I. What This Book Is About

Until now, there has been no single volume written on the law of agricultural land preservation. This book covers the legal principles, federal and state legal requirements, and legal issues that have arisen in the implementation of public and private agricultural preservation programs, federal tax and estate laws, court cases, and landowner financial issues and options that affect agricultural land preservation efforts. The primary purpose of agricultural land preservation is to prevent the conversion of privately owned farms and ranches to nonfarm uses (housing subdivisions, shopping malls, factories, and office parks) and, in the process, to curb sprawling development. A closely related purpose is to protect and maintain productive agricultural soils for current and future production of food and fiber. A third purpose is to sustain the viability of individual farms and ranches and to support local agricultural industries.

There are several ways that agricultural land preservation can occur: the sale or donation of conservation easements, the transfer of development rights, fee simple acquisition, and limited development. For the donation of conservation easements, especially to qualify for income and estate tax benefits, an extensive body of federal law exists, primarily in section 170(h) of the Internal Revenue Code and in section 1.170 of the Treasury Regulations (see appendix 1 and appendix 2). Other legal guidance in the use of conservation easements comes from cases in the U.S. Tax Court as well as cases in state courts and other federal courts. In the last fifteen years, there have been some two hundred cases, either decided or pending, involving
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conservation easements. In addition, the Internal Revenue Service produces private letter rulings, notices, and other publications on the tax aspects of land preservation; the U.S. Treasury also issues helpful publications. In sum, statutory laws and legal rulings and interpretations of law relevant to the preservation of agricultural land are constantly evolving. It is important for attorneys advising clients to stay up to date on the latest legal developments.

The transfer of development rights is based on state enabling legislation and carried out by local governments. Fee simple acquisition is a matter of real estate law in each state. Limited development involves developing some land but not as much as allowed under the current zoning with the remaining land preserved by the sale or donation of a conservation easement. Limited development depends on both local land use regulations and federal tax laws.

State and federal laws govern the operation of private nonprofit organizations (most often known as land trusts) as well as the procedures of government agencies that preserve agricultural land. Compliance with these laws is essential for transparent and legally durable preservation transactions, the trust of landowners, and long-term financial support from donors and the general public.

II. Why Agricultural Land Preservation Is Important

Agriculture is one of America’s leading industries, generating $835 billion in economic activity in 2014 or about 5 percent of the nation’s gross domestic product. More than 9 percent of the nation’s workforce was employed in agriculture and related industries that year. Exports of agricultural goods were worth $133 billion in 2015, and agriculture is one of the few sectors in which the United States enjoys a trade surplus with the rest of the world.

Farmers and ranchers own most of America’s privately held land, about 914 million acres as of 2012. Of this total, 390 million acres are cropland, 77 million acres are woodland, and 415 million acres are rangeland or pasture. The remaining land is in farmsteads and fallow cropland.4

Much of the United States possesses high-quality soils, adequate rainfall, and favorable temperatures. These physical conditions along with capable farm and ranch operators and modern technology have resulted in an abundant production of crops and livestock. In addition, agricultural land provides important environmental benefits, such as water recharge, wetlands, carbon retention, and wildlife habitat. In sum, America’s agricultural land contributes to the national security by providing the majority of food that Americans eat along with valuable ecosystem services.

Agriculture is a dynamic industry. Farm and ranch operators constantly incorporate new technologies and adapt to changing weather and market conditions. For instance, farming with drones was unknown twenty years ago; today it is growing in popularity. Organic agricultural production and farmers’ markets were rare twenty years ago; today there are more than 8,200 farmers’ markets, and more than $43 billion worth of organic food and nonfood products were sold in 2015.5 Agricultural productivity increased substantially during the twentieth century, thanks to agricultural machinery, chemicals, hybrid seeds, and improved animal husbandry. But the combination of rising world populations (expected to reach 9.7 billion by 2050 from 7.4 billion in 2016)6, the shortage of new arable land, and the leveling off of crop and livestock yields means that agricultural land will become more precious for providing the food that humans need to survive.

Nationally, the amount of land in farms and ranches has been declining since the 1930s. A major reason is the rising population of the United States, which more than doubled from 151 million in 1950 to 324 million in 2016. More people need more places to live, work, shop, go to school, and recreate. Many U.S. cities reached their population peak in 1950, and since then, suburbs have gained an increasing share of the national population. Suburban growth became possible primarily through the extension of sewer and water lines, the construction of interstate highways and arterial roads, and the conversion of agricultural land to houses, shopping malls, factories, office complexes, and schools. In addition, farmers and ranchers near rural resorts and amenities have felt the increased demand for second homes and related commercial development. As of 2010, the owners of an estimated 94 million acres of agricultural land faced intense pressures to sell their land for development.

Farmland is usually the easiest land to develop because of its deep, well-drained soils and gentle topography. In 1981, the National Agricultural Lands Study reported that approximately 3 million acres of America’s agricultural land were being converted to other uses each year. While the number of acres converted became the subject of some debate, the reality was that some regions were losing agricultural land more rapidly than others. For instance, the densely settled Northeast experienced the most rapid conversion of agricultural land, and this is where the nation’s first state and local government programs to preserve agricultural land arose in the 1970s.

By the 1990s, the preservation of farmland and ranchland had become a nationwide issue. In 1996, the federal government enacted the Farm and Ranchland Protection Program to provide grants to state and local governments and (after 2002) land trusts to purchase conservation easements.

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from willing landowners. This federal program continues today as part of the Agricultural Conservation Easement Program (hereafter, ACEP), included in the 2014 Farm Bill.

Preserving farmland and ranchland is a complex process. Attorneys who advise landowners, land trusts, or government agencies need training and experience in conservation law, nonprofit law, tax law, drafting conservation easements and other documents, and real estate settlements. They must also be familiar with the laws of the state in which their clients are preserving agricultural land.

Willing landowners are the key actors in the preservation of agricultural land. Either they see preservation as a way to continue operating their farms or ranches or they are willing to preserve their land so that someone else within or outside of the family can eventually own and manage it. Landowners often need legal advice about whether and how the preservation of their land can help them achieve their personal, financial, and family goals.

Land trusts and administrators of government land preservation programs must understand the legal aspects of operating their organizations, funding arrangements, the landowner’s taxation options in land preservation, real estate transactions, and monitoring and enforcing conservation easements. Legal advisors can help preservation organizations comply with state and federal laws and complete real estate transactions for preservation that will stand the test of time. However, land trusts and government agencies should not give legal advice to individual landowners. The landowners should obtain their own legal counsel and tax advisors.

Land trusts and government administrators must have a strategy for preservation. Arguably, the pattern of preservation — large contiguous blocks rather than scattered parcels — is more important than the number of acres preserved. This means that land trusts and government administrators must

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understand local land use ordinances and regulations, such as zoning, that can support or hinder agricultural land preservation efforts.

III. Purposes of This Book

This book has three main purposes:

1. To guide attorneys in advising landowning clients who wish to explore agricultural land preservation options;
2. To guide attorneys who advise private, nonprofit land trusts; and
3. To guide attorneys who advise government agencies that preserve farmland.

We hope that land trusts, state and local governments, landowners, interested citizens, and students will also find this book useful.

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Sooner or later, every farmer or rancher faces three choices of what to do with the land:

1. Sell it to the highest bidder, often for development;
2. Pass it on to a family member by sale, gift, or will; or
3. Sell it to another farmer or rancher.

Farmers and ranchers face three main challenges: 1) maintaining the profitability of their agricultural business, 2) passing their property to the next generation, and 3) resisting the temptation to sell land for development. A farm or ranch is first and foremost a business. Although part-time farmers and ranchers rely heavily on off-farm income (see chapter 2), commercial farmers and ranchers earn most of their income from agriculture. Commercial operators depend on the profitability of their agricultural businesses. If they cannot make a good living from farming or ranching, they will explore selling their land. Moreover, most farms and ranches are undercapitalized. The owners tend to be cash poor and land rich. The sale of land to cover college expenses for children, a major medical expense, or to set up a retirement fund is not uncommon.
Passing a farm or ranch to the next generation often involves more than a simple will. Transition planning and estate planning with the help of an attorney is essential (see chapter 6). In the Tax Cuts and Jobs Act of 2017, Congress helped the inheritance situation by raising the unified credit — the amount a person can pass on to heirs free of federal estate tax — to $11.2 million, indexed to inflation, from 2018 through 2025.\footnote{See Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, 26 U.S.C. § 2010 (2010). The unified credit in 2017 exempted the first $5.49 million of an estate from federal estate taxes. The Tax Cuts and Jobs Act of 2017 increased the unified credit to exempt $10 million of an estate from federal estate taxes, beginning in 2018 and expiring at the end of 2025. The $10 million exemption is indexed to inflation, beginning in 2012. See I.R.C. § 2010 (c)(3)(C). So, for a taxpayer who dies in 2018, the estate exemption is $11.2 million.}

A central question in passing the farm or ranch to the next generation is whether there are any family members who are interested in taking over the operation. Next, how many heirs are there, and will they be treated equally in their inheritance? For instance, there are often two or more children who would inherit the farm or ranch, but only one child wants to continue the operation. Can that child afford to buy out his or her siblings? A complicating factor has been the increase in land values over the past thirty years, making it more difficult for one child to buy out the siblings. As a result, the siblings can compel a sale of the farm or ranch, often for development, to turn the inherited farm into cash.

The succession on farms and ranches is a rising concern, given that the average age of farmers nationwide was fifty-eight as of 2012.\footnote{Preliminary Report Highlights: U.S. Farms and Farmers, 2012, U.S. Department of Agriculture, Census of Agriculture (2014), https://www.agcensus.usda.gov/Publications/2012/Preliminary_Report/Highlights.pdf (last visited July 27, 2016).} The high cost of acquiring a farm or ranch, the often low rate of return on investment, and the long hours of hard work are all common challenges.

The rise in land values has been especially prominent in metropolitan counties where virtually all agricultural land is worth more for real estate development than for raising crops and livestock. Communities that have already lost considerable amounts of agricultural land to development are not likely to retain many farmers or ranchers. Property taxes rise along with increased development and conflicts between farmers and nonfarm neighbors over dust, smells, pesticides, the sound of machinery
operating outside of nine-to-five weekday hours, and slow-moving farm machinery on roads.

Agricultural land preservation can help farmers and ranchers by providing needed capital to strengthen the profitability of the agricultural operation, facilitate the transfer of the farm or ranch to the next generation, and offer an alternative to selling land for development.

IV. What Is Agricultural Land Preservation?

A landowner in America owns a bundle of rights to the land. These include air rights, water rights, mineral rights, the right to lease or sell the land, the right to pass the land to heirs, the right to use the land, and the right to develop the land. These rights make up the fee simple interest. A nonprofit land trust or a government agency may purchase agricultural land in fee simple and keep it in agricultural production. This is a form of agricultural land preservation, but the question remains: How long does the land trust or government agency want to hold on to the land or continue its use in agriculture?

The most popular technique for preserving agricultural land is known as less-than-fee acquisition. A landowner may sever and sell or donate any one right in the bundle of landownership rights. The landowner can sever the right to develop the land and sell or donate that right to a qualified grantee/donee organization, such as a nonprofit land trust or an agency of a city, township, county, state, or federal government. The right to develop the land is then limited to open space, farming, and/or forestry uses through a conservation easement.

A conservation easement is an interest in land that is conveyed by a legally binding deed of conservation easement, which spells out the permitted and forbidden uses on the land.15 The conservation easement is signed by the landowner.

15 Conservation easements are real property interests according to the Uniform Conservation Easement Act, the law of most states, and at least two Internal Revenue Service private letter rulings. See Timothy Lindstrom, A Tax Guide to Conservation Easements 26 (Island Press 2008); and Tom Daniels & Deborah Bowers, Holding Our Ground: Protecting America’s Farms and Farmland 160 (Island Press 1997).
landowner and the grantee/donee organization that will hold the easement and is recorded in the county courthouse. The conservation easement becomes part of the landowner’s title of record, and the conservation easement runs with the land, applying to future landowners as well. A conservation easement will show up in a title search, alerting potential buyers that only specific uses are allowed on the property.

Most conservation easements exist in perpetuity, in part because perpetuity is required in order for the donation of a conservation easement to qualify as a charitable contribution for a federal income tax deduction or estate tax deduction. Term easements that endure for less than perpetuity do exist, such as thirty-year easements under the federal ACEP. At the end of the term, the conservation easement is extinguished.

Conservation easements have three legal sources: the common law, federal law, and state law. English common law spelled out the legal basis for private property rights. Federal law for conservation easements began with the Tax Reform Act of 1976 and the Tax Treatment Extension Act of 1980 and allowed the donation of easements as an income tax and estate tax deduction in Internal Revenue Code section 170(h) and Treasury Regulations 1.170. The Uniform Conservation Easement Act (hereafter, UCEA) of 1981 set forth a model of state enabling legislation for conservation easements. Twenty-seven states have adopted the UCEA substantially or in part, and twenty-two states have enacted their own enabling legislation. Only North Dakota has not enacted a modern easement statute. See chapter 4 for an in-depth discussion of the legal principles underlying conservation easements.

There are three ways in which a perpetual conservation easement may be extinguished. A government agency can use its power of eminent domain to condemn land under a conservation easement for a public purpose.
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Box 1.1 Agricultural Land Protection versus Agricultural Land Preservation

It is important to note the distinction between the protection and preservation of agricultural land. Farmland preservation is strictly voluntary, involving the sale or donation of a perpetual conservation easement or the sale of land in fee simple by a willing landowner to a government agency or to a qualified private, nonprofit land trust. Farmland protection techniques are not as restrictive as a perpetual conservation easement and may be changed through an act of the local or state government. Hence, farmland protection techniques are best seen as temporary limits on development and as moderate financial incentives for farmers. Farmland protection techniques include differential assessment in the property taxation of farmland (based on the agricultural use-value of the land, not the highest and best use), low-density agricultural zoning, urban growth boundaries, right-to-farm laws, agricultural districts, and a governor’s executive order to direct state infrastructure projects away from farmland. Farmland protection techniques come from political decisions, usually by county or municipal governments, and hence are vulnerable to changes in elected officials and representatives. For a detailed discussion on combining agricultural land preservation and agricultural land protection techniques in a coordinated package, see chapter 10.

and pay just compensation as required by the Fifth Amendment to the U.S. Constitution. For instance, if a state highway department needed to construct a public road through preserved farmland, the highway department could condemn the land, pay the landowner and the easement holder a court-determined sum of money (“just compensation”), take ownership of the land, and build the road. Second, a land trust or government agency could release a conservation easement, declaring it no longer active. Such a release, however, could cause federal tax problems for the landowner if the conservation easement was donated in whole or in part, and the former easement holder could come under scrutiny from the Internal Revenue Service. We do not advocate the release of a conservation easement unless it is impossible to protect the conservation values of the property as described in the deed of easement. Third, if the government agency or private land trust that holds a conservation easement does not monitor the preserved
agricultural land for compliance with the terms of the easement, the landowner could appeal to a court to have the conservation easement overturned. The holder of a conservation easement has the responsibility to monitor the property — usually visiting the property at least once a year — and to enforce the terms of the conservation easement. If the easement holder does not perform these duties, a judge could rule that the holder does not care about the conservation easement and that it is no longer valid. As of 2017, there was a total of more than 146,000 conservation easements nationwide.\(^\text{19}\) A 2008 survey of land trusts reported that land trusts won fourteen lawsuits, lost one, and settled twenty-one out of court.\(^\text{20}\) In short, conservation easements are durable legal documents.

V. The Origins of Farmland Preservation in the United States

Farmland preservation in the United States is more than forty years old. Suffolk County, New York, at the eastern end of Long Island, created the first public farmland preservation program in the mid-1970s and purchased what were called *development rights* even before New York or most other states had adopted conservation easement enabling laws.\(^\text{21}\) In 1977, the State of Maryland created the first statewide funding program for the purchase of conservation easements to preserve farmland. Today, 32 states and more than 150 local governments have enacted legislation to create agricultural land preservation programs.\(^\text{22}\) Nearly six million acres of farmland have been preserved through the purchase and donation of...
conservation easements.\textsuperscript{23} State farmland preservation programs have spent $4.1 billion to preserve 2.8 million acres as of 2017.\textsuperscript{24} Local governments have preserved 470,000 acres of agricultural land as of 2016.\textsuperscript{25} More than five hundred private land trusts have listed preserving farmland as an important priority.\textsuperscript{26} Land trusts have preserved about 2.5 million acres of agricultural land. This acreage figure includes the more than two million acres of rangeland preserved by seven statewide land trusts in the western United States that make up the Partnership of Rangeland Trusts (PORT).\textsuperscript{27}

The Land Trust Alliance, founded in 1982 by concerned land conservationists, is an umbrella organization with more than one thousand private, nonprofit land trusts as members. The Land Trust Alliance provides land trusts with information, training, and advice. The Land Trust Alliance was instrumental in working with Congress to pass legislation for more favorable tax treatment of easement donations in 2015.\textsuperscript{28} The Land Trust Alliance has produced an excellent \textit{Land Trust Standards and Practices} guide on how to operate a land trust.\textsuperscript{29} The Alliance also created an accreditation program for land trusts, and as of 2016, there were 342 accredited land trusts, which accounted for more than 75 percent of the land preserved by land trusts.\textsuperscript{30}

The challenges that agricultural land preservationists address vary somewhat from place to place. In many metropolitan areas, the rapid pace


\textsuperscript{24} See Farmland Information Center, supra note 22.


\textsuperscript{26} National Land Survey, 2010-11, \textsc{Land Trust Alliance} (2011).

\textsuperscript{27} Tom Daniels & Jack Wright, Preserving Large Landscapes, \textsc{Planning} 38 (Nov. 2015). The seven land trusts are the California Rangeland Trust, Colorado Cattlemen’s Agricultural Land Trust, Ranchland Trust of Kansas, Montana Land Reliance, Oregon Rangeland Trust, Texas Agricultural Land Trust, and Wyoming Stock Growers Land Trust.


of residential and commercial development has converted substantial amounts of agricultural land, and the remaining farmland may disappear without a preservation program. Most farmland preservation programs aim to protect high-quality agricultural soils, maintain a source of locally grown produce, and keep agriculture as part of the local economy. In addition, many residents want to retain the open space and scenic vistas that agricultural landscapes provide.

The purchase of a conservation easement by a government agency or a qualified land trust can help to achieve these goals. A farmer or rancher can choose to sell a conservation easement for cash without having to sell land for development. The landowner can use the easement money for a variety of purposes, such as to set up a retirement fund, reinvest in the farm operation, send children to college, or pay down debt. The agricultural land is restricted to agricultural uses, but the land still has value, and the value of the preserved agricultural land will be more affordable to other farmers or ranchers than unrestricted land.

The preservation of agricultural land can stabilize and enhance the business climate for agriculture and give landowners confidence to reinvest in their operations. When large areas of agricultural land are preserved in a community, there are likely to be fewer nonfarm residents and fewer land use conflicts. Ideally, over time, enough agricultural land can be preserved in a community or region to maintain a “critical mass” of farms and farmland to enable the farm support businesses — machinery dealers, feed mills, hardware stores, and transportation and processing companies — to remain profitable and in operation and help to sustain the overall farming industry.

The benefits of agricultural land preservation accrue to the general public as well. The American Farmland Trust has conducted several studies on the cost of community services. Every study has shown that the tax revenue that farmland generates from property taxes is greater than the cost of the public services that the property uses. On average, residential

development costs more in public services than it yields in property taxes. These studies suggest that farmland preservation is a good public fiscal strategy over the long run.

People enjoy the open space and scenic views that agriculture offers. In some communities, the farms or ranches are tourist attractions, from bed-and-breakfast operations to pick-your-own produce operations.
Chapter 1  The Law of Agricultural Land Preservation

The public often supports preserving agricultural land for its scenic qualities as well as for the production of fresh locally grown food for local markets. The popularity of farmers’ markets, roadside farm stands, and community-supported agriculture projects with direct sales from farmers to consumers has steadily increased in recent years.\footnote{Direct sales from farmers to consumers were worth $1.3 billion in 2012, and 144,000 farms participated. There were 8,200 farmers’ markets in 2014 and more than 12,000 farms involved in community-supported agriculture in 2012. \textit{Highlights: Farmers Marketing, 2012}, U.S. DEPARTMENT OF AGRICULTURE, CENSUS OF AGRICULTURE (2014), https://www.agcensus.usda.gov/Publications/2012/Online_Resources/Highlights/Farmers_Marketing/Highlights_Farmers_Marketing.pdf (last visited July 27, 2016); and \textit{U.S. DEPARTMENT OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, supra note 5.}}

VI. How This Book Is Organized

Chapter 2 provides an overview of American agriculture. An understanding of the agricultural industry is important for identifying how individual farms and ranches fit in with national trends and whether agricultural land preservation is well suited to a particular farm or ranch. Information on agriculture includes land in farms and ranches, the importance of agriculture to the national economy, the business of farming and ranching, and the role of federal farm programs.

In chapter 3, we review the national constitutional framework that establishes the powers of the federal government and the constitutional limitations that exist on national, state, and local governments, as they relate to the preservation of agricultural land.

In chapter 4, we discuss the legal origins and principles of conservation easements, drawing on the common law, federal law, and state statute.

Chapter 5 explains the income tax aspects and federal law and case law of conservation easement donations. The chapter describes what a land trust or government agency must do in order to comply with Internal Revenue Code 170(h) and Treasury Regulations 1.170 for a donated conservation easement to qualify as a charitable contribution and an income tax deduction.\footnote{See I.R.C. § 170(h), especially § 170(h)(4). For farmland easements, see Letter Rulings 8422064, 8544036, 862307, 8711054. \textit{See also} Treas. Reg. § § 1.170A-14; and \textit{STEPHEN J. SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS} (Land Trust Alliance, 4th ed. 1997).}
Chapter 6 presents the estate and gift tax issues that are involved in the transfer of a farm or ranch to heirs. The federal Internal Revenue Code provides preferential treatment for preserved farmland that passes through an estate.\footnote{See I.R.C. § 2031 (c).}

Chapter 7 reviews the federal spending programs for farmland preservation, especially the 2014 ACEP and its sample deed of easement.

Chapter 8 summarizes state and local government farmland preservation programs, featuring the purchase of agricultural conservation easements and the transfer of development rights. In addition, we describe payment options for purchased conservation easements.

Chapter 9 begins by explaining what a land trust is and its legal authority for preserving agricultural land. Next, the \textit{Land Trust Standards and Practices} serves as a guide to the legal and ethical requirements for operating a land trust and for real estate transactions, especially for conservation easement sales and donations. The chapter also discusses the most common legal challenges that land trusts face and presents the key elements of a sample agricultural conservation easement.

Agricultural land preservation programs work best when they are part of an integrated agricultural land planning and regulation effort. Chapter 10 presents how comprehensive plans, agricultural zoning, agricultural districts, growth boundaries, right-to-farm laws, and differential assessment for agricultural property taxation can work together with the acquisition of conservation easements to limit farmland conversion, minimize conflicts with nonfarm neighbors, and promote a positive business climate for farms and ranches.

Chapter 11 provides a summary of the legal issues in agricultural land preservation and offers recommendations for successful preservation efforts.

At the end of the book, there is a bibliography of sources and appendices that include the text of Internal Revenue Code section 170(h) and Treasury Regulations section 1.170, a sample federal agricultural conservation easement, and other information for conservation easement transactions.

We hope you find this book useful in your preservation work.