres of Land*, 35 F. Supp. 2d 773, 779 (D. Or. 1997) (holding that condemnation of wetlands for environmental reasons serves a valid public purpose and citing *North Dakota v. United States*, 460 U.S. 300 (1983)).

<sup>58</sup> See generally Margaret Rosso Grossman, “Exercising Eminent Domain Against Protected Agricultural Lands: Taking a Second Look,” 30 Villanova Law Review 701-766 (1985).

<sup>59</sup> Some states require landowners in agricultural districts to follow “sound conservation practices,” usually designed to prevent soil erosion. E.g., N.C. Gen. Stat. § 106-737(3) (requiring that land in the agricultural district be managed to control soil erosion). American Farmland Trust [AFT], Fact Sheet: Agricultural District Programs (2008), link from <http://www.farmlandinfo.org>.

requirement that alternatives to condemnation be considered, or a requirement that the condemnation be approved by a separate governing body.<sup>60</sup>

Conservation easements protect agricultural land over the long term by restricting the right to develop, while permitting continued agricultural.<sup>61</sup> In most cases, land subject to a conservation easement can be taken for a public use by eminent domain, and only a few states offer procedural protections.<sup>62</sup>

### **Tourism [Q 19]**

Natural areas attract tourists, and federal land includes both national parks and wilderness areas. US national parks reflect the difficult balance between tourism and conservation. The many visitors create pressure on park resources, and environmental damage may result.<sup>63</sup> The National Park Service (NPS),<sup>64</sup> which manages the parks, follows a dual mandate: to promote current use and enjoyment of parks and to conserve and manage parks for the enjoyment of future generations.<sup>65</sup>

The NPS established mandatory policies for park management. To protect parks over the long term, these policies emphasize land protection, management of natural and cultural resources, and wilderness preservation and management. To facilitate current use, policies apply to interpretation and education, use of parks, management of facilities, and services for visitors.<sup>66</sup> In addition, the NPS develops general management plans for each national park.<sup>67</sup> These plans impose measures to preserve resources and to accommodate visitors; they may also regulate activities that threaten environmental harm to the park (e.g., use of snowmobiles or off-road vehicles).<sup>68</sup>

Concessions and permits allow private businesses to provide public services, accommodations, and facilities within national parks. In granting concessions, the NPS must balance economically beneficial uses with preservation of the parks' natural beauty. The agency must limit public uses to those that are "necessary and appropriate" and that are highly consistent with "preservation

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<sup>60</sup> See, e.g., Tenn. Code § 43-34-106 (granting landowner the right to public hearing); Utah Code § 17-41-405 (requiring approval by an advisory board for condemnation); Minn. Stat. § 40A.122 (giving agency power to suspend eminent domain action if it determines condemnation is contrary to the purpose of the agricultural district and there are feasible, less harmful alternatives). See Jennifer Dempsey, "Much Ado About *Kelo*: Eminent Domain and Farmland Protection" (AFT, 2005).

<sup>61</sup> See AFT, Fact Sheet: Agricultural Conservation Easements (2010), link from <http://www.farmlandinfo.org>.

<sup>62</sup> See Grossman, *supra* note 58.

<sup>63</sup> Denise E. Antolini, "National Park Law in the U.S.: Conservation, Conflict, and Centennial Values," 33 William & Mary Environmental Law & Policy Review 851, 877 (2009). The number of visitors has declined in recent years.

<sup>64</sup> National Park System Organic Act of 1916, 39 Stat. 535 (1916) (codified, as amended, at 16 USC §§ 1-18f).

<sup>65</sup> Antolini, *supra* note 63, at 861-62.

The [National Park Service] shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 USC § 1

<sup>66</sup> See National Park Service, *Management Policies 2006*, <http://www.nps.gov/policy/mp2006.pdf>.

<sup>67</sup> 16 USC § 1a-7(b). Statutes creating individual parks impose additional requirements.

<sup>68</sup> Antolini, *supra* note 63, at 878-79.

and conservation of resources.”<sup>69</sup> The NPS awards permits to concession providers based on their ability to meet the goal of conserving park resources while providing necessary services to the public at reasonable rates.<sup>70</sup>

On private land, agritourism has become an important means of agricultural diversification, as it “links agricultural production with opportunities for recreation, education, or entertainment.”<sup>71</sup> Many agritourism activities focus on outdoor recreation (including hunting, fishing, and horseback riding) and hospitality (bed and breakfast, ranch stays).<sup>72</sup> Agritourism supplements farm income, generates economic activity for rural communities, and protects farmland and natural amenities, but it may overtax local facilities and stress wildlife.<sup>73</sup> Laws in more than 20 states promote or facilitate agritourism.<sup>74</sup> Though many laws provide governmental or financial support, a few mitigate liability, an important concern for agritourism enterprises, especially for injuries to participants.<sup>75</sup>

### Forestry [Qs 20, 25]

In the US, forests offer both natural beauty and economic value. Land used for forests makes up almost 29% of total US land area, and much of this forest is timberland. Forests serve numerous purposes. Some forest land is grazed or available for recreation; some forests are in special uses such as parks and wildlife areas. Only about one-third of US forests are federally owned.<sup>76</sup>

Many US forests are privately owned, and a number of federal programs offer assistance and economic incentives to owners who agree to follow prescribed forestry management and conservation standards.<sup>77</sup> The USDA Strategic Plan for 2010-2015 identified conservation of forests as an important goal,<sup>78</sup> and in June 2011, USDA announced its Strategic Framework to promote agroforestry -- the intentional combination of “agriculture and forestry to create integrated and sustainable land-use systems that take advantage of the interactive benefits from combining trees and shrubs with crops and/or livestock.”<sup>79</sup> With the cooperation of five USDA

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<sup>69</sup> National Park Service Concessions Management Improvement Act, Pub. L. 105-391, 112 Stat. 3503 (1998) (codified at 16 USC §§ 5951-5966) (quotation at § 5951(b)).

<sup>70</sup> 16 USC § 5952(5)(A). The NPS also examines the concessioner’s experience, expertise, and financial capacity. States also own parks and other land with conservation values.

<sup>71</sup> See Margaret Rosso Grossman, “Diversification of Farm Enterprises in the United States: Legal Incentives and Legal Obstacles,” 70 *Tijdschrift voor Agrarisch Recht* 4, 12-13 (2010) (quote at 12).

<sup>72</sup> J. Michael Harris et al., *Agricultural Income and Finance Outlook* 16-17, 70 (ERS, USDA, AIS 86, December 2008).

<sup>73</sup> Dennis M. Brown & Richard J. Reeder, *Farm-Based Recreation: A Statistical Profile* 1-2 (ERS, USDA, ERR 53, December 2007). Farmers and local communities also suffer some negative effects, including loss of privacy, risk of liability, and overtaxing of local facilities (roads, wildlife).

<sup>74</sup> National Agricultural Law Center, States’ Agritourism Statutes, <http://nationalaglawcenter.org/assets/agritourism/index.html> (last accessed 1 July 2010).

<sup>75</sup> Though many states have statutes that limit liability of landowners for injuries that occur during recreational use of agricultural land, protection does not usually apply if the landowner receives payment for the recreational use. E.g., N.Y. Gen. Oblig. Laws § 9-103. But see Kan. Stat. Ann. §§ 74-50,165 to -50,173; N.C. Gen. Stat. §§ 99E-30 to -32.

<sup>76</sup> Lubowski et al., *supra* note 1, at 25-26.

<sup>77</sup> See, e.g., 16 USC §§ 2102 (rural forestry assistance), 2103 (forest land enhancement), 2103a (forest stewardship), 2103c (forest legacy).

<sup>78</sup> USDA, *supra* note 45.

<sup>79</sup> Press Release, USDA, USDA Releases Plan to Promote Agroforestry (No. 0229.11, June 6, 2011).

agencies, state foresters, and conservation districts, activities to implement the framework will help to increase agroforestry, integrate agroforestry into conservation and economic development, and advance the science of agroforestry.<sup>80</sup>

Forest land owned by the US offers both natural and economic values. In 1897, Congress authorized establishment of national forests to “improve and protect the forest . . . and to furnish a continuous supply of timber for the use and necessities of citizens.”<sup>81</sup> Timber harvesting is the primary economic use of these forests, and the National Forest Management Act (NFMA) balances logging with natural values.<sup>82</sup> Under the NFMA, the Forest Service must manage forests according to the principle of “multiple use and sustained yield.”<sup>83</sup> The NFMA restricts logging methods (e.g., clearcutting) and requires the Forest Service to protect plant, wildlife, and water resources, “based on the suitability and capability of the specific land area.”<sup>84</sup> To this end, the Forest Service prepares management plans that identify forest management areas and assign priorities, including timber harvesting, recreation, and habitat and wildlife conservation, for each management area.<sup>85</sup>

The Endangered Species Act (ESA)<sup>86</sup> applies in forests, as well as on other land. The ESA prohibits the taking of endangered species and requires the federal government (and private landowners) to identify and protect the critical habitat of those species.<sup>87</sup> Parties may not undertake actions within critical habitat -- for example, harvesting trees that harbor endangered species -- that will take or harm the species by destroying habitat.<sup>88</sup> The US Supreme Court had interpreted the ESA to require the government to protect endangered species and their habitats, “whatever the cost.”<sup>89</sup> Congress amended the ESA, however, to allow consideration of economic as well as wildlife conservation interests in designation of critical habitat.<sup>90</sup> Now the US Fish and Wildlife Service, which administers the ESA, may consider the economic impact of a critical habitat designation and perform a cost-benefit analysis to determine whether an area should be

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<sup>80</sup> USDA, *Agroforestry Strategic Framework, Fiscal Year 2011-2016* (June 2011).

<sup>81</sup> 16 USC § 475 (part of the Organic Act of 1897, now partly repealed).

<sup>82</sup> Pub. L. 94-588, 90 Stat. 2949 (1976) (codified at 16 USC §§ 1600-1614). See Jack Tuholske & Beth Brennan, “The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute,” 15 Public Land Law Review 53, 65 (1994) (discussing timber regulations and natural planning requirements of NFLMA).

<sup>83</sup> 16 USC § 1604(e)(1) (requiring compliance with the Multiple Use Sustained Yield Act of 1960, 16 USC §§ 528-531).

<sup>84</sup> *Id.* § 1604(g)(3)(B),(E),(F).

<sup>85</sup> See 16 USC § 1604(a) (mandating the development of management plans, in accordance with NEPA).

<sup>86</sup> 16 USC §§ 1531-1544.

<sup>87</sup> See 16 USC § 1532(5) (defining critical habitat); *id.* § 1533(b)(2) (procedures for designating critical habitat). See also 50 CFR part 17.95 (listing critical habitat areas designated by FWS).

<sup>88</sup> See *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995).

<sup>89</sup> *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978). See Amy Sinden, “The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations,” 28 *Harvard Environmental Law Review* 129, 132-33 (2004).

<sup>90</sup> 16 USC § 1533(b)(2):

The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

included or excluded from critical habitat. As a result, US forests, like other land that harbors endangered species, are governed by a balance between economic interests and natural values.

US policy for wildfires focuses mainly on suppression and management of forest fires. For example, the Healthy Forest Restoration Act of 2003,<sup>91</sup> a response to extensive forest fires in the western part of the US, authorizes actions to prevent future forest fires. These include measures to clear hazardous brush and undergrowth that could fuel fires on federal land and to control insects that make forests more vulnerable to fire.<sup>92</sup> The Act also establishes a healthy forest reserve program, under which up to 2 million acres of private land can be enrolled, under contract and subject to a restoration plan, to restore or enhance habitat for endangered, threatened or other vulnerable species.<sup>93</sup> The Collaborative Forest Landscape Restoration Program, authorized in 2009, focuses on ecological restoration of National Forest land, but also encourages measures to reduce costs of wildfire management.<sup>94</sup>

Measures to prevent wildfire and to restore burned areas are often prescribed by the agency with authority over specific forest or wilderness areas. Site-specific legislation sometimes governs the application of fire management and suppression measures,<sup>95</sup> giving the agency (e.g., the Forest Service) authority to prescribe measures necessary to prevent and to control wildfires in national forests and other vulnerable areas. Federal agencies have also begun to incorporate elements for managing wildfires into their resource management and land use plans for specific areas.<sup>96</sup>

### **Conservation Agreements [Q 21]**

Since the 1930s, US agricultural legislation has offered financial and technical incentives for voluntary conservation measures, and a number of important new conservation programs have been enacted since 1985. Land retirement programs claim 78% of conservation payments, mostly under the Conservation Reserve Program. Working land programs claim only 22% of conservation payments.<sup>97</sup> USDA statistics, using 2009 data, estimate that rural residence and intermediate farms, rather than large commercial operations, received about 65% of payments (of \$2.5 billion total) under major conservation programs, and about 38% of total government payments to farmers.<sup>98</sup>

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<sup>91</sup> 16 USC §§ 6501-6591.

<sup>92</sup> *Id.* §§ 6511-6518; §§ 6551-6556.

<sup>93</sup> *Id.* §§ 6571-6578.

<sup>94</sup> *Id.* §§ 7301-7304.

<sup>95</sup> See Robert B. Keiter, “The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation,” 36 *Environmental Law* 301, 330-32 (2006) (listing various site-specific federal laws with fire management plans or measures).

<sup>96</sup> *Id.* at 329.

<sup>97</sup> Hoppe & Banker, *supra* note 11, at 34, 36. The Environmental Quality Incentives Program claimed 15% and Conservation Security Program, 7% of working land payments. These figures come from the 2007 Agricultural Resource Management Survey (ARMS), which includes data only from farm operators, so they do not reflect all government payments. See *id.* at 61-64.

<sup>98</sup> ERS, USDA, Farm Income and Costs: Farms Receiving Government Payments, <http://www.ers.usda.gov/Briefing/FarmIncome/govtpaybyfarmtype.htm> (updated Feb. 14, 2011). Producers who receive government farm payments must observe conservation compliance requirements (16 USC §§ 3811, 3821; regulations at 7 CFR part 12), and they must protect farmland from weeds and erosion and plant a cover crop, where necessary (7 USC s 8716; 7 CFR § 1412.61).

## *Working Land*

Measures for working land provide incentives for agricultural producers to implement conservation measures that minimize environmental effects.<sup>99</sup>

The largest USDA conservation program for working lands is the Environmental Quality Incentives Program (EQIP),<sup>100</sup> intended “to promote agricultural production, forest management and environmental quality as compatible goals, and to optimize environmental benefits.”<sup>101</sup> The program helps producers to comply with regulatory requirements concerning soil, water and air quality, wildlife habitat, and surface and groundwater conservation.<sup>102</sup> EQIP is also intended to avoid the need for regulation by helping producers meet environmental quality criteria, to provide assistance to install and maintain conservation practices, and to help streamline conservation planning and regulatory compliance.

EQIP authorizes contracts, lasting from one to 10 years, with producers who agree to implement eligible environmental and conservation practices under an EQIP conservation plan.<sup>103</sup> They receive payments for the cost of implementation of conservation practices, cost-share payments for installation of conservation structures, payments for income foregone, and technical assistance for developing a conservation plan. Environmental practices related to livestock production receive 60% of EQIP funding.<sup>104</sup>

The Conservation Stewardship Program (CSP),<sup>105</sup> is designed to encourage farmers to improve, maintain, and manage current conservation activities and to undertake additional conservation practices.<sup>106</sup> The CSP is a voluntary “payment for performance” program.<sup>107</sup> Participants must meet conservation compliance requirements (protection of highly erodible land and wetlands) for receipt of federal farm program payments.<sup>108</sup> Program acres are allocated by state, and about 12.8 million acres may be enrolled annually through 2017.<sup>109</sup>

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<sup>99</sup> Other conservation programs not discussed here include the Grasslands Reserve Program, designed to protect grazing uses and conservation values on eligible grassland (16 USC §§ 3838n-3838q; regulations at 7 CFR part 1415) and the Wildlife Habitat Incentives Program, which protects fish and wildlife habitats and species, especially those of national or regional significance, on private agricultural and forest land (16 USC § 3839bb-1; regulations at 7 CFR part 636). The Farmland Protection Program (16 USC §§ 3838h-3838i; regulations at 7 CFR part 149) provides matching funds for purchase of conservation easements on privately-owned productive farmland.

<sup>100</sup> 16 USC §§ 3839aa-3839aa-9; regulations at 7 CFR part 1466. EQIP includes an Agricultural Water Enhancement Program, 16 USC § 3839aa-9.

<sup>101</sup> 16 USC § 3839aa.

<sup>102</sup> By providing support to help producers to meet environmental regulatory requirements, EQIP may not implement the polluter pays principle. See generally Grossman, *supra* note 15.

<sup>103</sup> “Practice” is defined to include, among other things, site-specific structural practices, land management practices, and comprehensive nutrient management planning practices. 16 USC § 3839aa-1(5).

<sup>104</sup> *Id.* § 3839aa-2. Payments for most EQIP participants are limited to \$300,000 during any six-year period for all contracts entered in fiscal years 2009 through 2012. *Id.* § 3839aa-7.

<sup>105</sup> *Id.* §§ 3838d-3838g; regulations at 7 CFR part 1470.

<sup>106</sup> 16 USC § 3838e(a).

<sup>107</sup> Eligible land includes cropland, grassland, prairie, improved pasture, rangeland, nonindustrial private forest, and tribal agricultural land. Land enrolled in the Conservation Reserve, Wetlands Reserve, or Grasslands Reserve is not eligible. *Id.* § 3838e(b), (c).

<sup>108</sup> *Id.* § 3811 (highly erodible cropland) & § 3821 (wetlands).

<sup>109</sup> *Id.* § 3838g. Expenditures under CSP should average \$18 per acre nationally, including all payments to farmers, technical assistance, and expenses of enrollment and participation.

To qualify for CSP, a producer must meet a “stewardship threshold” for at least one resource concern at the time of the contract.<sup>110</sup> NRCS has identified more than 100 conservation activities that qualify for payment. A Conservation Measurement Tool determines whether producers meet minimum requirements for eligibility, calculates the effects of conservation activities, and helps to rank applicants for participation.<sup>111</sup> Producers who are selected for participation enter a renewable 5-year stewardship contract, which requires implementation of a conservation stewardship plan for the whole operation. They receive annual payments that reward both new and existing conservation activities, as well as resource-conserving crop rotations. Participants’ payments reflect environmental benefits from the practices they carry out.<sup>112</sup>

### *Land Retirement*

The Conservation Reserve Program (CRP), enacted in 1985 and reauthorized through 2012, retires environmentally sensitive cropland from production.<sup>113</sup> Maximum authorized enrollment is 32 million acres through 2012 (reduced from 39.2 million acres through 2009). Eligible land must have a cropping history, and it must be highly erodible cropland, marginal pasture land, or specified other land that will provide environmental benefits.<sup>114</sup> Recent enrollments have focused on high-priority field practices (e.g., filter strips), rather than whole fields.

Bids for CRP are submitted during a general sign-up period,<sup>115</sup> and the Farm Service Agency (part of USDA) uses an Environmental Benefits Index (EBI) to assign points to various practices that provide environmental benefits. Factors important for the most recent sign-up in March-April 2011 were wildlife habitat benefits from conservation cover, water quality benefits, benefits that will endure, air quality benefits, and cost.<sup>116</sup> The FSA ranks offers for CRP sign-up and enrolls land that provides maximum environmental benefits.

Under the CRP, agricultural owners, operators, or tenants enter 10- to 15-year contracts with the federal government. In exchange for annual rental payments, they retire eligible land from agricultural use, implement an approved conservation plan, and plant an approved vegetative cover. The federal government offers technical assistance and shares the cost of establishing

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<sup>110</sup> *Id.* § 3838f. Stewardship threshold is “the level of natural resource conservation and environmental management required ... to improve and conserve the quality and condition of a resource concern.” *Id.* § 3838d(7).

<sup>111</sup> The Conservation Activity List and Conservation Measurement Tool (CMT) are available at [http://www.nrcs.usda.gov/programs/new\\_csp/csp.html](http://www.nrcs.usda.gov/programs/new_csp/csp.html).

<sup>112</sup> NRCS Fact Sheet, Payment for Performance and Conservation Stewardship Program, link from [http://www.nrcs.usda.gov/programs/new\\_csp/csp.html](http://www.nrcs.usda.gov/programs/new_csp/csp.html).

<sup>113</sup> 16 USC §§ 3831-3835a; regulations at 7 CFR part 1410. Of the 40 million acres of farmland idled in 2002, 85% were part of the CRP, and one million acres were enrolled in the Wetlands Reserve. Lubowski et al., *supra* note 1, at 14.

<sup>114</sup> 16 USC § 3831(b),(d).

<sup>115</sup> Continuous sign-up applies to small areas of land to be set aside for purposes like filter strips, riparian buffers, windbreaks, etc. About 4 million acres are reserved for this program, which pays higher rents. A farmable wetland program, expanded in 2008, may enroll up to 1 million acres. The Conservation Reserve Enhancement Program (CREP), with cooperation from state and local entities, identifies and retires environmentally sensitive land with high priority for the state or nation. As of May 31, 2011, 3.8 million acres (including 279,00 farmable wetland acres) were enrolled in continuous sign-up and 1.25 million acres in CREP. FSA, USDA, Conservation Reserve Program, Monthly Summary -- May 2011, [http://www.fsa.usda.gov/Internet/FSA\\_File/may11crpstat.pdf](http://www.fsa.usda.gov/Internet/FSA_File/may11crpstat.pdf).

<sup>116</sup> FSA, USDA, Conservation Reserve Program Sign-Up 41 Environmental Benefits Index (Fact Sheet, Jan. 2011).

conservation practices required by contract.<sup>117</sup> The CRP has helped to reduce erosion by taking marginal cropland out of production and establishing vegetative cover. Participants have established over 3.2 million acres of habitat, reduced application of nitrogen and phosphorus, and planted 2.7 million acres of trees.<sup>118</sup>

Because the 2008 Farm Bill reduced the size of the CRP, some environmental benefits may be lost. Moreover, many CRP contracts are scheduled to expire in the near future; 4.4 million acres expired September 30, 2011 and an additional 11.8 million will expire by 2014.<sup>119</sup> When CRP contracts are not renewed, land can be returned to production of grain and other crops.<sup>120</sup> Much of the land currently enrolled in the CRP could be farmed, although some is marginal. Farming marginal land may degrade habitats, increase erosion and fertilizer runoff, and diminish other important environmental benefits (e.g., carbon sequestration).<sup>121</sup>

The Wetlands Reserve Program (WRP), enacted in 1990, protects farmed or converted wetlands through permanent easements, 30-year easements, restoration cost-share agreements, or a combination of these options.<sup>122</sup> Eligible land includes farmed or converted wetlands (or flooded crop or grasslands), plus “functionally dependent” land, that provide wildlife benefits and wetland values with a high likelihood of successful restoration.<sup>123</sup> Priority for enrollment goes to wetlands that maximize wildlife values and have least likelihood of re-conversion at the end of the easement period.

Owners of WRP land grant an easement to the United States, record a deed restriction under state law, and implement a conservation plan. The conservation plan must prohibit alteration of wildlife habitat and natural features, spraying or mowing, and other activities that interfere with wetland values or the purposes of the WRP. In exchange, participants receive compensation for the easement plus cost-share payments for conservation measures and technical assistance. The program is small, with a maximum enrollment of about 3 million acres.<sup>124</sup>

## Conclusion

US rural land is abundant, and rural areas are valued for their productivity, as well as for natural beauty, forestry, habitat, open space, and recreational opportunities. The federal government owns some rural land, including parks, wilderness areas, forests, and grazing land. On these lands, legislation and agency policies focus on sustainable current land uses, as well as conservation for future generations.

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<sup>117</sup> As of May 31, 2011, 31.2 million acres were enrolled in CRP, with average rental payments of about \$55 per acre; the general CRP average is \$46, with higher payments for vulnerable land enrolled under continuous sign-up. The March-April 2011 sign-up enrolled 2.8 million acres (of 3.8 million acres offered), bringing total October 2011 enrollment (after expiration of some contracts) to 29.6 million acres. FSA, *supra* note 115.

<sup>118</sup> Tadlock Cowan, *Conservation Reserve Program: Status and Current Issues* 10 (CRS RS21613, Jan. 2010).

<sup>119</sup> FSA, *supra* note 115.

<sup>120</sup> See generally Cowan, CRP, *supra* note 118.

<sup>121</sup> Highly erodible cropland coming out of the CRP must meet the standard applied to other HEL in the area. 7 CFR § 12.23.

<sup>122</sup> 16 USC §§ 3837-3837f; regulations at 7 CFR part 1467.

<sup>123</sup> 16 USC § 3837(c).

<sup>124</sup> *Id.* §§ 3837a, 3837(b).

The majority of US rural land is privately owned. On much of this land, US producers -- both landowners and tenants -- supply food and fiber for domestic and international markets. Though some rural areas are subject to protective zoning, US landowners enjoy considerable freedom of land use. Moreover, though agricultural operations have been exempt from some environmental requirements, farmers are likely to face more stringent environmental restrictions in the future.

The US has a long history of voluntary conservation practices, often supported by incentives. Federal law authorizes both payments to producers who retire vulnerable land from production and support for implementation of important conservation measures on working land. As the US and other nations address the issue of climate change more seriously, agriculture may play a significant role in mitigating emissions of greenhouse gases and sequestering carbon. It is to be hoped that US agricultural policy will encourage producers and other landowners to adapt their practices to pursue climate-friendly activities on rural land.<sup>125</sup>

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<sup>125</sup> See John Horowitz & Jessica Gottlieb, *The Role of Agriculture in Reducing Greenhouse Gas Emissions* (ERS, USDA, EB 15, Sept. 2010).