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Commission II

Protection of Cultivated Land in the United States: Planning, Conservation, and Agricultural Property Transactions

Report for the United States

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I. Introduction

Agricultural land in the United States is rich and abundant, providing food and fiber for the United States and for other nations. This Report focuses on legal protection for that agricultural land, which is governed by federal and state law. Federal agricultural statutes (Farm Bills), supplemented by other statutes and implemented by regulations, establish policy for agriculture and related areas. The Agricultural Improvement Act of 2018¹ includes, among many other provisions, conservation requirements and voluntary programs to protect cultivated land. The United States Department of Agriculture (USDA) plays an important role in implementing the 2018 Farm Bill and other laws that govern agriculture. State laws, too, help to protect important agricultural land.

This Report provides background about US agricultural land and its uses, based in part on information from the 2017 Census of Agriculture, published in April 2019.² The Report focuses on the role of federal and state planning instruments in protecting farmland, and it outlines important mandatory and voluntary federal programs designed to prevent degradation of productive land. The Report indicates that transfer of agricultural land is subject to few restrictions in the United States and discusses programs that facilitate acquisition of farmland by the next generation of farmers. It identifies the extent of foreign ownership of farmland, calculated from reports required under federal law. Finally, the Report describes a few state restrictions on ownership of agricultural land by aliens and by corporations.³

A. Land in the United States

Agriculture is a significant land use in the United States, with a total land area of about 2.3 billion acres (1 hectare is 2.469 acres). The majority of US land is rural. Land and water areas in the United States (excluding Alaska) occupy about 1.94 billion acres. Almost 1.4 billion

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¹ Pub. L. 115-334, 132 Stat. 4530 (20 December 2018). The 2018 Farm Bill (529 pages), like earlier Farm Bills, governs Commodities, Conservation, Trade, Nutrition, Credit, Rural Development, Research and Extension, Forestry, Energy, Horticulture, Crop Insurance, and Miscellaneous programs. The law increases funding for conservation by about 2%.

² National Agricultural Statistics Service, USDA, 2017 Census of Agriculture, United States Summary and State Data, vol. 1 (AC-17-A-51, 2019). The first census was in 1840, and a census is normally taken every five years.

³ This Report draws, with extensive updates and changes, on the author's Reports on similar topics for CEDR Congresses in 2011, 2013, and 2015, published in *Tijdschrift voor Agrarisch Recht* 71(10), 74(1), 76(2 & 7/8) and cited below when relevant.

acres are nonfederal rural land: cropland (367 million, with 52 million acres uncultivated), rangeland (404 million), pasture (122 million), and forest (416 million).⁴ Prime farmland totals 314 million acres.⁵ Urban uses are only a small percentage of US land.⁶ More than 60 percent of US land is privately owned. This includes 98 percent of cropland, 63 percent of pasture and range, and 57 percent of forest.⁷

The federal government owns about 28 percent of US land (640 million acres). Federal lands are located primarily in Alaska and the mountainous West, but the federal government owns land in every state. Four federal agencies -- the Bureau of Land Management, Forest Service, Fish and Wildlife Service, National Park Service -- administer most of this land (608 million acres). The Bureau of Land Management, which administers 248 million acres, manages rangelands, timber, and habitat; the Forest Service (193 million acres), part of USDA, manages national forests. The Fish and Wildlife Service manages 89 acres of wildlife refuges, with 86 percent in Alaska, and the National Park Service manages 80 million acres of national parks, monuments, recreation areas, and other units.⁸

B. 2017 Census of Agriculture

Recent details about US farms and farmland come from the 2017 Census of Agriculture. The 2017 Census indicated that the United States has 2.042 million farms, which occupy about 900 million acres of land (including 396 million acres of cropland). The average farm size is 441 acres, slightly larger than 434 acres in 2012, and 418 in 2007. The majority of US farms are small, both in size and in value of sales. Almost 1.4 million farms have sales of less than \$50,000, and 1.42 million are smaller than 180 acres. In contrast, about 147,000 farms have sales over \$500,000, and nearly 173,000 are larger than 1,000 acres. About 85,000 farms with 2,000 or more acres (average size 6,000 acres) operate on 58 percent of US farmland. Over the past decades, crop production has consolidated on increasingly larger farms, including family farms.⁹ In fact, most farms are operated by individuals or families, with only about 14 percent operated by partnerships, corporations, or other entities.¹⁰

Tenancy is significant in US agriculture, especially in Midwest and Plains regions of grain production. Almost 40 percent of US farmland is rented, with a higher percentage in some

⁴ US Department of Agriculture (USDA), Summary Report: 2015 National Resources Inventory, at 2-1 to 2-3 (2018), < https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcseprd1422028.pdf>. Total land and water area includes the 48 contiguous states, plus Hawaii, Puerto Rico, and the US Virgin Islands.

⁵ Prime farmland “has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops and is also available for these uses.” Since 1982, prime farmland has decreased from 329.4 to 314.5 million acres; 64% of prime farmland is cropland. *Id.* at 5-2 to 5-3.

⁶ Developed land in 2015 was about 115 million acres (an increase of 60% since 1982), including large and small urban and built-up areas and rural transportation. *Id.* at 2-6.

⁷ Daniel P. Bigelow & Allison Borchers, Major Uses of Land in the United States, 2012, at 42-45 (ERS, USDA, EIB 178, 2017) (latest edition, with figures from 2012). Private land includes land in foreign ownership (see discussion of AFIDA below). State and local governments own about 8% of US land.

⁸ Carol Hardy Vincent et al., Federal Land Ownership: Overview and Data, at 1, 4-6 (CRS, R42346, 2017). The BLM, FS, and FWS are part of the Department of the Interior. The Department of Defense also manages federal land, and other agencies manage smaller amounts.

⁹ On consolidation, see James M. MacDonald et al., Three Decades of Consolidation in U.S. Agriculture (ERS, USDA, EIB 189, 2018). Consolidation in livestock production depends on species, with earlier consolidation in hog, turkey, dairy, and egg production and more recent consolidation in broiler production and feeder cattle. *Id.* at 36-37.

¹⁰ NASS, *supra* note 2, at 7, 17, & 91, Tables 1, 7, & 71. A farm is “any place from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year.” *Id.* at viii.

states.¹¹ Although full owners operated 69 percent of farms (average size, 220 acres) in 2017, farm tenants operated larger farms. Part owners occupied 24 percent of farms (average size, 1,020 acres) and full tenants, 7 percent (average size, 620 acres).¹² Owners of rented land are mostly non-operators: individuals (for example, people who inherited farmland); legal entities such as partnerships, corporations, trusts; and other owners. Fewer farm operators rent out land. Tenancy gives younger operators access to farmland, and as farmers age, they tend to own more farmland.¹³

II. Planning Instruments to Protect Agricultural Land Resources

In the United States, owners of agricultural land enjoy significant freedom of land use. Mandatory land-use regulation protects some farmland, and voluntary measures protect farmland from conversion to other uses. Measures that govern land-use planning depend, in part, on ownership of land.¹⁴

A. Federal Law

Federal land-use plans govern the 640 million acres of land owned by the United States. Some US land serves agricultural purposes, including livestock grazing and timber production. Federal statutes impose general responsibilities on land-management agencies, as well as specific requirements for different types of federal land. For example, the Federal Land Policy and Management Act,¹⁵ which applies to grazing and other lands managed by the Bureau of Land Management, prescribes land-use planning principles and procedures. Land-use plans must use and observe “principles of multiple use and sustained yield,” protect environmentally sensitive areas, consider potential public uses of the land, and comply with pollution control laws, among other criteria.¹⁶ The Multiple-Use, Sustained-Yield Act,¹⁷ part of a comprehensive forest statute, requires planning for the national forest system to accommodate various products and services from forests, including timber production, livestock grazing, habitat, wilderness, and other uses. Federal statutes impose specific planning and management requirements, tailored to the type of land, for federal land managed by other agencies. Land-use planning for federal lands has been contentious, leading to numerous court cases over the years.

¹¹ Daniel Bigelow et al., U.S. Farmland Ownership, Tenure, and Transfer, at 15-17 (ERS, USDA, EIB 161, 2016) (based on a 2014 survey). Figures for 48 contiguous states totaled “354 million acres of rented agricultural land owned by 2.13 million landlord entities.” *Id.* at 17.

¹² NASS, 2017 Census, *supra* note 2, at 227, Table 76.

¹³ Bigelow et al., *supra* note 11, at 10-11, 15.

¹⁴ Information on planning instruments is derived in part, with significant changes and updates, from Margaret Rosso Grossman, *Use and Protection of Land in the US Countryside*, 71(10) *Tijdschrift voor Agrarisch Recht* 408, 409-410 (2011) (US Report, CEDR 2011, Commission II).

¹⁵ Federal Land Policy and Management Act, 43 US Code [USC] §§ 1701-1787. FLPMA applies to land managed by the Bureau of Land Management, Department of Interior. *Id.* § 1702(e).

¹⁶ 43 USC § 1712(c). US policy, § 1701(a)(8), 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.

¹⁷ 16 USC §§ 528-531; regulations at 7 Code of Federal Regulations [CFR] part 658.

The federal Farmland Protection Policy Act,¹⁸ enacted in 1981 at a time of particular concern about loss of farmland to other uses, recognizes that farmland “is a unique natural resource and provides food and fiber necessary for the continued welfare of the people of the United States,” and that federal programs can result in conversion of agricultural land to nonagricultural uses.¹⁹ The law, which applies to prime farmland, unique farmland, and farmland of statewide or local importance, requires federal agencies to consider the impact of programs (for example, transportation projects) that could convert protected farmlands to nonagricultural uses and to consider alternatives to conversion. A land evaluation and site assessment system determines if the proposed federal program will have a significant adverse impact on farmland.²⁰ The law requires consideration of impacts for farmland, but does not require alteration of federal projects that would convert farmland. Moreover, it does not authorize federal regulation of private land or affect property rights of land owners, nor does it authorize any person to challenge a federal program that affects farmland.²¹

To protect “agricultural use and future viability, and related conservation values” of certain vulnerable agricultural land and wetlands,²² the federal Agricultural Conservation Easement Program (ACEP) authorizes and supports the purchase of easements to limit nonagricultural uses that affect land negatively.²³ ACEP has an agricultural land component and a wetlands reserve component.²⁴ The agricultural land component authorizes the federal government to provide matching funds (generally limited to 50 percent of the easement’s fair market value) to state or local government agencies or eligible conservation entities to purchase conservation easements on eligible farm or ranch land, including working farmland and grassland. State farmland easement programs, discussed below, are often partners in the easement process. Landowners selected for the program convey a deed to the agricultural land easement, which protects the agricultural nature of the land and limits incompatible uses, but permits continued agricultural production and related farm uses on the land.²⁵ The landowner must comply with an agricultural land easement plan for highly erodible land and can work with USDA to plan conservation practices. Permanent easements bind future owners and protect agricultural productivity over the long term.²⁶

¹⁸ 7 USC §§ 4201-4209. See Farmland Information Center, Farmland Protection Policy Act (2019), <<https://www.farmlandinfo.org/farmland-protection-policy-act-0>>.

¹⁹ 7 USC § 4201(a).

²⁰ Natural Resources Conservation Service, USDA, Farmland Protection Policy Act, <<https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/landuse/fppa/>>. Accessed 26 June 2019.

²¹ 7 USC §§ 4208, 4209. The law does not preclude other challenges to federal projects.

²² 16 USC § 3865(b).

²³ 16 USC §§ 3865-3865d; regulations at 7 CFR part 1468 (not yet updated for 2018 farm bill). ACEP, added in the 2014 Farm Bill and amended in 2018 with increased funding, consolidated several federal programs dating from 1990 and 1996: wetlands reserve, grassland reserve, and farmland protection program. See NRCS, USDA, Agricultural Conservation Easement Program, <<https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/>>. Accessed 28 June 2019.

²⁴ The wetlands reserve component, 16 USC § 3865c, authorizes enrollment of certain wetlands under permanent or 30-year easements that require protection of wetlands and habitat and prohibition of harmful activities in or near the wetlands. Landowners receive compensation for the easement and technical assistance for restoration, enhancement, or maintenance of the easement.

²⁵ 16 USC § 3865b. A ranking system establishes priorities to ensure that easements are purchased on land that will maximize the value of the federal investment. 7 CFR § 1468.22.

²⁶ For state-level obligations and general information, see American Farmland Trust, Farmland Information Center, Agricultural Conservation Easement Program: Agricultural Land Easements (2018), link from <<https://www.farmlandinfo.org>>.

B. State and Local Law

1. Land-Use Regulation

For privately-owned land, both urban and rural, land use is a matter of local control. States govern land use under their general police power, the authority to protect the health, safety, and general welfare of citizens. States use the police power to enact zoning and other restrictions. Most states delegate zoning authority to local governments -- that is, counties and municipalities -- which enact ordinances for their own jurisdictions. A few states, however, have enacted state land-use planning laws. Comprehensive state land-use plans impose requirements, sometimes including protection of agricultural land, for local government planning.

Zoning helps to govern the process of urban development and to avoid incompatible land uses. Municipal zoning is normally based on a comprehensive land-use plan that articulates the community's vision and goals for future growth and development. A zoning map identifies land-use districts and defines uses and density permitted in each district. The adoption of zoning ordinances usually requires public notice and the opportunity for interested citizens to be heard.²⁷ Most municipalities have enacted zoning plans for built-up areas, and some regulate contiguous rural land.²⁸ Counties generally govern most rural land, where zoning is less common.

The majority of rural land in the United States, including agricultural land, is not zoned, though land use in the countryside may be subject to other restrictions and permit requirements, including environmental standards and permits for large livestock operations.²⁹ In fact, some states protect agricultural activities by limiting the power of zoning officials. 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."³⁰ Counties may require agricultural buildings and structures to comply with building or set-back lines. Other states have similar provisions.

Some counties have enacted agricultural protection zoning to restrict land uses and activities incompatible with agriculture. Land protected for agriculture may be defined by statute³¹ or by factors (for example, soil quality, existing farm uses) set out in the zoning ordinance. To protect farmland from incompatible uses, several zoning approaches are possible: exclusive agricultural zones that prohibits development, large minimum lot sizes to limit residential development, area-based restrictions (for example, number of dwellings per specified acres of farmland), or sliding-scale zoning (number of dwellings based on size of farm).³² Zoning

²⁷ See generally, William Toner, National Agricultural Lands Study, *Zoning to Protect Farming: A Citizens' Guidebook* (1981), <https://www.farmlandinfo.org/sites/default/files/Zoning_to_Protect_Farming_1.pdf>.

²⁸ E.g., 65 ILCS 5/11-13-1 (governing municipal regulation of land use up to 1.5 miles from corporate limits).

²⁹ On environmental rules, see Margaret Rosso Grossman, *Environmental Law for Agricultural Production: The Legal Framework*, 74(1) *Tijdschrift voor Agrarisch Recht*, 25-28 (2014) (US Report, CEDR 2013, Commission II).

³⁰ 55 ILCS 5/5-12001.

³¹ E.g., in the Illinois law just cited, "agricultural purposes" include "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." 55 ILCS 5/5-12001.

³² See Pennsylvania Land Trust Association, *Agricultural Protection Zoning*, at 5 (2013); Elisa Paster, *Preservation of Agricultural Lands through Land Use Planning Tools and Techniques*, 44 *Natural Resources Journal* 283, 292-299 (2014).

ordinances can be amended, so they do not offer permanent protection for productive farmland.

2. Voluntary Programs

As a result of national concern about farmland loss during the 1970s, states, and sometimes local governments, enacted programs to protect farmland from conversion to nonagricultural uses. Statutes authorize voluntary agricultural districts that offer protection from local regulation and conservation easements that permit farming but prohibit development of agricultural land.

Agricultural district programs, authorized in 16 states (with 19 total programs), allow farmers to establish agriculture districts that limit nonfarm development. Some states also authorize formation of urban agriculture areas.³³ States generally authorize landowners to place their land in a protected district by following a prescribed procedure. In Illinois, for example, an owner or owners can petition to create an agricultural area of at least 350 acres (100 acres in large counties).³⁴ After public notice, a hearing, and approval by the County Board, the area is established for 10 years; renewal (after review) is for 8 years, but owners may petition to withdraw land from the agricultural area.³⁵ Land in an agricultural area can be used only for agricultural production. State agencies are directed to ensure that their regulations and procedures encourage farming in agricultural areas. Local governments cannot enact laws or ordinances that would unreasonably restrict or regulate the farm, and special *ad valorem* levies are limited.

State agricultural district programs differ significantly. Most limit nonfarm development, protect landowners from special assessments, and encourage coordination with local land-use planning. Some require use of good conservation practices, limit use of eminent domain in agricultural areas, and offer other protections. Minimum acreage varies from 10 to 500 acres, but most laws require 200 acres or more. The initial term of enrollment varies from 2 to 20 years.³⁶ Although agricultural district laws are intended to keep farmland in agricultural use, they do not protect farmland permanently. If land is ripe for development, owners may not renew the agreement.

Conservation easements offer permanent protection for agricultural land. Landowners retain ownership of their property but, by deed, grant easements (property rights) to a public agency or a conservation organization. Easements, which are enforceable and bind future landowners, impose restrictions that prevent activities inconsistent with agriculture use, thereby protecting the land for farming. Data from the 2017 Census of Agriculture indicates

³³ Beginning in 2019, Illinois authorizes municipal urban agricultural areas, set up by local ordinance, after petition by a qualified farmer or partner organization. Areas are established for 5 years, can continue after review, and are dissolved after 25 years. Benefits include abatement of property taxes, limits on *ad valorem* taxes, and protection from unreasonable restrictions on farming practices. 65 ILCS 5/11-15.4 to 11-15.4.30.

³⁴ Agricultural Areas Conservation and Protection Act, 505 ILCS 5/1 to 5/20.3. Statutory criteria for formation of voluntary agricultural districts identify land suitable for protection in terms of minimum size, established agriculture use, viability of farming, and county needs and land-use patterns. *Id.* at 5/8.

³⁵ After 10 years, landowners can petition to dissolve the area. The law does not restrict buying and selling of land in an agricultural area.

³⁶ American Farmland Trust, Farmland Information Center, Agricultural District Programs (2016). Link from <<https://www.farmlandinfo.org>>.

that conservation easements (broadly defined) on almost 54,000 farms in the 50 states protect more than 13 million acres of agricultural land.³⁷

Almost every state authorizes permanent conservation easements. Landowners can donate conservation easements, and the donation may qualify for federal tax benefits.³⁸ More often, however, landowners participate in a program that purchases conservation easements. By 2018, 28 states had purchase of conservation easement (PACE) programs.³⁹ Depending on the state, easements are held and enforced by the state, by partner agencies, or by entities such as land trusts. A number of these programs use matching funds from the federal Agriculture Conservation Easement Program, discussed above.

State statutes offer other measures that may encourage farmers to keep their land in production. One example, available in nearly every state, is assessment of farmland at its use value as farmland (instead of as land for development) to reduce *ad valorem* property taxes. State right-to-farm laws protect agricultural operations from certain nuisance suits, normally when the nuisance arise from changes in conditions on the neighboring land (often changes in ownership, when new owners object to livestock odors).

III. Protection of Agricultural Land from Degradation

Federal law helps to protect farmland from degradation by imposing conservation requirements on some land and by offering financial incentives to retire vulnerable land and to implement conservation practices on working land. Most provisions are part of federal Farm Bills, normally enacted every 5 years. The 2018 Farm Bill, effective through 2023, continues a federal commitment to conservation, but modifies some programs.⁴⁰ Some state laws, not discussed here, impose conservation requirements or offer incentives for conservation practices.

A. Conservation Compliance

Since 1985, producers who received most types of federal farm support, including loans, disaster payments, conservation program payments, and (since 2014) subsidies for crop insurance premiums, have been required to conserve highly erodible land and to protect

³⁷ American Farmland Trust, Farmland Information Center, Changes in Conservation Easements (2019), using 2017 Census of Agriculture data. This data may include easements to protect wildlife, wetlands, or open space, as well as agricultural land. Farmland Information Center, 2017 Census of Agriculture (2019), <<https://www.farmlandinfo.org/2017-census-agriculture>>.

³⁸ Internal Revenue Code, 26 USC § 170(h), defining a qualified conservation contribution, which may be a charitable contribution for tax purposes. The easement may reduce the value of land for local property tax assessments, as well as in the landowner's estate. See Jess R. Phelps, *Defining the Role of Agriculture in Agricultural Conservation Easements*, 45 Ecology Law Quarterly 647, 677-691 (2018) (discussing requirements of IRC § 170(h)).

³⁹ American Farmland Trust, Farmland Information Center, Status of State PACE Programs (2018). Link from <<https://www.farmlandinfo.org>>. PACE programs protect almost 3 million acres on more than 16,000 farms.

⁴⁰ For details, see Megan Stubbs, Agricultural Conservation in the 2018 Farm Bill (CRS R45698, 2019). Conservation will account for about 7% of projected expenditures under the new law; crop insurance, 9%; commodities, 7%; other programs, 1%. Nutritional programs account for 76%. This discussion of federal conservation measures is updated and revised from Margaret Rosso Grossman, *Rural Development in the United States: Some Federal Programs*, 76(2) Tijdschrift voor Agrarisch Recht 66, 68-71 (2016) (US Report, CEDR 2015, Commission II).

wetlands on their farms. Only farmers who accept federal farm payments, about 38 percent of total farms, must comply with conservation compliance requirements.⁴¹

Conservation compliance is intended to keep highly erodible land in production, but also to reduce soil loss from erosion, improve water quality, and protect the long-term capability of US farmland to produce food and fiber. To meet these goals, conservation compliance requirements apply if a producer “in any crop year produces an agricultural commodity on a field on which highly erodible land is predominant.”⁴² These producers must apply conservation measures, using approved conservation systems. USDA’s Natural Resources Conservation Service prescribes conservation systems that are technically and economically feasible and cost-effective; they should not cause undue economic hardship to producers. Failure to apply conservation measures normally results in loss of federal farm program payments for all commodities and on all land farmed by the producer.⁴³ Implementation of conservation compliance has resulted in significant reductions in soil erosion.⁴⁴

Conservation compliance also applies to wetlands, now protected after decades of government policy that supported conversion of wetlands for cultivation. USDA identifies the existence of wetlands on farmland. Producers are ineligible for farm program payments if they produce commodities on certain wetlands.⁴⁵ A separate requirement enacted in 2008 limits benefits under federal crop insurance programs for farmers in six “prairie pothole” states who produce crops on more than five acres of newly-tilled native sod.⁴⁶

B. Conservation Reserve

The Conservation Reserve Program (CRP) is a voluntary set-aside program first authorized in 1985. Under 10- to 15-year contracts, owners, operators, or tenants retire eligible land from agricultural use, implement an approved conservation plan, and plant a vegetative cover crop. In exchange, participants receive annual rental payments, as well as technical assistance and cost-share payments for 50 percent of the cost to establish conservation practices.⁴⁷ Eligible land includes highly erodible cropland, marginal pasture, and grasslands with ecological value. Certain cropland and other land can be enrolled if conservation practices (for example, filter strips, riparian buffers) will improve water quality or if land will provide critical

⁴¹ Other eligibility requirements for farm program payments are set by statute; a maximum adjusted gross income applies to most payments, and payment limits exist. Randy Schnepf & Megan Stubbs, U.S. Farm Program Eligibility and Payment Limits Under the 2018 Farm Bill (CRS, R45659, 2019).

⁴² 16 USC §§ 3811-3814 (quotation, § 3811(a)); regulations for highly erodible land and wetlands at 7 CFR part 12.

⁴³ Program benefits may be reduced for violations committed in “good faith and without an intent to violate.” 16 USC § 3812(f)(4).

⁴⁴ Roger Claassen et al., Conservation Compliance: How Farmer Incentives Are Changing in the Crop Insurance Era at 1-2, 9-14 (ERS, USDA, ERR-234, 2017). In 2012, farms that received federal payments cultivated 93% of cropland. *Id.* at 2.

⁴⁵ 16 USC §§ 3821-3824. Requirements apply to wetlands converted after 1985; some exceptions apply. Other legal measures protect wetlands. E.g., Clean Water Act § 404, 33 USC § 1344, which requires permits for disposal of dredged or fill material into navigable waters, including certain wetlands.

⁴⁶ 7 USC § 1508(o). The restriction, referred to as “sodsaver,” applies only in Minnesota, Iowa, North Dakota, South Dakota, Montana, and Nebraska.

⁴⁷ 16 USC §§ 3831-3835; regulations at 7 CFR part 1410. Land may be considered for reenrollment after expiration of a conservation reserve contract. FAS, USDA, Conservation Reserve Program Statistics.

environmental benefits. Land accepted should represent a balance among conservation purposes: soil erosion, water quality, and wildlife habitat.⁴⁸

During general sign-up periods, producers bid to enroll land, and USDA's Farm Service Agency selects for enrollment land that provides maximum environmental benefits under an environmental benefits index. Continuous enrollment is not competitive; eligible land offers high-priority environmental benefits -- marginal pasture, land that affects water quality, and ecologically valuable cropland. Continuous enrollment also applies to farmable wetlands, certain grasslands, and the Conservation Reserve Enhancement Program (CREP). Under CREP an eligible partner (state or local entity or nongovernmental organization) identifies and cooperates with USDA to retire environmentally sensitive land with high priority for the state or nation.⁴⁹

The CRP enrolled 36.8 million acres in 2007, but enrollment, reduced by statute, declined in subsequent years. The 2018 Farm Bill increased the maximum CRP enrollment incrementally from 24 million acres (the maximum under the 2014 Farm Bill) to 27 million acres in 2023. By 2023, 8.6 million of those acres should be enrolled under continuous enrollment, and 2 million acres are reserved for ecologically valuable grasslands. The 2018 Farm Bill made numerous amendments to the CRP program, including new initiatives and reduced rental payments.

At the end of May 2019, CRP enrollment was 22.37 million acres under 603,045 contracts on 339,595 farms. Average rental payments were \$81 per acre. Between September 2019 and September 2021, contracts on 9 million acres will expire.⁵⁰ When a CRP contract on highly erodible land expires, conservation compliance requirements apply, and the land must be managed under an approved conservation system.

Environmental benefits from the CRP are significant. They include reduced flow of sediment, nitrogen, and phosphorus into waterways, increased numbers of ducks (37 million between 1992 and 2012) and grassland birds, and sequestration of more than 40 million metric tons of greenhouse gases per year.⁵¹

C. Environmental Quality Incentives and Conservation Stewardship

The Environmental Quality Incentives Program (EQIP) and the Conservation Stewardship Program (CSP) have been the most important federal conservation programs for working lands. The 2018 Farm Bill expanded EQIP and transferred the CSP, with amendments, to

⁴⁸ CRP also includes a small (750,000 acres maximum) farmable wetland program -- wetlands with a cropping history plus buffer acreage. 16 USC § 3831b.

⁴⁹ 16 USC § 3831a. The 2018 Farm Bill added this provision, though CREP existed since 1997. The eligible partner must generally provide matching funds or technical assistance.

⁵⁰ Rent for general signup averaged \$52, with higher payments for continuous enrollment (\$134), farmable wetlands (\$155), and CREP (\$162). Grasslands averaged \$14 per acre. FAS, USDA, Conservation Reserve Program, Status -- End of May 2019. Link from <<https://www.fsa.usda.gov/programs-and-services/conservation-programs/reports-and-statistics/conservation-reserve-program-statistics/index>>.

⁵¹ Daniel Hellerstein, Conservation Reserve Program, Chapter 3.23, at 123 in Daniel Hellerstein et al., eds, Agricultural Resources and Environmental Indicators, 2019 (ERS, USDA, EIB 208, May 2019); FAS, USDA, Conservation Reserve Program, Monthly Summary -- May 2019. Link from *supra* note 50.

EQIP.⁵² USDA’s Natural Resources Conservation Service implements and coordinates both programs.

The Environmental Quality Incentives Program⁵³ promotes agricultural production, forest management, and environmental quality as compatible goals. It helps producers to comply with regulatory requirements and, by helping producers protect the environment, aims to avoid the need for environmental regulation. It supports installation and maintenance of conservation practices, as well as changes to production systems designed to address resource concerns associated with production practices.⁵⁴

EQIP authorizes USDA to enter contracts with producers who implement eligible environmental and conservation practices on eligible land. Practices include structural practices, land management, nutrient management planning, soil remediation, irrigation and water conservation, wildlife habitat protection, and conservation practices related to organic production. Applications are evaluated in light of conservation priorities and the effectiveness of the producer’s proposed practices and approaches. Participants who receive EQIP contracts must submit and implement an EQIP conservation plan. They receive cost-share payments to plan and implement conservation practices and payments for income foregone. Contracts are normally limited to 10 years. Between fiscal years 2019 through 2023, a producer may receive no more than \$450,000. Environmental practices related to livestock production must receive at least 50 percent of EQIP funds, and practices that benefit wildlife habitat must receive at least 10 percent of EQIP funds.⁵⁵

The Conservation Stewardship Program (CSP)⁵⁶ provides on-going support for environmental performance on eligible agricultural land and requires enrollment of the whole farm. CSP encourages producers to address “priority resource concerns” under a conservation stewardship plan by maintaining existing conservation activities and undertaking additional activities. Producers submit a contract offer, and USDA ranks applications, with a focus on increased conservation benefits and, to the maximum feasible extent, enhanced soil health.⁵⁷ Producers whose contracts are accepted must meet or exceed a “stewardship threshold” for at least two priority resource concerns and, by the end of the 5-year contract, meet or exceed the stewardship threshold for at least one additional concern.⁵⁸ Between fiscal years 2019 through 2023, a producer may receive no more than \$200,000 under all CSP contracts.⁵⁹ CSP may now protect fewer acres because the 2018 Farm Bill limits the program by funding, rather than by enrolled acres.

⁵² For details on EQIP and CSP in the 2018 Farm Bill, see Stubbs, *supra* note 40. Existing CSP contracts are not affected, but renewals are restricted.

⁵³ Environmental Quality Incentives Program, 16 USC §§ 3839aa to 3839aa-8; regulations at 7 CFR pt. 1466 (not yet amended). Since 2014, EQIP has included provisions for protecting wildlife habitat.

⁵⁴ 16 USC § 3839aa.

⁵⁵ 16 USC §§ 3839aa-2 to 3839aa-4. Payments for organic practices may not exceed \$140,000 for 2019-2023. Certain states, irrigation districts, and other entities can receive EQIP funds for water conservation or irrigation practices.

⁵⁶ Conservation Stewardship Program, 16 USC §§ 3839aa-21 to 3839aa-25 (regulations before amendment at 7 CFR part 1470).

⁵⁷ 16 USC § 3839aa-24. The 2018 Farm Bill made soil health an important priority.

⁵⁸ 16 USC § 3839aa-23. A stewardship threshold is the level of management required to conserve and improve a natural resource. *Id.* § 3839aa-21. A new grassland conservation initiative, with different requirements, offers contracts to protect grazing areas, with payments limited to \$18 per acre. *Id.* § 3839aa-25.

⁵⁹ 16 USC § 3839aa-24. NRCS provides a lengthy list of conservation activities. NRCS, USDA, Conservation Stewardship Program, <<https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/csp/>>. Accessed 15 July 2019.

D. Conservation Impacts

Payments under these and other USDA programs help to protect vulnerable land from degradation and encourage adoption of critical conservation practices. Many of these practices offer public, off-farm benefits, as well as on-farm benefits.

Conservation compliance, required on highly erodible land to avoid loss of farm program payments, has resulted in significant reduction of erosion. Since 2014, when subsidies for crop insurance premiums also required compliance, more producers with highly erodible land have conservation incentives. But erosion has also been reduced on land not subject to conservation compliance, suggesting a general increase in adoption of soil conservation practices.⁶⁰

Soil health is critical for continued agricultural production and for providing ecosystem and economic benefits to farmers and society. A Nature Conservancy report identified three cropland management practices -- reduced tillage, cover cropping, and crop rotation -- as proxies for soil health systems.⁶¹ US farm programs have encouraged these practices. The 2017 Census of Agriculture noted, between 2012 and 2017, an increase in acres using no-till or reduced tillage and a reduction in acres using intensive tillage practices.⁶² USDA research has found that adoption of conservation practices, including conservation tillage and residue and cover-crop practices vary by crop and region, and farmers' practices vary by year and depend in part on crop rotation. USDA reported that "variation in tillage intensity may reflect crop choice, climate, soil productivity, soil erodibility, drainage, and soil topography."⁶³

Contracts under working-lands programs like EQIP and CSP require participants to implement conservation practices in exchange for USDA technical and financial assistance. USDA research concluded that, even without government payments, farmers are likely to adopt practices that increase profits or provide other on-farm benefits. Government payments encourage producers to adopt expensive practices (for example, structural elements like terraces) and practices that provide few on-farm benefits or to adopt those practices sooner.⁶⁴

Even under contracts, however, producers do not always carry out promised conservation practices. USDA research, based on a study of EQIP contracts, indicates that most EQIP practices are implemented, especially those with high on-farm private benefits. Some EQIP contracts, however, are modified. Conservation practices are dropped due to "adaptive management" (changing conditions) or, more often, "unrevealed incentives" related to on-

⁶⁰ Roger Claassen et al., *supra* note 44, at 37-39.

⁶¹ Nature Conservancy, *reThink Soil: A Roadmap to U.S. Soil Health, Executive Summary* (2016), <<https://www.nature.org/content/dam/tnc/nature/en/documents/rethink-soil-executive-summary.pdf>> The Nature Conservancy's goal for cropland management is for soil health to be "the leading indicator of economic and environmental outcomes on the majority (>50%) of farms by 2025."

⁶² NASS, *supra* note 2, at 58, Table 47. Cropland planted to a cover crop increased almost 50% during that period, but the 2017 total was only 15.4 million acres, compared with almost 200 million acres using no-till or conservation tillage.

⁶³ Roger Claassen et al., *Tillage Intensity and Conservation Cropping in the United States*, at 18 (ERS, USDA, EIB 197, 2018).

⁶⁴ Roger Claassen et al., *Additionality in U.S. Agricultural Conservation and Regulatory Offset Programs*, at iii, 1 (ERS, USDA, ERR 170, 2014). Changes are "additional" if practices that improve environmental quality are motivated by payments.

farm benefits.⁶⁵ Dropped practices (10 to 20 percent of practices) occur more often in large or complex contracts (often with multiple practices). These practices may offer low on-farm benefits to the farmer or are scheduled later (year 3 or after) in the contract term. By analyzing the structure of EQIP contracts, USDA concluded that “reducing the number of practices on contracts may reduce the frequency of contracts with dropped practices” and lead to more effective conservation on agricultural land.⁶⁶

IV. Regulation of Agricultural Property Transactions

A. Land Transfers

In the United States, farm real estate makes up more than 80 percent of the value of farm-sector assets.⁶⁷ The 2017 Census of Agriculture estimated the value of land and buildings on farms at \$2.68 trillion.⁶⁸ Per-acre value of farm real estate, especially cropland, appreciated significantly from 2000, with record high values in 2015, but slowed thereafter. Various factors, including farm income, interest rates, and federal farm policy, affect the value of agricultural land. Land values influence the structure of US agriculture and the amount of farmland on the market. Increased land values, which often trigger higher cash rents, pose obstacles for beginning and other resource-constrained farmers and ranchers.⁶⁹

Agricultural land, like other real property, can be transferred by sale, inheritance at death of the landowner, or (less commonly) gift. Some sales are arms-length transactions between unrelated, independent buyers and sellers; some farmland is sold by auction. Landowners often sell farmland to relatives, and relatives are also likely to acquire land by inheritance or gift.

Only a small percentage of US farmland changes ownership each year. USDA researchers estimated that only about 10 percent of land in farms would be transferred between 2015 and 2019, with most of that land to be transferred into trust (an estate-planning device), sold to relatives, or transferred by inheritance or gift. Only about 2 percent of land would be sold to non-relatives in arms-length transactions. Farm operators are the most common buyers of land from non-relatives or in auctions. Most individual landowners who do not farm acquire their land by inheritance or gift.⁷⁰

Unlike rules in some other countries, federal and state laws in the United States do not generally restrict transactions in agricultural property. Agricultural land, like other real property, is freely alienable, and a willing seller can convey farmland to a willing buyer. A landowner may leave agricultural land to family members or others by will, or the owner may

⁶⁵ Steven Wallander et al., Working Lands Conservation Contract Modifications: Patterns in Dropped Practices, at 5-6 (ERS, USDA, ERR 262, 2019). NRCS has a procedure for deleting practices or cancelling EQIP contracts. *Id.* at 10-12.

⁶⁶ *Id.* at 39.

⁶⁷ Debt on real estate makes up more than 60% of total farm debt. ERS, USDA, U.S. farm sector financial indicators, 2012-19F (March 2019). Link from <<https://www.ers.usda.gov/data-products/farm-income-and-wealth-statistics/data-files-us-and-state-level-farm-income-and-wealth-statistics/>>. Projected farm real estate value for 2019 is \$2.56 trillion; debt, \$264 billion.

⁶⁸ NASS, *supra* note 2, at 56, Table 43.

⁶⁹ Christopher Burns et al., Farmland Values, Land Ownership, and Returns to Farmland, 2000-2016, at 1-2, 13, 28-29 (ERS, USDA, ERR 245, 2018). Low farm returns may lead to a decline in the value of farmland.

⁷⁰ Bigelow et al., *supra* note 11, at 32-36. Land transferred into trust may remain under control of the transferor, acting as trustee. *Id.* at 21. A retiring landowner may sell land to a relative or a non-relative or rent to a tenant.

make a gift of land. With a few restrictions in some states,⁷¹ anyone -- a person or legal entity -- can own agricultural land. No agricultural education or other qualifications are required of the person who purchases or inherits agricultural land. No specific qualifications are required of farm tenants, but landowners normally ensure that their tenants are competent farmers and often impose standards for good husbandry in the farm lease. Moreover, owners of agricultural land, like other landowners, are subject to laws that apply generally, including land-use laws and environmental responsibilities, and to laws that govern agriculture in particular.

B. Facilitating Acquisition of Agricultural Land

Although few restrictions impede the transfer of agricultural land, only a small amount of US farmland becomes available to new owners each year, and high prices for productive cropland pose barriers for many potential farmers. Moreover, US farmers have been growing older. In 2017, the average age of primary producers was 59.4 and of principle producers, 58.6, up from the 2012 average age of principle operators, 58.3. Relatively few producers had farmed for 10 or fewer years.⁷² To help ensure that future generations will continue to farm, US law facilitates access to agricultural land for beginning farmers and ranchers,⁷³ as well as for veterans of military service, socially disadvantaged farmers (African American and other groups), and (in some programs) women farmers. USDA programs encourage ownership or rental of farmland for these groups. In addition, beginning and socially disadvantaged farmers and ranchers may receive priority or higher payments under some USDA conservation programs.⁷⁴

Many producers rely on credit to purchase farmland, and USDA is an important lender for some producers. The Farm Service Agency (FSA), for example, is governed by statutes that give beginning farmers and ranchers priority for some federal loans.⁷⁵ The FSA is a “lender of last resort because it makes direct farm ownership and operating loans to family-sized farms that are unable to obtain credit elsewhere,” and guarantees some loans made by other lenders.⁷⁶ FSA is also “the lender of first opportunity,” because it reserves for beginning farmers and ranchers 75 percent of funding for farm ownership loans, 50 percent for operating loans, and 40 percent for guaranteed ownership and operating loans.⁷⁷ Since 2016,

⁷¹ See sections V and VI below, discussing foreign and corporate ownership. In some situations, however, specific parcels of land may be subject to deed restrictions or easements that limit permissible uses.

⁷² NASS, *supra* note 2, at 62, Table 52. The average age in 1997 was 54. Many producers also have off-farm occupations.

⁷³ See *id.* at 88-89, Tables 70 & 71 for 2017 Census of Agriculture information on new and beginning producers. Beginning farmers receive priority for USDA programs in addition to those that facilitate access to land.

⁷⁴ E.g., EQIP, 16 USC § 3839aa-2.

⁷⁵ See 7 USC §§ 1922, 1929, 1935, 1941. A “qualified beginning farmer or rancher,” among other requirements, has not operated a farm or ranch or has operated for not more than 10 years and owns no land or a statutorily limited amount of land. 7 USC § 1991.

⁷⁶ Jim Monke, *Agricultural Credit: Institutions and Issues*, at 7 (CRS RS21977, 2018). See FSA, USDA, *Farm Ownership Loans*, <<https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/farm-ownership-loans/index>>. Accessed 19 July 2019.

⁷⁷ 7 USC § 1994(b)(2). Loan funds are reserved for the first 11 months of the fiscal year. Beginning farmers and ranchers get priority for loan guarantees for 6 months. The Farm Credit System, which serves agriculture, is a privately-owned government-sponsored enterprise. FCS is a for-profit lender to credit worthy farmers and other agricultural borrowers. Monke, *supra* note 76, at 7.

the FSA has offered microloans, with a maximum of \$50,000, for farm ownership and other purposes.⁷⁸

Another USDA program guarantees loans made by private sellers who convey farmland to a beginning farmer under a land contract.⁷⁹ Socially disadvantaged farmers are targeted for participation in some USDA loans.⁸⁰ In addition, USDA provides grants to entities (non-profits, educational institutions) to provide education, training, and other assistance, as well as increased access to USDA programs, to help socially disadvantaged and veteran farmers and ranchers operate successful farms.⁸¹

The Conservation Reserve Program offers incentives for making land available to beginning farmers. The CRP Transition Incentives Program (TIP), intended to preserve conservation practices and make land available to new farmers, applies to land in expiring CRP contracts. Under the TIP, owners of land enrolled in an expiring CRP receive incentives if they sell the land, or lease for at least five years (or for a shorter term with an option to purchase), to a beginning, veteran, or socially disadvantaged farmer or rancher. CRP contract holders may receive two extra CRP annual rental payments, and the new owner or tenant must apply sustainable farming or grazing practices.⁸² The new owner or tenant has priority for enrollment in federal conservation programs, including EQIP, CSP, and ACEP.

State programs exist, too. Some states⁸³ authorize loan guarantees, subsidize interest rates, and encourage leases of farmland to young farmers.⁸⁴ A number of states and regions have “farm link” programs, which help to keep farmland in production by matching beginning farmers with farmland owners.⁸⁵ A new program in New York, for example, Farmland for a New Generation, helps to connect landowners who want to keep their land in farming with farmers who seek land to farm. Coordinated by the American Farmland Trust, the program provides directories of farm properties, profiles of farmers, educational training and materials, and other resources.⁸⁶

⁷⁸ FSA, USDA, Microloan Programs, <<https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/microloans/index>>. Accessed 19 July 2019.

⁷⁹ 7 USC § 1936. A land contract is an installment sale of farmland, under which the buyer goes into possession of the land, but title does not transfer until all contract payments are made.

⁸⁰ 7 USC § 2003 (defining socially disadvantaged groups to include those subject to racial, ethnic, or gender prejudice).

⁸¹ USDA, Press Release, USDA Announces \$16 Million Funding Opportunity to Support Socially Disadvantaged and Veteran Farmers and Ranchers (Release No. 0110.19, 16 July 2019). Announced at 84 Federal Register 33,904 (16 July 2019).

⁸² 16 USC § 3835(f). If the sale or lease is to a family member, no additional payments are paid. The program does not include sale or lease specifically to women farmers, but women who are beginning farmers qualify. FSA, USDA, Transition Incentives Program, <<https://www.fsa.usda.gov/programs-and-services/conservation-programs/transition-incentives/index#retired>>. Accessed 25 June 2019.

⁸³ For detailed information, see National Council of State Agricultural Finance Programs, Directory: State by State Agricultural Loan Programs (2017), link from <www.stateagfinance.org>.

⁸⁴ In Illinois, for example, see 20 ILCS 3501/830-5 to 830-45 (agricultural assistance under the Illinois Finance Authority Act). See also Illinois Finance Authority, Agriculture (2019), <<https://www.il-fa.com/programs/agriculture>> (providing information about the Beginning Farmer Bond Program, Young Farmer Guarantee Program).

⁸⁵ Farmland Information Center, Farm Link Programs, <http://www.farmlandinfo.org/special-collections/4439/field_contact_category/farm-link-programs-4348> (describing 45 programs in 38 states). Accessed 18 July 2019.

⁸⁶ Farmland for a New Generation New York, <<https://nyfarmlandfinder.org/>>. Accessed 18 July 2019.

V. Acquisition of Agricultural Property by Foreigners

A. Federal Law

In the 1970s, US focus on the loss of farmland to other uses was accompanied by concerns about foreign ownership of agricultural and its impact on US agriculture.⁸⁷ No national system then collected data about foreign ownership, and most states had no information about alien owners of land.⁸⁸ In response, Congress passed the Agricultural Foreign Investment Disclosure Act of 1978.⁸⁹ The law (AFIDA) was intended in part to “determine the effects of foreign persons acquiring, transferring, and holding agricultural land, particularly the effects ... on family farms and rural communities.”⁹⁰

AFIDA does not restrict foreign investment, but instead requires foreign investors to report their holdings. Any “foreign person who acquires or transfers any interest ... in agricultural land” must report that transaction to the US Secretary of Agriculture within 90 days.⁹¹ The report must provide information about the foreign investor, the land (including a legal description and acreage), its proposed use, and the purchase price. Failure to report foreign ownership (or incomplete or misleading reporting) will result in a civil penalty based on the fair market value of the foreign person’s interest in the agricultural land.⁹²

AFIDA defines both agricultural land and person broadly to ensure comprehensive reporting. “Agricultural land” includes any land “used for agricultural, forestry, or timber production.”⁹³ The term “person” includes both individuals and legal entities (such as corporations, associations). “Foreign person” includes any individual who is not a citizen or permanent resident of the United States and any foreign government. It also includes any legal entity created under the laws of a foreign government or with its principal place of business outside the United States. In addition, a foreign person under AFIDA is an entity created under a US state law, but in which a foreign individual, entity, or government holds a “significant interest.”⁹⁴

The USDA publishes annual reports of foreign holdings, based on data drawn from reports required under AFIDA. The foreign holdings report published in 2019 analyzes foreign

⁸⁷ Parts V and VI of this Report are adapted and updated from Margaret Rosso Grossman, *Cross-Border Ownership of Agricultural Land in the United States*, 76(7/8) Tijdschrift voor Agrarisch Recht 343-347 (2016) (US Report, CEDR 2015, Commission II).

⁸⁸ See, e.g., General Accounting Office (GAO), *Foreign Ownership of U.S. Farmland: Much Concern, Little Data* (CED-78-132, 1978). GAO is now called the Government Accountability Office.

⁸⁹ 7 USC §§ 3501-3508; regulations at 7 CFR part 781. See also 26 USC § 897 (enacted in 1980 to impose tax on sales and other transfers of real property held by foreign owners). For history, see Grant Wilson, Note, *Reforming Alien Agricultural Landownership Restrictions in Corporate Farming Law States: A Constitutional and Policy View from Iowa*, 17 Drake Journal of Agricultural Law 709, 719-721 (2013).

⁹⁰ 7 USC § 3504, now repealed.

⁹¹ 7 USC § 3501, supplemented by 7 CFR § 781.3. State Departments of Agriculture receive copies of reports involving land in their states. 7 USC § 3505. “Any interest” includes leaseholds of 10 years or longer.

⁹² 7 USC § 3502; 7 CFR § 781.4. Maximum penalty is 25% of the fair market value of the foreign person’s interest.

⁹³ 7 USC § 3508(1). Regulations exempt land areas less than 10 acres if gross receipts on the land were \$1,000 or less. 7 CFR § 781.2(b).

⁹⁴ 7 USC § 3508(3). Regulations define “significant interest” to include an interest of 10% or more held by a single foreign person or by multiple foreign persons acting in concert, and a total interest of 50% or more held by foreign persons who do not act in concert. 7 CFR § 781.2(k).

ownership through December 2017.⁹⁵ Foreign holdings of all US agricultural land totaled 29.1 million acres in 2017: 1 percent of all US land and 2.3 percent of privately-owned agricultural land. Between 2016 and 2017, foreign holdings of agricultural land increased by about 800,000 million acres.⁹⁶

The USDA reported that foreign holdings exist in all 50 states. Maine, in the Northeast, has the largest number of acres, mostly forest or timber; Texas and Alabama follow with the second and third highest number of agricultural acres in foreign holdings. In general, however, most foreign holdings are in the South and the West of the United States. In terms of land use, agricultural land holdings are timber or forest, 52 percent; cropland, 20 percent; pasture and other agricultural land, 26 percent. Only 2 percent of foreign holdings are non-agricultural land.⁹⁷

Investors from many countries own agricultural land in the United States. Canadians hold 25 percent; other important investor countries are the Netherlands (17 percent) and Italy, Germany, and the United Kingdom (6 percent each). Investors from all other countries hold 40 percent of foreign-held land.⁹⁸

B. State Law

Some states have used their general police power to restrict ownership of land within their borders by aliens, as well as by business entities.⁹⁹ In the late 1970s, US concern about farmland was intense, but a government report published in 1978 indicated that although 25 states regulated some aspects of alien ownership of farmland, few states imposed significant restrictions. Only 9 states then prohibited alien ownership or imposed major restrictions; 11 states restricted the amount or duration of ownership.¹⁰⁰

Around 2012, 28 states had some type of provision that regulated land ownership by non-citizens, but a number of states affirmed some property rights for non-citizens, and some states both affirmed and restricted property rights. State laws that affect alien ownership of land vary significantly, with differences that depend on the status of the owner (resident or non-resident alien, business organization) and the type or amount of property.¹⁰¹ In states that distinguish between resident and nonresident aliens, resident aliens are free to own land, but laws prohibit or restrict ownership by nonresident aliens or impose reporting requirements.

⁹⁵ Tricia Barnes et al., *Foreign Holdings of U.S. Agricultural Land Through December 31, 2017* (FSA, USDA, 2019), <<https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/EPAS/PDF/afida2017report.pdf>>.

⁹⁶ *Id.* at iii.

⁹⁷ *Id.* at 4-5. In Maine, foreign owners hold 18.1% (3.25 million acres, mostly forest) of private agricultural land; in Hawaii, 8.8% (almost 159,000 acres, mostly pasture). *Id.* at 12.

⁹⁸ *Id.* at 4. Over 10 million foreign-held acres are owned by US corporations with foreign shareholders. *Id.* at 215-220, Report 6.

⁹⁹ For information on state control of alien land holding, see James Frechter, Note, *Alien Landownership in the United States: A Matter of State Control*, 14 *Brooklyn Journal of International Law* 147, 149-159 (1988). States enacted laws restricting alien ownership during four periods: 1880-1900 (11 states), the 1920s, during World War II, and the 1970s. *Id.*

¹⁰⁰ GAO, *Foreign Ownership*, *supra* note 88, at 2. In 1978, 25 states did not restrict alien ownership of farmland, and 13 restricted corporate ownership. *Id.* at 3.

¹⁰¹ Allison Brownell Tirres, *Property Outliers: Non-Citizens, Property Rights and State Power*, 27 *Georgetown Immigration Law Journal* 77, 97-98 (2012).

Some states regulate ownership by foreign (including out-of-state) corporations, as well as aliens.¹⁰²

Because of the importance of agriculture, some Midwest farm states regulate ownership of agricultural land by nonresident aliens.¹⁰³ Indeed, many of the states with corporate farming laws (discussed below) also restrict alien ownership.¹⁰⁴ These restrictions vary among the states, but may prohibit ownership by nonresident aliens, impose acreage limitations, set time limits on ownership, or require reports of ownership.¹⁰⁵ Iowa, for example, allows alien ownership of most real property.¹⁰⁶ But, with a few exceptions, Iowa does not permit individual nonresident aliens or foreign governments and business entities to purchase or acquire agricultural land.¹⁰⁷

Some states have repealed restrictions on alien ownership. In Illinois, for example, an 1887 statute limited the duration of alien ownership of real property. After repeal of that statute in 1992, aliens may acquire, hold, and dispose of real property without special restrictions.¹⁰⁸ The Illinois Agricultural Foreign Investment Disclosure Act, enacted in 1979, requires any “foreign person” (defined broadly to include legal entities) or foreign government to report their ownership (including a lease of 10 years or longer) of agricultural land to the state Director of Agriculture.¹⁰⁹

Foreign ownership of US agricultural land is less controversial than in the 1970s. But it still captures political attention. In March 2019, for example, a US presidential candidate argued for a federal statute like the Iowa law that would prohibit foreign ownership of US farmland and agricultural companies. She “called out” the merger of Germany’s Bayer with the US Monsanto, as well as Chinese purchase of Smithfield Foods, a large hog producer.¹¹⁰ Interestingly, Missouri amended its foreign ownership ban in 2013 to allow aggregate foreign ownership of up to 1 percent of state agricultural acreage, with any sale subject to approval

¹⁰² See Grant Wilson, Note, *Reforming Alien Agricultural Landownership Restrictions in Corporate Farming Law States: A Constitutional and Policy View from Iowa*, 17 Drake Journal of Agricultural Law 709, 721-722 (2013). Tirres, *supra* note 101, criticizes inconsistent state laws and would decouple citizenship from property rights.

¹⁰³ See generally Erin McKinstry, Midwest Center for Investigative Reporting, Regulation on foreign ownership of agricultural land: A state-by-state breakdown (22 June 2017), <<https://investigatamidwest.org/2017/06/22/regulation-on-foreign-ownership-of-agricultural-land-a-state-by-state-breakdown/>>.

¹⁰⁴ States with statutes in 2013 were Iowa, Minnesota (prohibiting aliens and non-US corporations), Missouri, Nebraska, North Dakota, South Dakota (160 acre maximum alien holding), and Wisconsin (640 acres maximum). Constitutional restrictions include Kansas Const., Bill of Rights § 17 (allowing statutory regulation of alien rights); Oklahoma Const., art. XXII (restricting ownership of land by aliens). Wilson, *supra* note 102, at 727 & n.142.

¹⁰⁵ Some laws permit aliens to acquire by devise or descent (that is, inheritance by will or statute). Federal reports under AFIDA indicate that every state has foreign investment in farmland, and some acquisitions occurred before states enacted restrictions.

¹⁰⁶ Iowa Code § 9I.2.

¹⁰⁷ Iowa Code § 9I.3. Among several exceptions, a maximum of 320 acres can be acquired for “an immediate or pending use other than farming,” § 9I.3(3)(e), but the owner must report ownership and pending use annually, § 9I.8. Iowa also requires confidential reports from business entities that own agricultural land. Iowa Code §§ 10B.4, 10B.5.

¹⁰⁸ Property Owned by Aliens Act, 765 ILCS 60/7-8.

¹⁰⁹ 765 ILCS 50/1-8. A copy of the AFIDA report discussed above complies with the Illinois law.

¹¹⁰ Maxwell Strachan, Elizabeth Warren: ‘No Foreign Country Should Be Able To Purchase Farmland In America,’ HuffPost, 30 March 2019. The acquisition of Smithfield came with more than 100,000 acres of US farmland. Katy Keiffer, Who really owns American farmland?, The New Food Economy (31 July 2017), <<https://newfoodeconomy.org/who-really-owns-american-farmland/>>.

by the director of the state Department of Agriculture.¹¹¹ The amendment occurred shortly before a Chinese company purchased Smithfield Foods, with 40,000 acres of farmland (hog operations) in Missouri.¹¹²

VI. Land Grabbing and Corporate Ownership

A. Land Grabbing

As it applies to agriculture, land grabbing is “the buying or leasing of large tracts of farmland ... by governments or private investors.”¹¹³ Land grabbing -- more neutrally, transnational land acquisition¹¹⁴ -- is prevalent in developing countries, particularly in the global South and in Sub-Saharan Africa, and to some extent in Eastern Europe and Asia.¹¹⁵ Access to agricultural land in these countries can help wealthier investing countries “to secure their own food supply in the most economical and efficient way -- which means taking land from less-developed countries.”¹¹⁶ Moreover, land grabbing may serve purposes other than agriculture, including “water, energy, climate change, and environmental protection, and financial safe havens.”¹¹⁷ All acquisition of agricultural land by foreign and other investors, however, is not land grabbing; foreign investment in agriculture may help to promote food security in developing countries.

The 2011 Tirana Declaration, which denounced both local-level and large-scale land grabbing, defined large-scale land grabbing as “acquisitions or concessions that are one or more of the following: (i) in violation of human rights, particularly the equal rights of women; (ii) not based on free, prior and informed consent of the affected land-users; (iii) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and; (v) not based on effective democratic planning, independent oversight and meaningful participation.”¹¹⁸ Some argue that the Tirana definition may be too narrow, because it seems to exclude predatory land acquisition by “foreign, state, and international actors.”¹¹⁹

¹¹¹ Mo. Rev. Stat § 442.571.

¹¹² Efforts to repeal the 2013 Missouri amendment and ban further foreign purchases of farmland have not yet succeeded. Johnathan Hettinger, Midwest Center for Investigative Reporting, As foreign investment in U.S. farmland grows, efforts to ban and limit the increase mount (3 June 2019), <<https://investigatamidwest.org/2019/06/03/as-foreign-investment-in-u-s-farmland-grows-efforts-to-ban-and-limit-the-increase-mount/>>.

¹¹³ Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52(2) Harvard International Law Journal 504, 504, 520-524 (2011).

¹¹⁴ Andreas Neef, Editorial, *Law and Development Implications of Transnational Land Acquisitions: Introduction*, 7(2) Law and Development Review 187, 189 (2014).

¹¹⁵ Most of the legal literature on land grabbing seems to focus on developing countries in Africa and in the global South.

¹¹⁶ Alyssa Titche, *Land Grabs & Food Security: The International Community Should Adopt a Code of Conduct to Protect Local Communities and Improve Global Food Security*, 7 UC Irvine Law Review 473, 482 (2017) (asserting the need for an international Code of Conduct). Acquiring countries are often cash rich (e.g., Gulf States, China), but lack arable land and water. EU countries may invest in foreign agricultural land to acquire land for agrofuels. *Id.* at 481-482.

¹¹⁷ Jootaek Lee, *Contemporary Land Grabbing: Research Sources and Bibliography*, 107(2) Law Library Journal 259, 262 (2015).

¹¹⁸ International Land Coalition, Tirana Declaration, para 4 (Tirana, Albania, 27 May 2011), <<https://www.landcoalition.org/sites/default/files/documents/resources/tiranadeclaration.pdf>>. Accessed 28 May 2019.

¹¹⁹ Lee, *supra* note 117, at 263.

Land grabbing carries human rights implications, because it can marginalize and impoverish rural people and their communities and imperil food security.¹²⁰ A number of international human rights principles, as well as principles focused specifically on transnational land acquisition, may help to address the effects of land grabbing.¹²¹ Many organizations and institutions focus on protection of land access (often for indigenous peoples) and related issues, and some provide helpful information.¹²² One global initiative, Land Matrix, monitors “land deals” in several global regions. Land Matrix calculated that since 2000, land deals intended for various agricultural uses (including forestry) covering 200 hectares or more have been concluded on 73 million hectares globally, with intended deals on many more hectares.¹²³ US corporations and other investors have acquired agricultural and other land for crops, livestock, timber, energy production, and conservation in numerous developing countries.¹²⁴

Although investors own large tracts of US agricultural land, that ownership is not usually characterized as land grabbing. Indeed, the website Land Matrix, which identifies global land deals by country and investor, does not include North America, but focuses on Africa, Asia, Eastern Europe, and Latin America.¹²⁵ Historically, of course, early settlers, generally with statutory authorization and government support, expropriated the land of Native Americans.¹²⁶

B. Corporate Ownership

Apart from land grabbing, however, as the discussion of alien land ownership above indicates, ownership of agricultural land, especially by corporations, has been a matter of concern in some states. Family or individual operation of farms (85.7 percent of farms) is most prevalent, though farmland is often rented from other owners.¹²⁷ The 2017 Census of Agriculture determined that about 14 percent of the 2 million US farms were organized as corporations, partnerships, or other legal entities. Only 5.7 percent of farms were corporations; of these, 5.1 percent were family owned, most with 10 or fewer shareholders. Only 0.6 percent were not family owned, but those corporations produced the highest market value of farm products.¹²⁸

Some states have enacted constitutional provisions or statutes that restrict corporate ownership of farmland.¹²⁹ These laws, which have limited corporate farming on about one-

¹²⁰ De Schutter, *supra* note 113, 504-505; Lee, *supra* note 117, at 260-261.

¹²¹ Lee, *supra* note 117, at 265-272 (explain numerous international principles and documents); Titcher, *supra* note 116, at 486-493.

¹²² Lee, *supra* note 117, at 272-279.

¹²³ Land Matrix, Global: By Intention. <<https://landmatrix.org/data/by-intention/?>>. Accessed 29 May 2019.

¹²⁴ Land Matrix, Global: United States of America, <https://landmatrix.org/data/by-investor-country/united-states-of-america/?order_by=>>. Accessed 29 May 2019.

¹²⁵ Land Matrix, Public Database on Land Deals, <https://landmatrix.org> (Accessed 29 May 2019).

¹²⁶ Fred Magdoff, *Twenty-First-Century Land Grabs: Accumulation by Agricultural Dispossession*, 65(6) *Monthly Review* (1 November 2013), <<https://monthlyreview.org/2013/11/01/twenty-first-century-land-grabs/>>. See also Megan Dooly, *Note, International Land Grabbing: How Iowa Anti-Corporate Farming and Alien Landowner Laws, As a Model, Can Decrease the Practice in Developing Countries*, 19 *Drake Journal of Agricultural Law* 305, 310-312 (2014).

¹²⁷ Almost 40 percent of farmland is rented, often from owners, including retired farmers, who are not farm operators. Bigelow et al., *supra* note 11, at iii, 15-17.

¹²⁸ NASS, *supra* note 2, at 7, 170-171, Tables 1, 74. Corporate farms averaged 1,194 acres, but many are larger.

¹²⁹ These include Oklahoma, Nebraska, South Dakota, North Dakota, Wisconsin, Minnesota, Kansas, Missouri, and Iowa. Some have been challenged in court. See National Agricultural Law Center, *Corporate Farming Laws*

third of US agricultural land, “restrict corporations [and other limited-liability entities] from owning agricultural land and, often, engaging in production agriculture, unless the corporation is closely held (usually by family members) and active farmers or rural residents are included as owners.”¹³⁰ Numerous arguments, including concerns about large-scale land ownership, support existence of these laws, but many view them simply as attempts to protect family farms.¹³¹ The laws generally prohibit corporations from specific agricultural ownership and activities. Exceptions apply to some agricultural activities (for example, poultry or swine production or operation of livestock facilities), and some corporations -- family farm corporations with restricted size and ownership structure -- are permitted to own and to operate agricultural land.¹³² Because fewer than one percent of agricultural corporations are non-family corporations, the family-farm exemption is significant.

Restrictions on corporate ownership are vulnerable to constitutional challenge,¹³³ and a state law that discriminates against interstate commerce is likely to be invalid. Federal appellate court judgments held that corporate farming restrictions in the Nebraska and the South Dakota constitutions violated the Dormant Commerce Clause.¹³⁴ The Nebraska provision discriminated against residents of other states,¹³⁵ and the South Dakota restriction had been enacted with discriminatory intent.¹³⁶ A federal district court held that an Iowa law restricting out-of-state swine processors violated the Dormant Commerce Clause.¹³⁷ In September 2018, a federal district court determined that the North Dakota family farm exception, which did not apply to out-of-state family corporations, had a discriminatory effect and therefore violated the Dormant Commerce Clause, but the court did not strike the entire law.¹³⁸

In the majority of states that have no restrictions on corporate farmland ownership or farming, corporations are generally free to invest in farmland, carry out agricultural

-- An Overview, <<https://nationalaglawcenter.org/overview/corporatefarminglaws/>>. Accessed 31 May 2019. For analysis of provisions in Kansas and Iowa, see J. Michael Boomershine, Jr., Note, *The Battle over America's Farmlands: Corporate Farming Practices and Legislative Attempts at Preserving the Family Farm*, 21(3) Drake Journal of Agricultural Law 361, 373-384 (2016).

¹³⁰ Anthony B. Schutz, *Corporate-Farming Measures in a Post-Jones World*, 14 Drake Journal of Agricultural Law 97, 98 (2009). A few states (Arizona, South Carolina, Texas, West Virginia) have other restrictions on corporate ownership. *Id.* at 106-107.

¹³¹ See *id.* at 98-102 for a list of justifications.

¹³² *Id.* at 107-116 (providing details about restrictions in 9 states). In some states, a family member must live on the farm or be engaged in farming.

¹³³ The Commerce Clause of the US Constitution authorizes Congress “to regulate commerce ... among the several states.” U.S. Const. art. I, § 8, cl. 3. Even when Congress has not regulated, the so-called Dormant Commerce Clause prohibits states from enacting laws that discriminate against, or unduly burden, interstate commerce.

¹³⁴ Nebraska Const. art. XII, § 8(1)(A) (adopted in 1982); South Dakota Const., art. XVII, § 21 (approved in 1998).

¹³⁵ *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006) (finding both discriminatory intent and discrimination on the face of the measure).

¹³⁶ *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003). The South Dakota Family Farm Act of 1974 continues to govern corporate farming. S.D. Codified Laws §§ 47-9A-1 to 47-9A-23.

¹³⁷ See also *Smithfield Foods, Inc. v. Miller*, 241 F. Supp. 2d 978 (S.D. Iowa 2003), a federal district court decision holding the Iowa law, Iowa Code § 9H.2, which restricted activities of out-of-state swine processors, violated the Dormant Commerce Clause.

¹³⁸ *North Dakota Farm Bureau v. Stenehjem*, 333 F. Supp. 3d 900 (D ND 2018). In 2015, North Dakota amended its 1932 anti-corporate farming law to permit corporations to operate dairy farms or swine production facilities on a maximum of 640 acres (adding ND Code § 10-06.1-12.1). In 2016, 76% percent of voters rejected this statute by referendum, restoring the 1932 law. The ND Farm Bureau lawsuit challenged the 1932 law as discriminatory and unconstitutional.

operations, and lease land to producers.¹³⁹ For example, Nuveen, a farmland partnership fund of a large pension company Teachers Insurance and Annuity Association, owns more than 251,000 acres of agricultural land in 11 US states without restrictions on corporate ownership. Nuveen's farmland in the US grows row crops (cereals, corn, cotton, soy, vegetables, and others), grapes for wine, nuts, and perennial crops (apples, avocados, cherries, citrus).¹⁴⁰ Another investor, Ceres Farms, owns more than 122,000 mostly-tillable acres in 10 states, and leases that farmland to experienced local farmers.¹⁴¹ Institutions -- including pension fund, investment banks, and others -- buy agricultural land in part because investments in farmland have performed well historically.¹⁴²

VII. Conclusion

As the discussion above indicates, the United States enjoys vast areas of productive agricultural land, including cultivated cropland, pasture and rangeland, and forests. That agricultural land is critical for production of food, fiber, and timber, but also provides environmental amenities and economic benefits for the nation and the world. State and federal programs encourage owners of farmland to keep their land in agricultural use. Federal Farm Bills, most recently in 2018, impose conservation compliance requirements on highly erodible land, support retirement of vulnerable land areas, and provide financial incentives for conservation practices on working land.

Ownership of US agricultural land is subject to few restrictions, and most land transfers occur via sale (often to relatives) or inheritance. Federal and state programs help to make land available to beginning and other qualified farmers by providing loans and other assistance. Owners of farmland need no specialized education in agriculture; non-farming owners often rent their land to tenants. Aliens may own farmland, subject to a federal reporting requirement, but a few states limit alien ownership. Land grabbing is not a significant problem, and corporations may own farmland, subject to restrictions in a few states. Most agricultural land, however, is owned by individuals and families, who bear the responsibility of protecting that farmland for future generations. The federal and state measures described in this Report will help US farmers to carry out that responsibility.

¹³⁹ In 2014, non-operators owned about 31 percent of US land in farms. Of those acres 3 percent (32 million acres) were owned by corporations (family and nonfamily). Bigelow et al., *supra* note 11, at 15.

¹⁴⁰ Nuveen, Farmland transparency: interactive map and policies, <<https://www.nuveen.com/institutional/farmland-map>> (showing land ownership in the US, Australia, New Zealand, Brazil, Chile, and Poland). Accessed 4 June 2019. Nuveen owns land in several other countries, including 739,000 acres in Brazil. See Ed Maixner & Sara Wyant, Big changes ahead in land ownership and farm operators?, AgriPulse, 5 February 2019.

¹⁴¹ Ceres Partners, Farmland (2019), <<https://www.cerespartners.com/farmland>>. Accessed 4 June 2019.

¹⁴² Keiffer, *supra* note 110.