



# Inspirations for Creating a Long-Term Agricultural Lease for Agroforestry: A Workbook

LAST UPDATED:  
September 29, 2017

FIRST PUBLISHED:  
June 29, 2016

**By: Erin Hannum**

Research Attorney, Farm Commons  
[erin@farmcommons.org](mailto:erin@farmcommons.org)

[www.farmcommons.org](http://www.farmcommons.org)

**DISCLAIMER:** This guide does not provide legal advice or establish an attorney-client relationship between the reader and author. Always consult an attorney regarding your specific situation.

## TABLE OF CONTENTS

Workbook Overview: Exploring Long-Term Leases for Agroforestry	3
Who Is This Workbook for?	3
What Is Agroforestry?	4
What It Takes: The Vision, Commitment, Inputs, and Benefits of a Successful Long-Term Lease	7
Next Steps: Using This Workbook to Create a Successful Long-Term Lease	10
Getting Started: Questions Answered on Basic Legal Considerations Involved in a Long-Term Lease	16
Checklist: Walking through Key Elements of a Long-Term Agroforestry Lease	36
Checklist at a Glance	36
Checklist with Explanations	37
Sample Annotated Long-Term Lease Agreement	55



This work was supported by the [USDA National Agroforestry Center](https://nac.unl.edu), a partnership of the U.S. Forest Service and the Natural Resources Conservation Service (<https://nac.unl.edu>). Any opinions, findings, conclusions or recommendations expressed within do not necessarily reflect the view of USDA, NAC, UFS or NRC.

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident. Persons with disabilities who require alternative means of communication for program information (e.g., Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720-2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English. To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at [https://www.ascr.usda.gov/complaint\\_filing\\_cust.html](https://www.ascr.usda.gov/complaint_filing_cust.html) and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by: (1) mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue, SW, Washington, D.C. 20250-9410; (2) fax: (202) 690-7442; or (3) email: [program.intake@usda.gov](mailto:program.intake@usda.gov).

## Workbook Overview: Exploring Long-Term Leases for Agroforestry

### Who Is This Workbook for?

Are you a landowner, farmer, or advocate for farmland conservation who has a long-term vision for a piece of land? Perhaps this vision includes restoring the land's ecological balance, securing some diversified income, building a thriving farm operation, creating a rewarding livelihood, or leaving a legacy for future generations. The long-term agroforestry lease offers one potential solution for folks who are willing to collaborate and commit to making such visions a reality..

“The long-term lease allows the farmer to secure long-term land tenure without requiring a lot of money upfront.”

**Why long-term leases?** A long-term lease presents a win-win situation for farmers and landowners. Beginning and experienced farmers alike seek long-term access to land; however, many don't have the funds to purchase land outright. The long-term lease allows the farmer to secure long-term land tenure without requiring a lot of money upfront. Long-term leases are particularly key for farmers engaged in agroforestry ventures, as perennial woody crops inherently require an extended time before becoming productive. The farmer thus needs predictable and long-term land access to make any arrangement worthwhile.

Owners of agricultural land—whether they're aging, absentee, non-farmers, only cultivating part of the land, or are otherwise wanting to join forces with another farmer—often want their land to be taken care of or used for farming practices but don't have the time, resources, or desire to do it themselves. Perhaps they need additional income as well. The long-term lease allows them to secure a long-term tenant who they can count on, as well as supplemental income from rent. By prescribing sustainable and conservation-oriented farming practices, a long-term lease can also help facilitate ecological restoration and protection of the land for the benefit of their heirs and future generations.

**Why are we focusing on agroforestry?** Agroforestry is showing great promise in advancing sustainable land use practices, more resilient local food systems, and economic prosperity for individuals and communities. It's been gaining momentum in certain pockets of the United States. This workbook offers an overview of legal considerations for long-term leases that address key particularities of agroforestry.

////////////////////////////////////

“Agroforestry is a suite of practices and tools that involves intentionally integrating perennial trees and shrubs into traditional crop and animal farming systems.”

////////////////////////////////////

### What if I’m interested in a long-term agricultural lease, but I’m not involved or interested in an “agroforestry” venture?

This workbook may still be of benefit! While much of this workbook is specific to agroforestry, many of the issues raised are relevant to long-term leases for annual crop or livestock farming. In particular, the recent resurgence of pasture-based livestock farming practices and silvopasture has led to growing support for creative multi-party arrangements for securing long-term land tenure—often involving farmers, landowners, and even investors. Long-term leases can be an optimal land tenure option for these types of arrangements.

For any long-term agricultural lease, both the landowner and the farmer generally share a vested interest in the success of the farming operation. They too have a lot at stake and a lot to gain. Regardless of whether you’re involved in an agroforestry venture, a pasture-based livestock operation, or even a more traditional annual farming operation, working through this workbook can help you identify key issues to consider for a successful long-term agricultural lease.

### What Is Agroforestry?

Agroforestry is a suite of practices and tools that involves intentionally integrating perennial trees and shrubs into traditional crop and animal farming systems. This innovative land management approach of blending forestry and agriculture can enhance productivity, profitability, and environmental stewardship of the land.

Agroforestry is thus a promising tool for farmers, ranchers, landowners, and others who share an interest in protecting natural resources, creating profitable farming operations, promoting sustainable and conservation-oriented land use practices, and developing more resilient food systems. Agroforestry creates opportunities for landowners, farmers, and communities by supporting:

- sustainable farms, ranches, and woodlands
- diversified income streams for farmers and landowners
- healthy and sustaining jobs
- clean air and water
- preserved forests and working lands
- protected wildlife habitat

- enhanced soil health
- safe and healthy food sources
- local and regional food security
- energy conservation
- carbon sequestration
- resilience to floods, droughts, and other effects of climate change
- bioenergy production
- increased prosperity in rural communities

### **Agroforestry: A sampling of commonly used practices and perennial plants**

The suite of agroforestry practices and tools are ever evolving. The following highlights a few of the many specific practices that are commonly used in agroforestry operations today:

- **Silvopasture:** This practice involves integrating forestry and grazing in a way that mutually benefits the forest and the domesticated animals. Benefits to the landowner and farmer include enhanced soil quality as well as increased long-term income from the joint production of trees and grazing animals—including pasture-raised animal products (meat, dairy, and eggs).
- **Alley cropping:** Food, forage, or specialty crops are grown between rows of trees. Alley cropping can help prevent erosion, provide protection to the crops, and help to diversify farm income.
- **Riparian buffers, hedgerows, and windbreaks:** These practices involve creating a vegetated area made up of wild shrubs and trees as a buffer strip. The buffer strip could be used to protect streams, rivers, and lakes (i.e., riparian buffers) or other areas such as roads or fields (i.e., hedgerows and windbreaks). They can play a key role in increasing water quality as well as shielding crops, native habitats, and even roads from adjacent land uses. In agroforestry, such vegetative buffer strips often include the incorporation of edible crops, which again helps to bring in additional farm income.
- **Forest farming:** The landowner leases a woodlot for mushroom or other native wild food and forest production. Forest farming provides yet another opportunity for diversified income while preserving the native state of the forest.

The high-value perennial species that can be cultivated in an agroforestry operation are innumerable. The following highlights some common types of trees and shrubs that are being incorporated into agroforestry ventures here in the United States:

- **Nut trees and shrubs:** Black walnut, chestnut, hazelnut, and pecan
- **Fruit trees and shrubs:** Apple, cherry, cranberry, currant, elderberry, gooseberry, grape, hawthorn, juneberry, mulberry, pawpaw, plum, and raspberry
- **Hardwood trees:** Black walnut, ash, maple, and oak
- **Softwood trees:** Cedar, fir, juniper, pine, poplar, and spruce
- **Herbs and other specialty crops:** Asparagus, dandelion (root), ginseng, goldenseal, and mushrooms

Agroforestry has been practiced for centuries by traditional and indigenous communities in the United States and around the world. Contemporary farmers and scientists also continue to develop innovations to make agroforestry more productive, profitable, and ecological. In 2011, the USDA released the Agroforestry Strategic Framework to support the science and adoption of agroforestry. Eight USDA agencies—including the Forest Service, Farm Service Agency, Natural Resources Conservation Service, Rural Development, and Agricultural Marketing Service—make up the USDA’s Agroforestry Executive Steering Committee. They are working with farmers, landowners, and other stakeholders throughout the country to expand the knowledge and integration of agroforestry practices. Widespread adoption and support of agroforestry can help ensure the long-term health and sustainability of lands, local economies, and food systems for current and future generations.

### A word on terminology used in this workbook

“Agroforestry”

Other branches and names associated with agroforestry principles and practices include restoration agriculture, permaculture, evergreen agriculture, perennial polyculture, and more. Some folks may pick apart and point out the distinctions between these methods and terms. For our purposes here—the application of long-term leases to sustainably oriented

////////////////////////////////////

“The long-term, intricate, and place-specific nature of agroforestry requires the parties to the lease to co-create unique norms and standards that will govern the long-term arrangement.”

////////////////////////////////////

and multi-year food production practices—we are using “agroforestry” as a generic term that embodies these general principles.

#### “Trees”

Agroforestry typically involves all sorts of perennial plants and species: trees, shrubs, vines, and flowers. Throughout this workbook we often only use the term “trees”—such as when discussing the issue of allocating the value of “trees.” This is purely for simplicity’s sake. When the term “trees” is used, we are generally referring to the combination of any and all perennial plants that may be involved in a specific agroforestry venture. With that said, the lease should be sure to consider the particulars about the actual types and species of plants involved. For example, the establishment costs and risks, management needs and risk, as well as compatibility with future land uses will vary depending on whether the species is a tree or a flower as well as the particular species of tree or flower. A strong lease will consider and address such relevant nuances.

### **What It Takes: The Vision, Commitment, Inputs, and Benefits of a Successful Long-Term Lease**

The long-term, intricate, and place-specific nature of agroforestry requires the parties to the lease—the landowner and the farmer—to co-create unique norms and standards that will govern the long-term arrangement. Understanding upfront the vision, commitments, inputs, and benefits involved is a great place to start.

#### **The tenant farmer’s vision, commitment, and benefits**

The farmer typically brings a vision to restore the land and implement ecologically sound agricultural practices. He likely also aspires to establish a livelihood and build a profitable business. He’s committed to the long haul, because he’s not relying on the relatively immediate returns of annual crops. In this sense, he has more vested in the venture than a tenant farmer who is engaged in a traditional annual farming operation.

The upfront investment required for an agroforestry venture can be quite significant. It includes purchasing and planting a large number, and possibly wide range, of fruit- and nut-bearing trees and shrubs and other perennial plants. It will take years for many of these perennials to mature enough before the farmer

collects any significant yields and resulting profits. The upside is that once the yields are established and consistent, the farmer can maintain a profitable venture with relatively little ongoing input and energy. The trees, plants, and nature do much of the work for the years to come. As any farmer knows, this is a huge boon.

### **The landowner's vision, commitment, and benefits**

The landowner may share a vision of sustainability and commitment to stewardship of her land. Or, perhaps she is more intrigued by the consistent income from rent and considers the ecological benefits for her heirs and future generations as a plus. Regardless, the landowner also carries a heightened stake in the success of the agroforestry venture. By nature, the trees will inhabit the property longer than annual crops. The landowner thus needs to commit for an extended period, at least beyond just a season or single year.

Depending on the preference of the parties, the landowner may take a very hands-off or very hands-on approach in running the agroforestry operation—or somewhere in between. To whatever degree the landowner is involved, her commitment to the long-term lease will likely reap rewards. The property's value has potential to increase due to the improved soil and ecological balance. The increase in value will of course depend on various factors, including the size and location of the parcel, the suitability for row crops, development demand, what kind of trees and how they are spatially arranged, and so on. Regardless, the landowner will benefit from consistent rent payments and possibly enduring profits from the established yields of mature perennials long after the lease ends.

### **What does each party have to offer?**

In addition to bringing a vision and commitment to the table, both parties also have something tangible to offer. Generally, the farmer brings knowledge, skills, and time. The landowner brings access to and use of the land. Perhaps the landowner may also bring some of her own talent, time, equipment, or initial funding.

An agroforestry venture typically involves a significant investment upfront. This raises fundamental questions, such as:

- Who pays for this upfront purchase of trees?
- How is this initial investment accounted for in the lease or rent arrangement?
- How is the value of mature trees accounted for at the end of the lease?

////////////////////////////////////  
 “To whatever degree the landowner is involved, her commitment to the long-term lease will likely reap rewards.”  
 //////////////////////////////////////



The arrangement may also involve the introduction and management of livestock.

- Who is responsible for taking care of the livestock and who brings these skills?
- Are there specific animal husbandry practices or standards that the parties must abide by?

Typically, an agroforestry venture also embodies a vision and sensitivity toward the long-term ecological and value-added benefits for the land.

- Who brings this knowledge?
- How are conservation and ecological issues addressed in the lease so that the parties are all clear on the vision, objectives, and outcomes?

Determining who brings what at the outset and how it's all accounted for is a key element that the parties must discuss, negotiate, and agree upon before solidifying a lease arrangement.

**What are the shared benefits for all?**

While a successful arrangement requires shared visions, commitments, and inputs, both parties have potential to benefit immensely from the arrangement. It can be motivating to reflect upon the benefits throughout the process.

**Potential Benefits of a Long-Term Agricultural Lease in Agroforestry**

For the Farmer	For the Landowner
Gain affordable long-term tenure of land	Receive consistent income
Build skills and experience	Have a caretaker of the property
Establish a profitable business	Gain improvements to the property
Share in innovation of agroforestry practices	Realize increased property value
Develop a model to be replicated elsewhere	Receive conservation funding
Create a rewarding and enjoyable livelihood	Option to share in profits
Attain legacy of revitalizing the land	Attain legacy of revitalizing the land

“Determining who brings what at the outset and how it’s all accounted for is a key element that the parties must discuss, negotiate, and agree upon before solidifying the lease arrangement.”

### Reflection

Both parties can begin the process by asking themselves and reflecting upon the following:

- What are your overall visions and goals for the long-term lease arrangement?
- Describe your level of commitment to the long-term lease arrangement.
- What inputs do you have to bring at the outset (talent, time, money, other)?
- What inputs do you hope the other party will bring (talent, time, money, other)?
- What are the main short-term and long-term benefits you aspire toward (for yourself, the land, the other party, the greater community, anyone else)?

### Next Steps: Using This Workbook to Create a Successful Long-Term Lease

The process of creating a long-term lease can be broken down to four steps:

1. Understanding your goals and options
2. Developing and negotiating specific terms to meet your goals
3. Getting the lease agreement in writing
4. Following through with the lease agreement

#### Understanding your goals and options

Identifying your central goals and objectives can help ensure you stay on track along the way and that whatever overall arrangement you agree to is aligned with your ultimate vision. This step may require initial research to confirm that a long-term lease is your best option. It can be helpful to start by asking around: What are other people with similar goals and objectives doing? A good place to start for farmers would be local extension agents, farmer advocacy organizations in your region, as well as other farmers who you come across at various gatherings, workshops, conferences, or even farmers' markets. Landowners can also inquire with extension agents as well as land trusts and even real estate agents who may know of farmers looking for land.

The second section of this workbook—"Getting Started: Questions Answered on Basic Legal Considerations Involved in a Long-Term Lease"—can also help you with this initial research. It walks through the high-level differences between

“The ultimate purpose of this workbook is to help landowners and farmers understand key issues and better navigate the legal landscape of long-term leases.”

leases, licenses, and easements and compares long-term and short-term leases. It also highlights foundational legal issues that may come into play if and when you determine that a long-term lease is the preferred option. These include the importance of getting a lease in writing, the possibility of state-specific restrictions involving long-term leases, potential tax and financial implications, as well as determining how the value of the perennials are accounted for throughout the lease. These are all important elements to understand before entering a long-term lease arrangement. But don't be intimidated! The ultimate purpose of this workbook is to help landowners and farmers understand these key issues and better navigate the legal landscape of long-term leases.

### **Developing and negotiating specific terms to meet your goals**

The next step is to start contemplating the specific terms of the lease. These include obvious aspects such as:

- What's the rental price?
- What's the length of the lease?
- Who are the parties?

It also includes more nuanced aspects such as:

- Does the tenant have exclusive use of the land?
- Does the tenant have an option to buy the property if it ever goes up for sale?
- Are there any prohibited activities?
- Does the tenant have the right to use equipment and buildings? And so on.

The third section of this workbook—“Checklist: Walking through Key Elements of a Long-Term Agroforestry Lease”—serves to help parties to the long-term lease determine specific terms of the lease. It lists key issues, small and large, that a long-term lease should address. It includes a brief explanation of the significance for each as well as a list of key questions to guide the parties in figuring out how you want to address the issue.

It's not always easy to come to a resolution on all the issues all at once. This process can be time consuming. It can also be awkward as it requires discussing tough issues and decisions around various worst-case scenarios, such as death or even hostile disputes. The key to a successful lease is open communication and dialogue upfront. Discussing the worst-case scenarios at the get-go can pay off huge rewards over the long run. The parties are more likely to be on the same page and to know what to expect throughout the duration of the lease, particularly if

and when a worst-case scenario arises. Better yet, it helps prevent disputes from arising in the first place.

### **Getting the lease agreement in writing**

#### **Getting it in writing is essential**

A written agreement may be required for the lease to be meaningful and enforceable in court. This is discussed more in Section 2's Q&A—*Why get a long-term agricultural lease in writing?* Just as much or more important than legal enforceability is that going through the drafting process and having a comprehensive written agreement in place ensures the parties create a shared understanding. Not only will it ensure the key terms are clearly addressed, it helps prevent forgetfulness and misunderstanding should an issue or dispute arise. The parties can thereafter turn to the agreement, and the answer will be there. In the ideal scenario, the parties will never have to refer back to the agreement because they have cultivated mutual understanding and open communication through the negotiation and drafting process.

“Getting the agreement in writing is essential to a successful arrangement.”

With this in mind, the best written agreements are those that are thorough and specific to your particular circumstance. The agreement as a whole addresses solutions and approaches to a wide range of scenarios—or “what ifs”—such as what if the parties die, what if the land is sold, or what if the farmer doesn't pay rent on time. The terms are also specifically adapted to your unique operation.

#### **Your lease agreement should be specific to your arrangement**

There are hundreds of agricultural lease templates and sample leases out there that can be quickly found and downloaded for free on the internet. It may be tempting to simply copy and paste and fill in the blanks. But beware! Most agricultural lease templates include norms and standards that are designed for commodity farming operations. Agroforestry farming operations are unique. Most are diversified farms that involve multiple crops and operations—value-added, nurseries, livestock, fruits and vegetables, perennials, direct-to-consumer, agritourism, and so on. The intricacies of agroforestry and diversified farm ventures require more issues to be sorted out for the lease to be effective, the relationship to be functional, and the venture to be successful. It's not as cut and dry as a farm operation involving monoculture crops that simply need some land for planting and harvesting. Leases involving an agroforestry or diversified farming operation must be adaptable; they are meant to accommodate unique and individual circumstances.

“Your lease agreement should be specific to your arrangement—do not cut and paste from samples or templates.”

This workbook includes a sample long-term agroforestry lease to help farmers and landowners solidify an effective written lease agreement. A good approach is for the parties to separately and then together walk through the checklist and the sample long-term agroforestry lease as a guide, carefully noting the specifics for how they want to address a particular situation or issue. The sample lease includes annotations to help explain legal aspects and the significance of key terms or sections of the lease.

The sample agreement in this workbook is not comprehensive, nor will it meet the needs of any and all long-term agroforestry lease arrangements. Rather, it is a starting point, and serves to meet the growing need to further develop new standards and norms for long-term leases in the agroforestry and diversified farming context. This sample agreement is not intended to be a template. Do not cut and paste, in whole or in part! The best lease agreements will be those designed specifically for the unique situation of the parties.

**The parties should consult with an attorney—working through this workbook will make the process more efficient and affordable**

While the parties can begin the drafting process themselves, Farm Commons strongly recommends working with an attorney who is familiar with long-term agricultural leases. Long-term leases involve complex and state-specific areas of law. Having a lease with unlawful, conflicting, or confusing sections or terms can come back to haunt you, as it will likely lead to confusion and dispute. Working with an attorney who is skilled at drafting a coherent and effective lease can help prevent a lot of headaches.

● An agreement is like a puzzle. All the pieces need to seamlessly fit together. If one section of the lease is a mismatch with another, the whole agreement could lose its effectiveness. It can be hard to catch conflicting sections without a keen legal eye. That’s where an attorney can step in. Doing the research and legwork upfront by working through this workbook can help make your time with an attorney more efficient and affordable. If you’re willing to commit to the long-term nature of the lease, and see the potential upsides, you’ll realize that it’s worth the time and money to do it right at the get-go.

**Follow through with the terms**

While it goes without saying, the parties need to follow through with the terms of the lease throughout its duration. From a legal perspective, if the terms aren’t

For more on negotiating and drafting a written agreement, see Farm Commons’ resource *Farmer’s Guide to Negotiating and Drafting an Agreement*—available for free download at [farmcommons.org](http://farmcommons.org).

followed on a consistent basis, the other party could argue that the lease is effectively null and void. More significantly, honoring the terms helps sustain a healthy and respectful relationship between the parties. You can quickly lose the respect of the other party if you begin disregarding the terms that you agreed to, even the small ones. Over time, the littlest of frustrations can add up to a full blow out.

Open and ongoing communication is an optimal way to ensure that issues are discussed and resolved early on. If a problem or issue arises, the best approach is to talk through it rather than ignore it hoping the other party doesn't say anything. Ideally, the parties can resolve issues when they arise and move forward, preventing the parties from ever going to court. Leases can also be modified through an amendment process if needed.

### Feature Story

#### **The Savanna Institute: Laying the groundwork for agroforestry expansion in the Midwest**

The Savanna Institute is leading the charge in advocating and supporting agroforestry efforts in the midwestern United States. The 501(c)(3) nonprofit organization was formed in 2013 to develop agricultural systems that mimic an exceptionally productive ecosystem once common throughout the corn belts and bread baskets of the world: the savanna.

Oak savanna was the primary pre-plow ecosystem across the Midwest, with park-like scattered canopies of nut-bearing trees, understories rich in fruiting shrubs, lush ground cover of grasses and flowers, and periodic fire and large grazing animals maintaining diversity and productivity. Agricultural savannas follow this pattern, but are designed and managed to grow valuable crops, thereby producing food, fuel, and fiber while restoring soil, water, climate, and biodiversity resources. This ecosystem-mimicking agriculture adapts diverse agroforestry practices, including alley cropping, silvopasture, edible buffers, and forest farming. It also draws ideas and techniques from aligned fields of agroecology: organics, permaculture, holistic management, Fukuoka's *Natural Farming*, Smith's *Tree Crops*, Jackson's *Natural Systems Agriculture*, and others.

A pivotal goal of this emerging paradigm is to replace annual grains grown in monoculture—which supply the bulk of the human diet and commodity demand—with perennial crops grown in polyculture with integrated livestock. Eaters increasingly demand healthy food systems that restore ecosystems, and they are developing tastes for emerging crops that can be grown in agroforestry systems, including chestnut, hazelnut, elderberry, pawpaw, and currants. While farmers have pioneered cultivation and market development of these and other such perennial crops, they remain underutilized and underdeveloped. The Savanna Institute exists to help advance the research and education necessary to grow and market these crops in integrated systems alongside other more established perennial crops, such as pecans, apples, grapes, cherries, peaches, raspberries, asparagus, and pasture-raised animal products.

To explore the potential of savanna-based farming to become ecologically sound, agriculturally productive, and economically viable, the Institute runs a [Case Study Program](#) that works with farmers across the Midwest. The study involves the conversion of these farmers' working farmland into commercial-scale agroforestry operations. This research program is cooperative and participatory: Scientists and farmers work together to collect and share information concerning the economic, ecological, and social impact of diverse agroforestry practices.

The Savanna Institute is building a network of landowners and farmers who are interested in participating in their Case Study Program or simply learning more about the opportunities in perennial agriculture. At [www.PerennialMap.org](http://www.PerennialMap.org), they are connecting landowners and experienced farmers for the expansion of agroforestry throughout North America. If you are a landowner who is ready to transition your land into more ecological agriculture, or if you are a farmer seeking land for perennial crops and pasture, be sure to contact the Savanna Institute! Visit their website—[www.savannainstitute.org](http://www.savannainstitute.org)—for more information and to sign up for their mailing list. If you farm in the Midwest, you can also complete an application to participate in the Case Study Program. For specific questions contact Keefe Keeley, the executive director—[info@savannainstitute.org](mailto:info@savannainstitute.org).

## Getting Started: Questions Answered on Basic Legal Considerations Involved in a Long-Term Lease

The following questions and answers highlight key legal issues related to long-term agricultural leases. It serves as a way to guide landowners and farmers in determining whether a long-term lease is the right option for them. It covers the difference between leases, licenses, and easements. It also discusses the difference between short-term and long-term leases. What is the best option for you?

The discussion goes on to highlight some high-level issues that parties to a long-term lease may need to take into consideration. Issues covered include:

- understanding the necessity of getting a long-term lease in writing;
- realizing that there may be some restrictions in your state on the length of the lease and the structure of the parties;
- recognizing that there may be certain tax and other financial implications for certain landowners depending on how the lease is structured; and
- realizing the significance of how the trees will be valued and accounted for throughout the lease.

Having an understanding of these issues can help the parties navigate the negotiation and drafting process at the get-go and prevent big surprises down the road. It can also help ensure that any time spent with an attorney is most efficient and affordable.

### **Q: What is an agricultural lease?**

**A:** An agricultural lease is a private contract that grants someone (i.e., the farmer-tenant) a legal right to occupy and use the land of someone else (i.e., the landlord/landowner) for agricultural purposes. Usually leases involve an exclusive right—which means that the landlord agrees to give the tenant exclusive or primary possession to occupy and use the property identified in the lease. The property could be a whole parcel of land or a designated part of it. From a legal perspective, the lease grants the tenant what’s called a “leasehold interest” in the land. One way of thinking about this is that the lease is attached to the land itself, not the landowner or person. It’s as if the land has signed the lease. Therefore, leases are generally *binding on future landowners*. In effect, if the landowner were to die or sell the property, the lease continues on—unless the parties otherwise agree.

A lease is also *transferrable*. This means that the tenant can transfer it to someone else. For example, if the farmer-tenant were to die, the lease would generally

“This Q&A serves as a way to guide landowners and farmers in determining whether a long-term lease is the right option for them.”



“Exclusive right to occupy and use the land, binding on future landowners, transferability, and irrevocability are the key default elements of a lease.”

transfer to the farmer’s heirs. This also means that if the farmer were to fall ill or simply get sick of farming, the farmer could generally transfer or assign the lease to someone else. Also, leases generally *cannot be revoked*. Basically, the landowner can’t suddenly change her mind and revoke the tenant’s leasehold interest or legal right to occupy and use the land after the lease agreement has been signed. Such a change of heart would typically come with implications, such as compensating the tenant for hardship or costs incurred from the broken promise.

These elements—exclusive right to occupy and use the land, binding on future landowners, transferability, and irrevocability—are the key default elements of a lease. However, a lease agreement could for the most part specify otherwise. That’s because the lease itself is a contract between the parties and the parties are free to negotiate different terms. For example, the lease could reserve some uses or permissions for the landowner under certain conditions, so long as the tenant’s uses are primary. The lease agreement could also limit the binding effect and transferability of the lease by providing that the lease terminates upon the death of one or both of the parties. It could also restrict the tenant from transferring or assigning his leasehold interest to someone else, or at least requiring the landowner’s written permission first. The lease may also allow the landowner to revoke the lease under certain circumstances.

If alternative terms are not explicitly discussed in the lease, the default rules as outlined above will generally apply. With that said, each state has its own laws specifying default rules and restrictions for lease agreements. These rules vary to a degree from state to state. It’s best to consult with an attorney experienced in leases in your state to be sure the lease terms you negotiate are permitted and appropriate.

### Comparing the lease to an easement and a license: Which is the best option?

One way to help better understand a lease, and to know if it’s the best option for you, is to compare it to other somewhat similar options—the easement and the license. The following chart provides a quick overview of the distinctions between these three temporary yet potentially long-term land tenure options. The following two Q&A sections provide further explanations highlighting the significance of these distinctions.

**At a Glance: Comparing Key Elements of a Lease, Easement, and License**

Default Characteristics	Lease	Easement (Appurtenant)	Easement (In Gross)	License
<b>Binding to the land:</b> Grants the farmer a property interest or legal right that attaches to the land and passes to future landowners.	✓	✓		
<b>Possession rights:</b> Grants the farmer the exclusive right to possess or occupy the property.	✓			
<b>Usage rights:</b> Grants the farmer a right to use the property for some purpose(s).	✓	✓	✓	✓
<b>Revocability:</b> Can generally be revoked by the landowner at any time.				✓
Can be revoked by the landowner at the time of death or when the property is sold.			✓	
<b>Transferability:</b> Can be transferred by the farmer during his lifetime or at death.	✓	✓		

**Q: What’s the difference between an agricultural lease and an easement?**

**A:** An easement is a legal right to *use* someone else’s land for a particular purpose. Easements are generally granted by a landowner to an individual or entity who is referred to as the easement “holder.” One key difference between leases and easements is that a lease grants the tenant a right to *occupy and use* land,

whereas an easement simply grants the holder a right to *use* the land. This aspect of easements is described in legal lingo as a *non-possessory and nonexclusive* interest. This means that while the easement holder, in this case the farmer, has rights to use the land for one or several particular purposes, he does not have a right to fully possess or occupy the property. In addition, the landowner typically retains rights to use the property, so it's not exclusive to the holder or the farmer. Depending on the use, the landowner could grant the same or similar easement to multiple folks.

“There are several types of easements that may come into play for farmers and landowners wanting to collaborate on an agroforestry venture.”

A simple example of an easement is a right-of-way going through a property. An easement may grant the holder specific rights to use the road, but the holder can't block or take control over it in any way. And, the landowner will likely retain rights to use the road as well. She could also grant a similar easement to others so that multiple people could have rights to use the road.

In a similar fashion, an easement could be granted to one or more farmers to use a portion of a property. In particular, an arrangement involving easements could work well in an agroforestry venture where multiple farmers are involved in various activities or uses, such as cultivating perennials, raising livestock, and so on.

#### **Easement appurtenant vs. easement in gross**

Without getting into too much detail, there are several types of easements that may come into play for farmers and landowners wanting to collaborate on an agroforestry venture. These include “easement appurtenant” and “easement in gross.” A key difference is that appurtenant easements generally attach to the land. Again, this means that like leases they are generally *binding on future landowners*. Subsequent owners—whether purchasers of the property or heirs—are obligated to let whoever holds the easement appurtenant use the property as originally specified. Also, like a lease, an easement appurtenant is generally *transferable*. This means the holder, in this case the farmer, can transfer the easement appurtenant rights to someone else—whether upon his death or during his lifetime. In addition, like a lease, an easement appurtenant is generally *irrevocable*. For the most part, the landowner can't back out once it's granted.

Easements in gross, on the other hand, are treated as more of a right of personal enjoyment. Examples include recreational rights such as hunting, camping, and fishing. They could also include certain agricultural uses. Because easements in gross are granted more for “personal” enjoyment, they are generally not considered

to be attached to the land. As such, easements in gross are *not binding on future landowners* and are typically *non-transferable* by the holder, in this case the farmer, upon his death or otherwise. In addition, generally easements in gross can be *revoked* by the landowner when the property is sold or upon her death.

This is a very cursory discussion of easements for purposes of comparing them to leases in the agroforestry context. Entire law school courses are taught on easements! Keep in mind too that the agreements and documentation that coincide with easements are contracts and can generally be tailored to the preferences of the parties. However, as for leases, state laws on easements vary and may have limitations on what the parties can agree to. If you're considering an easement, it's best to first consult with an attorney familiar with property law in your state.

**Q: What's the difference between an agricultural lease and a license?**

**A:** A license is the landowner's permission to use the land for a specific purpose. Unlike a lease or easement appurtenant, it does not attach to the land and is therefore *not binding on future landowners*. It is basically a personal agreement between the landowner—the licensor—and the individual or entity who is using the land—the licensee. A license can be either exclusive or non-exclusive. So it could grant the licensee sole use of the property, or it could designate a specific use or uses. A license is also typically *non-transferable*. In this case, a license generally can't be transferred by either party to someone else—whether upon death, when the property is sold, or otherwise. That's because a license is considered a personal agreement between the parties.

Licenses are quite similar to easements in gross. A key difference is that licenses are often *easily revocable*. Therefore, the licensee, or person using the land, has no real guarantee in the long-term nature of the arrangement. Licenses are often used in the context of oil, gas, timber, and mining. They can also be applied for various agricultural uses and could be a useful tool for certain agroforestry arrangements that don't require a longer-term commitment.

### **Agricultural lease, easement, or license: How do you know which is right for you?**

The decision of which of these mechanisms is best often comes down to what's common in similar contexts as well as personal preferences, comfort level, and intentions. The following questions can help farmers and landowners determine what's best for their situation.

#### *Reflection for landowners*

Are you okay with allowing the farmer exclusive or primary rights to occupy and use the land (in its entirety or a specific part), perhaps with certain conditions or uses reserved to you? If so, a lease may be a good option. If not, an easement or a license may be a better option.

Is it okay that the farmer can transfer his interest in the property at some point during the lease or upon his death? If so, a lease or easement appurtenant may be a good option for you. If not, you still have the option to restrict or limit the farmer's right to transfer the leasehold interest or easement through the agreement (e.g., require written permission first or prohibit it all together). If this still doesn't feel right, a license may be a better option.

Is it okay that future owners, including your heirs, will be obligated to follow through with the agreement you reach with the farmer? If so, a lease or an easement appurtenant may be a good option for you. If not, you still have the option to restrict or limit the binding effect of the lease or easement in the agreement. If this doesn't feel right an easement in gross or a license may be a better option.

#### *Reflection for farmers*

Is it important or necessary that you have exclusive or primary rights to the property, or very limited rights reserved to the landowner? If so, a lease may be a good option for you.

Are you wanting the ability to transfer your interest in the property to someone else, whether upon your death or at some point during the lease (e.g., if you get injured or sick, need to move, no longer want to farm, etc.)? If so, a lease or an appurtenant easement may be a good option for you. If this is a concern of yours, be sure to read the agreement carefully, and confirm that it does not place any

restrictions on transferability. If you don't care whether you can transfer your interest to someone else, then any of the options could be fine for you.

Do you want to have a level of security that your interest in the property will remain regardless of whether the landowner sells the property or dies? If so, a lease or an appurtenant easement may be a good option for you. Be sure that the agreement does not place restrictions on the binding effect of your property interest, unless you are comfortable with it. If you don't care whether the lease continues on after the property passes to another landowner, then any of the options could be fine for you.

**Q: What's the difference between a short-term and long-term agricultural lease?**

**At a Glance: Legal Terminology for Types of Leases—the Timeframe or “Term”**

“Periodic Tenancy”	Short-Term Lease
“Tenancy for a Term of Years”	Long-Term Lease

Another alternative to a long-term lease is a land contract or lease-to-own arrangement, which is suitable for parties who want an arrangement where the farmer will gain ownership of the land over time. For more information on land contracts, see Farm Commons' resource *Financing Farmland through an Effective Land Contract: A Toolbox*—available for free download on our website.

**A:** Typically, an agricultural lease is either what's called a “periodic tenancy” or a “tenancy for a term of years.” The periodic tenancy runs for a short period of time such as the growing season, which is one year or less. Typically, such short-term agricultural leases will automatically renew at the end of the term unless the parties agree to terminate it. Thus, periodic tenancies could end up continuing for a long period if it were to automatically renew year after year. However, there are no assurances at the get-go given each party can simply terminate the arrangement at some point before the end of each term.

As the name depicts, a “tenancy for a term of years” is a long-term lease that covers more than one year—whether 5, 10, 50, or even 99 years. Typically, such a long-term agricultural lease automatically terminates at the end of the set term unless the parties mutually agree to renew it. Let's say it's a 50-year lease. The default is that the arrangement will end at that 50-year mark; however, the parties could agree to renew it at some point beforehand. The lease should include a section that specifies how the renewal process works, such as by when the parties must let each other know of their decision and the length of the renewal term.

Note also that most states allow up to a 99-year lease. However, some states set a shorter limit on the number of years. Be sure to check if your state has any restrictions on length before entering a long-term lease arrangement.

**Reflection: Short-term or long-term lease?**

If you answer yes to any of the following, the periodic tenancy may be suitable for you:

- Are you a beginning farmer who wants a trial run at farming?
- Are you a farmer who doesn't mind living with a level of uncertainty on where you'll be farming each season or year?
- Are you a landowner who wants a trial run at leasing your land or otherwise wants to preserve the option to end the arrangement early on?

If you answer yes to any of the following, the long-term lease may be suitable for you:

- Are you a farmer who needs more than a season or a single year to get your venture off the ground?
- Are you a landowner who wants a consistent tenant and doesn't want the hassle of having to deal with the possibility of folks coming and going each season or year?

*Note: Be sure to check your state law to confirm that whatever long-term lease term you decide upon is permitted!*

////////////////////////////////////  
“Generally, if a lease is longer than a year, it must be in writing to be enforceable or upheld in court.”  
////////////////////////////////////

**Q: Why get a long-term agricultural lease in writing?**

**A:** Generally, if a lease is longer than a year, it must be in writing to be enforceable or upheld in court. This is because of the “Statute of Frauds,” which is a law that exists in every state in some form that requires important agreements be in writing. Among other things, any agreement that can't be completed in one year is deemed important. Long-term leases fall within this category. Accordingly, if something goes wrong, legal recourse in court would only be available if the lease was in writing.

While legal enforceability is important, it's not the primary reason for getting a long-term lease in writing. After all, if a dispute arises, most folks prefer to resolve it outside of court. The main reason to get a lease in writing is to preserve a good relationship between the parties. Even those with the best of memories

For more information on drafting agreements, see Farm Commons' resource *Farmer's Guide to Negotiating and Drafting an Agreement*—available for free download on our website.

can forget the details of a conversation a few months, years, or a decade ago.

Mere conversations about leases often don't address significant details. Tensions can build when issues arise that the parties didn't thoroughly think through and discuss. In addition, forgetfulness and confusion tend to fuel disputes when an agreement is simply based on oral conversations.

By getting the key details in writing, the parties can prevent most if not all disputes. Ultimately, the lease solidifies or reinforces the relationship between the farmer, the landowner, and the land. How do you, the parties, want to engage with each other and the land? There's no official formula or magic words. It's your agreement.

### Reflection

Identifying what your main concerns and fears are in entering a long-term lease arrangement can help you see the importance of getting the lease arrangement in writing. It can also help you focus your attention on finding ways to address these concerns through the negotiating and drafting process.

Take some time to consider this: What are your biggest concerns and fears—your worst-case scenarios—in entering a long-term lease?

### Q: Can the farmer-tenant party to the agricultural lease be a business entity?

**A:** These days more and more small farmers are running their farm operation through a business entity, such as an LLC or corporation. It's a wise thing to do, mainly because it can protect the farmer's personal assets from the liabilities of the farm business. Farm Commons encourages farmers to take this route as part of an overall liability risk-management strategy.

However, running the farm operation through a business entity can raise issues when land tenure is involved. Nine states in the Midwest have what's often referred to as "anti-corporate farming laws"—Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin. Anti-corporate farming laws in these states, which are in the form of state statutes or constitutional provisions, place restrictions on certain business entities from engaging in farming or agricultural practices, including owning or leasing land for agricultural production.

The restrictions and limitations on land tenure by a business entity vary in each of these states. For example, some of these states allow cooperative corporations to



own or lease land. Others allow business entities that are majority owned by family members to own or lease land if certain circumstances are met.

It can be challenging to navigate the anti-corporate farming laws, but this should not be a deterrent. Farmers who live in these nine states who run their farm through an LLC, corporation, or other business entity and are wanting to enter an agricultural lease in the name of the entity are encouraged to check out Farm Commons' resource *Farmer's Guide to Anti-Corporate Farming Laws*. This resource includes flowcharts for each of these nine states, which walk through the specific requirements and available exemptions.

### Reflection

If you are a farmer who lives in one of the nine midwestern states mentioned above and you run your farm operation through a business entity, take some time to review your state's flowchart in Farm Commons' resource *Farmer's Guide to Anti-Corporate Farming Laws*. Do you foresee your state's anti-corporate farming law being a barrier in entering a long-term lease? If so, your next step would be to consult with an attorney. There may be some creative ways to get around it.

### Q: What are the tax and financial implications for the landowner in receiving rent payments?

**A:** The impact on the landowner's tax obligations and other financial aspects depend on how or in what form the farmer pays rent. To answer this question, the following provides an overview of the basic options for paying rent. Generally speaking, three types of leases cover the main options: (1) cash rent leases, (2) crop share leases, and (3) hybrid leases.

#### At a Glance: Legal Terminology for Types of Leases—Rent Arrangement

"Cash Rent Lease"	Rent amount is fixed
"Crop Share Lease"	Rent amount is tied to the success or failure of the farming operation (e.g., parties agree to percentage share in profits, revenues, and/or yields/harvest)
"Hybrid Lease"	Rent amount is a mix between cash and crop share (some fixed amount + some percentage tied to operation)

### **Cash rent leases**

For a cash rent lease, the tenant is required to pay a fixed amount in cash. The dollar amount could be associated per acre or it could be a set rent for the entire property. This provides a level of certainty for both parties. The landowner is guaranteed a steady stream of income, regardless of whether the farmer makes a profit. The farmer also has visibility into set costs, and can set his budget accordingly. The parties can also agree to include a section in the lease that modifies the rent if, for example, crop prices fall or production prices increase. Such a clause could provide that the rent would increase by a certain amount or percentage in good years or lower by a certain amount or percentage in poor years. Landowners who wish to have a cash rent lease are typically hands off, as they're primarily interested in the rental payment. Thus, the farmer retains control of the farming operation.

One downside of a cash rent lease for certain landowners is that some federal and state programs require the landowner to be "actively engaged in farming" to participate or reap the benefits of the program. Cash rent leases typically do not meet this standard as the landowner is not taking on any risk or participating in the farming operation. Such programs include the Conservation Security Program administered by the Natural Resource Conservation Service (NRCS) and the Price Loss Coverage and Agricultural Risk Coverage programs administered by the Farm Service Agency (FSA).

Another point landowners need to keep in mind for cash rent leases is that because the landowner is not "actively engaged in farming," the cash paid in rent is not subject to self-employment tax and is not considered earned income. This could have tax implications, depending on the landowner's tax basis. One financial benefit of this is that retired landowners will not see a reduction in the amount of their social security check.

### **Crop share leases**

The landowner is typically more involved in the actual farming or agroforestry operation with a crop share lease. In addition to granting the farmer access to the land, the landowner will typically share in the input costs, such as trees and other perennial plants. Depending on the arrangement, the farmer often provides the bulk of the labor and any remaining inputs for the duration of the lease term. In this scenario, the rent amount the farmer owes is tied to the success or failure of

“For a crop share lease, the landowner is typically more involved in the actual farming or agroforestry operation.”

the farming operation. This could be based on a percentage of profits or revenues from harvests each year or season.

For example, the parties could agree that the landowner gets a quarter of the profits each year as a rent payment. Rent payments could also be made in-kind through a percentage of actual yield or harvest. Either way, with a crop share lease both parties have stake or risk in the farming venture. The rent could increase or decrease depending on the success or failure of the farm operation. Because the landowner has stake in this way, she will likely want to retain some control over decisions or at least share in the decision-making process of how the operation is managed.

Because of the shared risk, the landowner will likely satisfy the “actively engaged in farming” requirement of some government programs and can therefore reap those rewards. Landowners can also take advantage of special tax provisions, such as Section 179, for expensing capital investments. They may also be able to utilize certain estate tax provisions available for family-owned farms, such as Section 2032A Special Use Valuation, which can reduce the estate’s tax liability. For individual tax purposes, the money the landowner receives through crop share rent will be subject to self-employment taxes and is considered earned income. This will enable non-retired landowners to build a social security base. However, retired landowners may see a reduction in their social security check due to the added income.

### Hybrid leases

For a hybrid lease, the parties can choose some combination of cash rent lease and crop share lease. Typically, the goal of the hybrid lease is to provide the landowner with at least a minimum rent amount in cash. The landowner then makes a “bonus” if the production reaches a certain amount. The parties should be careful when crafting these hybrid leases as they can be complex. It can be helpful to include an equation or an example so that the parties are absolutely clear what the arrangement is. Depending on how involved the landowner is and how much risk the landowner takes on in a hybrid lease, the landowner may or may not be considered “actively engaged in farming” for purposes of federal program eligibility and self-employment taxes.

For more information on crop share and hybrid lease arrangements see **Crop Share Rental Agreements for Your Farm**—a publication of North Central Regional (NCR) Cooperative Extension, available at <http://www.aglease101.org/DocLib/docs/NCFMEC-02.pdf>.

For more information on the legal implications of creating general partnerships, whether inadvertently or intentionally, see Farm Commons' resource *Farmer's Guide to Sole Proprietorships and General Partnerships*, particularly Section 2—available for free download on our website.

### Accidental partnerships

Another caveat with a crop share or hybrid lease arrangement is that the law may consider the arrangement to be a general partnership for liability purposes. This can be the case even if the parties do not intend nor want it to be. A general partnership is created when two or more parties come together and contribute assets, management, and labor to a business venture and share the benefits and risks associated with it. This sounds a lot like a crop share lease arrangement. Hence, such an arrangement can be deemed a general partnership, which brings up liability risks for the parties. With a general partnership comes joint authority and liability. This basically means that each partner can bind the other into contracts. Each partner will be held jointly and severally liable for the actions and inactions of the other. Therefore, if one partner incurs debt or legal liability from a lawsuit connected to the agroforestry operation, the other partner would generally be on the hook even if she or he had nothing to do with it.

If the parties' intention is not to create a partnership, be sure the lease specifies as much, such as, "This Lease does not create a partnership or joint venture and neither Party has the authority to obligate the other without written consent."

### Cash rent, crop share, or hybrid: Which is the best rent option for you?

#### *Reflection for landowners*

- Are you a landowner who wants the security of a set income in rent each year? If so, a cash rent lease may be the best option for you.
- Are you a landowner who wants to be involved in the agroforestry venture and is willing to take a risk in the profits? If so, a crop share lease may be the best option for you.
- Are you a landowner who is involved in federal programs that require you to be "actively engaged in farming" to reap the benefits? If so, a crop share lease or hybrid lease may be the best option for you.
- Are you a retired landowner who is collecting social security checks? If so, a crop share lease or hybrid lease may be the best option for you.
- Are you a retired landowner who is concerned about high estate taxes? If so, a crop share lease or hybrid lease may be the best option for you.
- Are you a landowner who has significant assets or is otherwise concerned about limiting your personal liability in association with the agroforestry venture? If so, a cash rent lease may be the best option to

help limit your liability should something go wrong. Or, if you have this concern and decide to enter a crop share or hybrid lease, be sure the lease agreement explicitly states that the arrangement is not a general partnership.

*Reflection for farmers*

- Are you a farmer who wants autonomy and control over your agroforestry or farming operation? If so, a cash rent lease may be the best option for you.
- Are you a farmer who wants to pay a set amount each year, regardless of the success or failure of your crops? If so, a cash rent lease may be the best option for you.
- Are you a farmer who needs or wants some upfront costs paid and is willing to share in the profits to make it happen? If so, a crop share lease or hybrid lease may be the best option for you.

**Q: How are the trees valued and accounted for throughout the lease?**

**A:** This issue gets at the heart of the uniqueness of an agroforestry lease. Agroforestry ventures require significant costs upfront. The farmer who takes on this investment in full has a lot at stake. It could be years before his investment pays off through profits of the agroforestry venture. He could lose everything if the lease were to end early. What if the landowner backs out? What if the landowner dies or sells the land and the lease is terminated? What if the government takes the land by eminent domain? What if the zoning laws change and he can no longer farm? Will the farmer have a safeguard to get some of his upfront investment back?

The issue of how the trees are valued and accounted for touches upon many key elements of an agroforestry long-term lease—including the rent amount, how improvements are handled, what happens if and when the lease ends, what happens if the farmer wants to exercise an option to purchase the land, and so on. Ultimately, it will impact any decision or issue that deals with money and accounting between the parties throughout the duration of the lease. The checklist that follows highlights this issue in relevant places to help the parties navigate it all.

Before diving into the details, it can be helpful to start with a higher-level principle. What it comes down to is two questions: Who owns the trees and how are the trees valued? The parties' agreed-upon answers to these questions will

vary depending on the specific circumstances of the arrangement and each party's preference and intention. The point is that the lease should clearly address these questions as they trigger significant implications.

An example can be helpful to explain. Let's say the parties agree to a 50-year lease. In year 10, the landowner decides to sell the land and insists that the lease terminates. Let's put aside for the moment the fact that this would be in breach of the lease if the lease stated that it is binding on all future landowners. In the first five years, the farmer invested more than \$50,000 in trees. So the issue becomes: what does the lease have to say about who owns these trees, and how are they valued at this 10-year mark?

The lease should have something to say about it. Otherwise, imagine the disputes that would arise! The parties are free at the outset to devise a creative approach to this issue that best fits their needs and circumstances. There is no one-size-fits-all answer. That said, what follows are some potential approaches that you might adapt to your circumstances and needs.

### **Approaches for who owns the trees**

The answer to the first question, who owns the trees, could depend upon a number of factors. For example, who paid for the cost of trees upfront? If the parties share in the cost, perhaps they share in the ownership. If the landowner pays for the trees, most likely the landowner will own them or vice versa. Is it a crop share lease arrangement? If so, the parties may decide to split ownership along the same lines as the crop share percentages. Or maybe the value is somehow already calculated into how the percentages are broken down and the landowner owns the trees outright.

Also, what is the rent amount? The parties could decide to keep the rent amount low to account for the long-term value that the trees will add to the overall property value. A lower rent could be one way to pay the farmer back, in part or in full, for his upfront investment. If the rent amount is more akin to the local agricultural going rate, it very well may be that the farmer will want to preserve some ownership interest in the trees to account for this added property value in the long run.

With this said, whether and how the trees actually impact the property value will depend on a multitude of factors—including the size and location of the parcel, the suitability for row crops, development demand, the kind of trees and how they are spatially arranged, and so on. The ultimate question in each case remains: if, how,

and when in the time span of the lease will the trees add to or detract from the market value of the land?

### **Approaches for how to account for the value of the trees**

The answer to the second question—how the value of the trees is accounted for—presents some challenges. Assessing the value of trees is not a common exercise! It will depend on a number of factors as just mentioned. One approach would be to assess the value at the amount initially paid, which in our example would be \$50,000. However, the value will naturally increase as the trees mature. Another approach would be to assess the value of the trees for the nuts or fruit they bear in a given year. Based on this, their value will increase based on their maturity, up to a point.

Yet another approach would be to base the value on the overall property value. In this case, if the issue were to arise, the parties could hire an appraiser to come out and assess the value of the land or ground only. The value of the trees would be derived from the difference of the ultimate selling price of the property and the appraised value of only the land itself.

In addition, the parties could decide to split the valuation of the trees into two components: (1) the value of the trees “as trees” and (2) the value of the trees “as crops.” This could be a useful concept if the farmer wants to own the rights to the proceeds from the trees’ crop production—i.e., fruits, nuts, and so on—through the duration of the lease. The landowner then retains the rights to any and all longstanding ecological and other benefits resulting from the trees through the lease and thereafter. In such a scenario, the farmer would get all the revenue from selling the crops while the landlord would receive things like conservation program payments, as well as any added value to the land price if and when the land was sold.

These are just a few ideas for getting a close-to-accurate value of the trees over time. It’s up to the parties to decide the best approach for them.

### **The analogy of commercial ground leases—the reversionary interest**

Looking at approaches taken in commercial ground leases can be a useful way to generate effective ways to address these two questions. Commercial businesses such as Target or Starbucks often enter long-term leases. They then spend an enormous amount of money designing and building their storefront. Who owns what in the end?

“The issue of how the trees are valued and accounted for will touch upon many key elements of an agroforestry long-term lease.”

////////////////////////////////////  
"Looking to commercial ground leases can be helpful to stir some creativity on the two questions: Who owns the trees and how are the trees valued?"  
////////////////////////////////////

Generally, in a ground lease the landowner owns the land or ground, which the tenant is simply leasing. However, the tenant is deemed the owner of everything that the tenant adds to the land—the actual buildings or improvements that it finances and builds. Oftentimes ground leases have what's called a reversion clause. This clause will change the ratio of "ownership" interests between the landowner and the ground tenant over the course of the lease. Thus, at some point during the lease, usually at the end, the landowner gains full ownership of the improvements—or what's called a reversionary interest.

The reversionary interest is most easily understood through an example. Let's take our above example of a 50-year lease. Let's say the parties adopt a reversion clause where on day one, the tenant "owns" the trees and perennials in entirety. Midway through the lease, at 25 years, the landowner "owns" 50%. And at year 50, the landowner attains 100% ownership. Here's how this all applies. If the property were to sell at year 10 and the lease for whatever reason did not continue on, the tenant would have a right to 80% of the value of the trees and the landowner would get 20% (reflecting one-fifth of the way through the term). The parties could, of course, agree upon a different timeline or ratio. The parties would also need to decide upfront in the lease how the value of the trees would be assessed.

The reversionary interest concept can strike a relatively fair balance of incentives and risks to both parties. The farmer has an incentive to enter the long-term lease and begin making substantial improvements, as he carries little risk in losing everything upfront. For example, if the property were to sell in the early years, the farmer would get a substantial portion of the proceeds reflecting the value of the trees. In addition, the landowner has an incentive to enter the long-term lease, because she knows that over time she will earn the benefit of the mature trees through the increased value of her property. Farmers and landowners may want to take this approach in some form to fairly address the issue of how trees and perennials are accounted for in an agroforestry lease.

### Reflection

Before diving into the details of the lease terms, it can be helpful to initially reflect upon how the following pieces fit together:

- Who's paying for the initial input costs of the trees and perennials?
- Is the rent being lowered in any way to account for the value of the trees?



- How do the parties want to allocate the ownership of the trees throughout the lease?
- What approach do the parties want to take for assessing the value of the trees at any given point?

## Feature Story

### Kevin Wolz: Insights from a 99-year agroforestry lease

Stories can help enliven any legal issue or arrangement, and positive, true stories are the best at that. Over the past few years, Farm Commons has been working with Kevin Wolz, an experienced agroforestry entrepreneur and PhD student at the University of Illinois at Urbana-Champaign. Kevin sees great potential in agroforestry to solve social and environmental issues facing our country and our world. He serves on the board of the Savanna Institute. Through his research, outreach, and entrepreneurship, Kevin is playing a leading role in advancing the benefits of agroforestry in the Midwest and beyond.

Kevin has already entered two long-term agroforestry leases in the Midwest, and aspires to enter more leases and other long-term collaborative agroforestry ventures in the years to come. He recognizes the win-win situation for himself, the environment, and the landowners—many of whom are absentee and want someone they trust to take care of and even help revitalize their land.

It's been just over a year since Kevin entered his first long-term lease. So far it's going well. He attributes this to the collaborative and thorough process he and the landowner engaged in when negotiating and drafting the lease. Kevin met the landowner through the Savanna Institute. She's a sheep farmer and not really a plant person—just the opposite of Kevin. She caught wind of the benefits of agroforestry and envisioned her sheep grazing under the shade of trees. Kevin had a similar vision of integrating livestock within his agroforestry practices, but doesn't have livestock experience himself. Over the course of a few months, Kevin worked with her on various projects, including planting prairie plants. Over time it dawned on Kevin that this would be a perfect property for a long-term lease. It was close to home, he would have the benefit of animals without having to deal with them, and the 10-acre size was perfect for a pilot project. But, as Kevin explains, "The most

important part was that our personalities clicked. When you're going into a long-term agreement with someone, that's the most important thing."

Kevin brought up the idea of a long-term lease arrangement during one of his visits. She was just as excited and instantly saw the synergistic potential. Her sheep would get shade, she'd have pollinators in the garden, Kevin would be around to help out and look after things, and she'd get rental income. At this time, they had no document or template, or really anything to go off. They started by jotting down some ideas and key points. They then contacted Farm Commons to help them with the details and drafting process. With Farm Commons' help, they continued to engage in several back-and-forth discussions, and finally came up with the essential terms and ultimately a final agreement.

It's a 99-year cash rent lease with a 5-year trial period for the 10-acre parcel. Kevin didn't have a lot of money upfront to pay for the trees and perennials to get started. Yet, seeing the potential upside and overall value of the arrangement, the landowner agreed to put some money in. For Kevin's share, he gets the right to harvest the trees and take 100% of the profits throughout the duration of the lease. For the landowner's share, she owns the trees and gets to benefit from the trees' ecological services to her sheep and the land. The following highlights some of the key aspects of the lease:

- Given the landowner wanted to secure her investment in the trees, she and Kevin also entered a separate Memorandum of Understanding (MOU) agreement that outlined specific obligations and responsibilities to ensure that the trees are established successfully and endure. It also outlined a precise planting plan and design so that the landowner's expectations were clear and could be met.
- Given the landowner's sheep were also part of the equation, the lease includes specific terms that outlined the landowner's usage rights for the alleys between the trees. If the landowner's sheep damage or reduce the growth of the trees, the landowner must either compensate Kevin for the damage or replant the trees to mitigate those damages. Vice-versa, if Kevin's management or harvesting practices damage or reduce the growth of the alleys, Kevin must either compensate the landowner for the damage or replant the pasture to mitigate those damages.

- Two out of the ten acres of the leased property are enrolled in the Conservation Reserve Program (CRP), a cost-share and rental payment program under the USDA Farm Service Agency. Given the landowner fronted some of the costs for the trees, Kevin agreed to allow her to take the CRP payments. These payments ultimately reflect the value of the trees that she paid for, even though Kevin is responsible for taking care of them. Kevin would have negotiated this differently if he had paid for the trees.
- The lease includes a right of first refusal, which gives Kevin the opportunity to purchase the land before anyone else does if the landowner decides to sell or receives an unsolicited offer. This relieves Kevin of some anxiety surrounding what would happen if the land were to transfer hands. Would the new landowner challenge the lease? Would she be challenging to work with? While Kevin would have to come up with the financing should the right of first refusal opportunity arise, he at least knows that he'll have a chance to purchase the land and potentially prevent a disgruntled new landowner from taking over. The sample lease in this workbook provides an example of a right of first refusal that is similar to the one Kevin used.

Kevin has already planted a wide range of nut and fruit tree crops on the farm, including chestnuts, hazelnuts, currants, and grapes. He has been managing the trees in these early years by mowing and pruning to get them well established. In a few years, Kevin will begin harvesting from these trees and hopes to leverage this yield as part of a fruit- and nut-focused CSA. The landowner has continued to harvest hay from the alleys in between rows of trees, but will soon be grazing her sheep in these alleys instead.

So far there haven't been any issues with the lease arrangement. Again, Kevin attributes this to their open communication and thorough consideration of the key issues at the outset. Kevin sees his symbiotic and long-term arrangement with a landowner as just the beginning. His bigger picture vision is agroforestry ventures involving more collaboration, "Imagine if you had a landowner providing land and equipment, a tree expert, a berry expert, an animal expert—it would be the most highly functioning and efficient project out there." He explains, "Collaboration is how to be really successful."

## Checklist: Walking through Key Elements of a Long-Term Agroforestry Lease

Now that you've decided that a long-term lease is right for you, the next step is to start contemplating the specific terms of the lease. This checklist serves to help you through this process. A good approach would be to walk through the checklist on your own, and jot down your ideal responses. Then meet with the other party or parties to the lease arrangement and talk through issues or discrepancies. Together you can co-create solutions and generate an agreement. Most likely there will be one or a few areas where you can't come to an agreement or will need further help or insight, whether from an attorney, accountant, or someone specializing in agroforestry practices. Simply flag these issues and then seek the help you need.

Don't expect to easily resolve all the issues at once. This process takes time and can involve some awkward conversations around tough issues, such as money, break-ups, and death. These conversations are best held upfront rather than during or after a dispute or worst-case scenario arises. Ultimately, open and honest dialogue upfront will help the parties get on the same page and set clear expectations and understanding throughout the relationship. This alone can help prevent disputes from ever arising.

“This checklist serves to help you through the process of contemplating the specific terms of the lease.”

### Checklist at a Glance

- Who are the parties?
- What are the overarching objectives of the parties?
- What is the exact area of land or premises to be leased?
- What is the length term of the lease?
- What is the process for renewing the lease?
- What are the rent arrangement, amount, and payment requirements?
- Is the lease binding on future landowners?
- Can the farmer transfer the lease to another party?
- Can the farmer sublease the land to someone else?
- What happens if the landowner decides to sell the land?
- What are the uses or activities that the farmer is permitted or prohibited from doing?

- Are there standards and land use practices that either of the parties must follow?
- How are improvements handled and accounted for, including the addition of trees?
- Does the landowner retain rights to use the premises?
- Who pays for insurance?
- How is access to water handled?
- Does the farmer-tenant have access to facilities and equipment?
- Who pays for utilities?
- Who pays for taxes?
- Who is responsible for large-scale capital improvements to the land (e.g., access roads, drainage management, perimeter fencing)?
- How are disputes handled if and when they arise?
- Can the lease be terminated early?
- What happens when the lease terminates, whether early or at the end of the term?
- How do the parties ensure ongoing and open communication?

### Checklist with Explanations

- Who are the parties?

Being sure that all necessary parties are named in the lease agreement is essential to ensure that the lease is legally enforceable and binding should an issue arise.

- Who are the people or parties involved?
- Is everyone who needs to be represented at the table?
- Are they acting in their personal capacity or on behalf of something else? For example, is the landowner or tenant a business, such as a farm LLC? Is the land owned in trust, such as through a family trust?
- If the farmer-tenant is in the Midwest and operating the business through an entity, have you checked into your state's anti-corporate farming laws?

● Nine states in the Midwest have what's often referred to as "anti-corporate farming laws"—Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin. For more on anti-corporate farming, see Farm Commons' resource *Farmer's Guide to Anti-Corporate Farming Laws*—available for free download on our website.

□ What are the overarching objectives of the parties?

Including some overarching goals or objectives of each party can be helpful for the parties to reflect upon and revisit the purpose of the lease. It can help substantiate the value that each of the parties are getting, which is a necessary element of a legally enforceable agreement. Each party must give and get something of value in exchange, which in legal lingo is called "consideration." Setting forth the goals can be particularly helpful in a lease involving agroforestry, where the rental price may be below the market rate given the landowner is also benefiting through the ecological system improvements and potential increased land value over time.

- What does the landowner seek to gain through the lease agreement?
- What does the farmer seek to gain through the lease agreement?

□ What is the exact area of land or premises to be leased?

The description of the land needs to be precise and accurate. It's best to include a map with the borders clearly marked, particularly if the land subject to the lease is part of a parcel (such as 10 acres of a 20-acre piece of land).

- Exactly what land is being leased?
- What is the precise legal description?
- Is it an entire parcel, or part of a parcel?
- If it's part, how can you best describe and mark the boundaries (e.g., a map or pictures of corner markers or landmarks)?

□ What is the length term of the lease?

Your state may have restrictions on how long a long-term lease can be. Some states allow up to a 99-year lease while some have stricter rules. The following table lists states that have laws specifying the maximum length of agricultural leases. Generally, if a lease is longer than the number of years specified, the arrangement will be treated as a full land transfer for tax or other purposes. If your state is not listed, be sure to confirm with an attorney as some restrictions may still apply through case law developed by the courts.

State	Years
Alabama	99 Years
California	51 Years
Colorado	99 years
Connecticut	99 years
Iowa	20 years
Massachusetts	99 years
Michigan	34 years
Minnesota	21 years
Mississippi	99 years
Montana	10 years
Nevada	25 years
New Hampshire	99 years
New Jersey	99 years
North Dakota	10 years
South Dakota	20 years
Vermont	50 years
Wisconsin	15 years
Wyoming	10 years

- How many years is the lease?
- Is it under the number of years allowed under your state's law?
- What is the precise start date?
- What is the precise end date?

What is the process for renewing the lease?

Most long-term leases require action for renewal. In other words, the lease will end on the date selected unless the parties agree otherwise. But you can determine your own renewal process.

- Does the lease renew automatically or do specific steps need to be taken by either party?
- If it doesn't renew automatically, what steps need to be taken (e.g., notify each other within three months before the end of the lease)?
- If it renews automatically, when and how does either side give notice that they don't want the lease to renew?

□ What are the rent arrangement, amount, and payment requirements?

The parties will need to determine a method or basis for determining a reasonable rental amount. This involves much more than deciding upon a price.

### Type of rental arrangements

A primary question is whether the arrangement is a cash rent or crop share arrangement, or a hybrid of the two. In short, a cash rent arrangement is a set amount for a set period (e.g., \$500 a year). A crop share arrangement is where the rental amount is somehow tied to the profits, revenue, or some other aspect of the farming operation (e.g., landowner shares 20% of profits/losses each year). Sometimes the rent amount is even tied to the yield or harvest of the crops, which is provided as an in-kind payment. Either way, the landowner has a stake in the venture. A hybrid arrangement is where there's some set amount, but there's a "bonus" that's also tied to the profits (e.g., landowner gets \$200 a year and shares 10% of the profits/losses). For more on the financial and tax implications of each of these arrangements, see the discussion in Section 2 Q&A—*What are the tax and other financial implications for the landowner in receiving rent payments?*

The rent arrangement, and ultimately rent amount, will likely be tied to the values and objectives that each party aspires to get out of the lease arrangement. It can be helpful to first discuss each party's aspirations and intentions. The arrangement will also depend on who provides what inputs at the outset. If the landowner is sharing in the upfront cost of the trees, it may make sense to have the rental amount be a higher. Or, it may be tied to the profits (i.e., a crop share arrangement). If the tenant is fronting the costs, the rental price may be less as it could be a way to account for this upfront investment that will potentially benefit the landowner through improved land value.

For more on the financial and tax implications of cash rent, crop share, or hybrid arrangements, see the discussion in Section 2 Q&A—What are the tax and other financial implications for the landowner in receiving rent payments?



### **Deciding on a rental amount**

It can be helpful to look at comparable rental rates for agricultural land in your area to determine the initial and revised rental amounts. However, leases involving agroforestry practices are unique. They encompass other values than an amount paid in rent, such as enduring ecological benefits and established yields with mature trees and perennials.

The agreed-upon rent arrangement and amount will likely depend on how the parties address other issues that are addressed later in this checklist, such as how the value of the trees is accounted for through the duration of the lease. Does the landowner or tenant “own” them? Does the tenant have the right to remove the trees at the end of the lease? It may be best to jot some ideas down now and then come back to revisit the rental arrangement and amount once all the other details of the lease are finalized.

### **Benefits of including a rent adjustment protocol or escalation clause**

It's often common for long-term leases involving a cash rent arrangement to include a rent adjustment protocol, which is often called an “escalation clause.” This requires the parties to revisit the rental amount at a certain time or times during the lease. This makes a lot of sense when the lease runs such a long period—say 99 years—as the price will certainly fluctuate. The assumption is that the price will go up, as it generally does, hence the term escalation. But an escalation clause typically allows for either an increase or decrease.

From a legal perspective, an escalation clause can be very helpful if not necessary for the validity of the agreement. It helps establish what's called “legal consideration”—or mutual benefit—throughout the duration of the lease. Consideration is necessary for any contract to be enforced by a court. If the rental amount becomes so low as compared to going rates, a court could say it's not a fair arrangement. While this is unlikely, including an escalation clause helps the parties play it safe. It's also in both parties' best interest as the market could go either way.

With that said, including an escalation clause or protocol for adjusting the rent price may not be necessary or desirable for a 5- or even 10-year lease, as the price may not fluctuate too much within that relatively short time span, and the parties may not want to have to deal with it. Nevertheless, it's advisable for longer leases. While there's no clear cutoff for when it's necessary, it's best to include some form of an escalation clause for leases longer than 10 years.

One common form of an escalation clause is to tie periodic rent adjustments to an objective standard. An objective standard will ensure that rent amount adjustments are rationale and not random. Often escalation clauses for long-term commercial leases are tied to the Consumer Price Index (CPI), which measures the loss or gain of the dollar. However, the CPI is not as accurate for rural agricultural leases as the CPI reflects urban purchasing and does not account for discrepancies in rural areas. Instead, the parties may want to use an agricultural commodities index, going rental rates in the area, the value of the land being leased based on a third party appraisal, a percentage of annual revenue of the farming operation, or some other objective standard.

Another option is to increase the rent by a fixed rate that's established at the get-go. This is called a stepped rent. For example, the rent amount could increase by \$100 every five years. While this approach is simplest, it can be risky as it doesn't account for actual fluctuations in the market.

Setting a time period to revisit and renegotiate the rent price is another option. For example, "Every 5 years the rent amount will be revisited." However, this might make the arrangement vulnerable if the parties can't agree in the future. The parties could agree that a third party will determine the rent for the next year if the parties are unable to decide. But this costs time and money.

Another option is to not include an escalation clause but rather require the tenant to agree to pay for certain capital improvements over the duration of the lease. The tenant is thereby investing in the property, or paying for something that the parties both value. This could make up for what may be considered a "low rent" later down the road. Such capital improvements could include maintaining access roads, drainage, perimeter fencing, and so on. In an agroforestry lease, such improvements could include the quality of the soil and the mature trees and perineal crops. If the parties choose to take this approach, it's best to include a provision somewhere in the lease agreement that highlights the parties' recognition of this added value over time.

When it comes to escalation clauses or rental adjustments, it's up to the parties to decide what they feel most comfortable with. Note that crop share and flexible cash lease arrangements often include a natural rent adjustment. In both cases, the value of the farm's productivity and the yearly fluctuations in crop prices are inherently bound to the rental amount each year. For a crop share, the landowner receives a specified percentage of the crop and thus there is no need for yearly renegotiations

of the rental amount. The same holds true for flexible cash leases, which base the rental amount on yield, the market price for the commodities raised, or both.

- What is the type of rental arrangement—cash rent, crop share, or a hybrid of the two? For more details on each, see Section 2 Q&A—*What are the tax and other financial implications for the landowner in receiving rent payments?*
- If it is a crop share or hybrid lease, how is the profit-sharing calculated and allocated (i.e., what percentage of revenue/profit goes to the landowner and what goes to the farmer)?
- If it is cash rent or hybrid, what is the initial rent amount?
- Is the rent amount ever revisited (i.e., escalation clause)? If so, when and how often? What is the objective basis of the rent change (e.g., commodities index, rental price in the area, consumer price index)?
- When is the rent due (annually, quarterly, monthly, other)?
- How should rent be paid (e.g., cash, check, direct deposit, and to what address or bank if not in person)?
- Is there a late payment fee? If so, what is it and when is it assessed?
- If the farmer-tenant's voluntary conservation practices increase the value of the land, should the farmer's rent be reduced accordingly? Or, is there another way to reward the farmer?

□ **Is the lease binding on future landowners?**

The property could very well change hands at some point in the duration of a long-term lease. This could be to an heir if the landowner dies, to a buyer if the landowner decides to sell, or a bank if the land is repossessed. These are all scenarios that the parties need to contemplate, even if they in no way anticipate them happening at the get-go. Most farmers will want to make sure that any future landowners are bound by lease. If this is true in your situation, it's best that the lease explicitly say as much.

The lease should also specify that the farmer can record the lease in the relevant county or public office. The official recording process helps ensure the binding effect of the lease on future landowners. That's because it officially notifies future landowners that the land is subject to the lease. Many states have laws that require longer-term leases to be recorded. In some cases, leases as short as one year are required to be recorded to have a legally binding effect. Farmers who want to play

it safe should take the time to record their lease. Typically, the recording process requires a fee, which is often linked to the number of pages of the lease being recorded.

- If the landowner dies, is the lease binding on her heirs?
- If the landowner sells the land, is the lease binding on the new landowner?
- May the tenant officially record the lease?

□ Can the farmer transfer the lease to another party?

The parties need to decide what will happen if the farmer dies or no longer wants to farm the land—whether because he falls ill, gets sick of farming, or something else.

- If the farmer dies, does the lease automatically transfer to his heirs?
- If the farmer decides to stop farming the land, can he transfer the lease to someone else (i.e., “assignment” in legal lingo)?
- Are there any restrictions on assignment of the lease, such as does the farmer first need written consent of the landowner?

□ Can the farmer sublease the land to someone else?

A sublease is different than a full transfer or assignment. A sublease simply means that the tenant allows someone else to occupy or use part or all of the land that is subject to the lease for a set period of time. Perhaps the farmer just wants to take a break. Or, perhaps the farmer wants to sublease a portion of the property for a few years, because he realizes it’s too much for him to handle all at once. The person who enters the sublease is bound by the terms of the original lease.

- If the farmer wants to take a break or let someone else use a portion of the premises, can the farmer sublease all or any portion of the premises?
- Does a sublease require written consent of the landowner?

□ What happens if the landowner decides to sell the land?

Long-term leases often provide the tenant what’s called a “right of first refusal” or “option to purchase” the land if the landowner decides to sell. This way, if the landowner receives an unsolicited offer or decides to sell the land, the farmer would have an opportunity to buy it himself. If the parties decide that the lease will be binding on future landowners, the farmer can continue the lease if the land sales and he chooses not to purchase it.

---

For more information on lease-to-own or land contract arrangements, see Farm Commons’ resource *Financing Farmland through an Effective Land Contract: A Toolbox*—available for free download on our website.

- Does the farmer have a “right of first refusal” or “option to purchase” the property if the landowner decides to sell?
- If so, what are the details of this arrangement? How will the land be valued and what is the procedure for exercising the right or option?
- Is the lease convertible to a land contract (i.e., past rental payments will be allocated to the purchase price)?

- What are the uses or activities that the farmer is permitted or prohibited from doing?

While it may seem tedious, the parties should create an exhaustive as possible list of all the activities that the farmer is allowed and not allowed to do. This will help prevent any discrepancies or confusion down the road. The parties should be sure to confirm that all permitted uses under the lease are allowed by the county zoning code where the land is located. The parties can either review the code themselves, or consult with an attorney. The zoning code is generally available online or at the county library. Here are a few issues the parties should consider to get started:

- Is the lease limited only to agricultural use of the property? If so, what all is included in “agriculture”?
- Must the farmer follow production standards for the agricultural use of the premises, such as a requirement to follow organic practices?
- Are there limits on the type of agricultural production allowed (e.g., crops and livestock)?
- Is the farmer allowed to engage in any commercial use of the property?
- Are agritourism or special events allowed?
- Can the farmer do any value-added processing on the premises?
- Is the farmer permitted to live on the property? If so, would the parties prefer to handle the residential lease separate from the commercial farmland lease? (Recommended.)
- Is the farmer permitted to hunt on the property?
- Is the farmer permitted to camp or allow others to camp on the property?
- Are there prohibited activities such as planting of GMOs, aerial spraying, etc.?
- Are there any restrictions or requirements for point of access and parking?
- What about other uses or activities that are important to the parties?

- Are there standards and land use practices that either of the parties must follow?

The parties need to consider the various standards and land use practices that they want each other to follow. It may be that the landowner mandates certain practices, such as following organic standards or forbidding GMOs. It may also be that the farmer mandates that the landowner abide by certain practices. If, for example, the farmer leases 10 acres of a 20-acre piece of property for 99 years and he wants to obtain organic certification, the farmer would want to be sure that the landowner does not do anything on either the adjacent property or the area leased to impact the organic certification. The following line of questions provides some examples of land use standards and practices the parties may want to consider including:

- Are there any production standards that either or both parties must follow (e.g., organic standards, no aerial spraying, etc.)?
- Are there animals involved? If so, are there animal husbandry practices that either or both of the parties must follow?
- Are there any specific standards for weed or disease control that either or both parties must follow?
- Are there any specific standards for pest control that either or both parties must follow?
- Are there any land stewardship practices that either or both parties must follow?
- Do the parties want to participate in a land conservation or stewardship program (e.g., through the USDA Natural Resources Conservation Service (NRCS) or other state program)? If so, who pays for any costs incurred? Who benefits for any payments received from the program?

- How are improvements handled and accounted for, including the addition of trees?

With a long-term lease, the farmer very well may want to make improvements to the property. Improvements could include constructing or remodeling outbuildings, installing irrigation systems, building hoop houses or a greenhouse, erecting fences, and adding or bolstering other infrastructure. Some of these improvements may be considered “temporary” in that they could feasibly be removed, while others may be considered “permanent” in that their removal would cause permanent damage. In an agroforestry lease, the parties may decide that the

planting of trees should be treated as improvements, as over time the mature trees will contribute to the increased value of the property.

The parties will need to determine how these and other such improvements are accounted for throughout the lease as well as when the lease ends—whether early or on the termination date. The parties could decide that any and all improvements—whether temporary or permanent—belong to either the tenant or the landowner. Or, they could decide that temporary improvements belong to the tenant while permanent improvements belong to the landowner. Another option would be that all improvements belong to the tenant at first, and then at some point during the lease—whether on a given date or gradually over time—they revert to the landowner. For more on this reversionary interest concept, see Section 2 Q&A—*How are the trees valued and accounted for throughout the lease?*

For more details on the differences between a lease, easement, or license, see Section 2 Q&A – What’s the difference between an agricultural lease and an easement? and What’s the difference between an agricultural lease and a license?

How improvements are addressed will often depend upon the rent amount and who made the initial investment. For example, if the rent amount is low, perhaps the landowner gets to keep the benefit of the improvements (as part of legal consideration). Similarly, if the landowner invests in the agroforestry venture—for example, by purchasing some or all of the trees—perhaps the landowner has the right to the value in the end. Otherwise, the farmer-tenant may want to negotiate a fair way to be compensated for the increased value from these improvements that can’t feasibly be taken with him at the end—whether through a lower rent amount or through a cash out at the end.

Ultimately, the parties need to be sure to have clear expectations about improvements as this is ripe grounds for dispute in lease agreements. The inherent “improvements” with agroforestry ventures heightens this risk. When it comes down to it, the question is: who owns what at the end? Here are some overarching things to consider when it comes to improvements.

- Which improvements are considered temporary and which are considered permanent? Note that temporary improvements are generally things that can be removed from the land without causing damage, while permanent improvements are things that are so affixed that it is either impossible to remove them or doing so would permanently damage the land.
- How are temporary and permanent improvements handled?
- How is the value of an improvement determined?
- How is this value accounted for and divvied up throughout the duration of the lease?

The parties will also need to decide whether there are limitations and conditions on the tenant's ability to make improvements. The landowner will often want the chance to review and approve any permanent improvement before it is built or added; after all, it is her property.

Finally, the parties will need to be sure that however they choose to handle improvements, it is done so consistently throughout the lease agreement. The issue of improvements could impact multiple aspects of the lease, including the rental amount and who gets what when the lease ends. Be sure to also see the checklist question near the end: What happens when the lease terminates, whether early or at the end of the term? The following line of questions is a good place for the parties to start thinking about how they want to handle improvements in an agroforestry lease.

Is the farmer allowed to install “temporary improvements”?

- If so, how are temporary improvements defined (e.g., anything that can be removed without permanent damage)? What are some examples of temporary improvements (e.g., monitoring devices, removable irrigation systems, mobile fences, and other equipment)? Are trees considered temporary improvements?
- Can the farmer-tenant remove temporary improvements before the lease terminates? If so, can this be done at any time, or is there a certain point when temporary improvements become the landowner's property? Are there any conditions or limitations for their removal (e.g., must repair any damages, must get written permission beforehand, must give landowner the option to purchase them prior to removing them)?
- If the tenant is not permitted to or chooses not to remove any temporary improvements, how are they accounted for at the end of the lease (e.g., tenant gets a reimbursement, they automatically revert to the landowner)? If the tenant gets a reimbursement, how is the value determined?

Is the tenant allowed to install “permanent improvements”?

- If so, how are permanent improvements defined (e.g., anything that would result in permanent damage if removed)? What are some examples of permanent improvements (e.g., buildings)? Are trees considered permanent improvements?



- Are there limitations or conditions on installing permanent improvements (e.g., must get landowner's written permission beforehand)?
- Can permanent improvements ever be removed? If so, what are the conditions or limitations?
- How are permanent improvements accounted for at the end of the lease (e.g., they automatically revert to the landowner, tenant gets a reimbursement for the value)? If the tenant gets a reimbursement, how is the value determined?

□ Does the landowner retain rights to use the premises?

By definition, a lease grants the tenant exclusive rights to occupy and use a specific piece of property. The actual leased premises could include an entire parcel, or a delineated portion of the property. The landowner can, however, retain some rights to use or access some of the leased premises.

Let's say both parties want to use the same exact premises for different purposes. The farmer wants to use it for planting and harvesting perennials, and the landowner wants to use it for allowing her farm animals to graze under the canopy. It may seem like a good idea to simply divvy up the property in a way that the lease applies only for the areas where the trees are and not the alleys where the animals graze. However, this would be complicated, if not impossible, to articulate and enforce. A better approach is to enter a lease with the farmer for the entire premises while reserving certain rights of use for the landowner. This will grant the farmer possession and use of the premises, while allowing the landowner access under certain conditions for certain activities. The lease would need to include several clauses to outline that relationship. In our example, it could specify certain times and places for animal grazing. It could also specify a protocol if the grazing harms the trees, such as the landowner must compensate the farmer for any damage done.

Keep in mind that if the landowner wishes to reserve substantial use of the premises, a lease arrangement may not be the best option. The parties may instead want to consider an easement or a license. For more details on the differences between these options, see Section 2 Q&A—*What's the difference between an agricultural lease and an easement?* and *What's the difference between an agricultural lease and a license?*

- Is the landowner granting an exclusive right to use the leased premises, or will the landowner also be using some or all of the premises for certain activities or purposes?
- If the landowner retains some rights to use, what are the specific uses or activities and areas affected?
- What potential conflicts might arise?
- How can these conflicts be managed (e.g., specify types of uses the landowner may engage in, include schedules, etc.)?
- If conflicts occur, such as property damage or lost revenue because of the other party's actions, is the party who loses compensated in any way?

□ Who pays for insurance?

The parties will need to work out who pays for insurance, what types of insurance coverage are required, and what the premiums are. Types of insurance coverage could include crop insurance, liability insurance to cover injuries to workers or guests on the property, insurance for equipment or buildings, and so on.

- What types of insurance do the parties want to be sure to have in place?
- Who is responsible for maintaining the type(s) of insurance desired?
- Is the tenant added as an additional insured to the landowner's policy, or does the farmer need his own insurance?
- If the landowner provides insurance, are there any coverage thresholds desired by the tenant (i.e., \$1-5 million)?

□ How is access to water handled?

Water can be a big issue in many if not all regions throughout the country. It would be a travesty if the farmer invested tons of money and effort only to lose the trees and perennials due to water shortages or misunderstandings. Farmers in particular should be sure that the water allocations are sufficient for their intended farming operation. .

- Is water for irrigation provided in the lease?
- If so, how, and how much?
- If water usage is unlimited, what is the expected capacity of the well/water supply?
- If there are volume limits, how is usage measured and accounted for?
- What happens if the water infrastructure breaks down or if the well runs

- dry (i.e., who is responsible for any repairs, is the farmer owed damages)?
- If the farmer chooses to install a well or irrigation system to ensure sufficient water supply, how is the cost incurred and value of improvement accounted for when the lease is terminated?

- Does the farmer-tenant have access to existing resources on the property, such as facilities and equipment?

Often landowners have existing equipment as well as buildings on the premises or on an adjacent lot. There may also be natural resources such as timber. The parties should be clear upfront whether the farmer has a right to use these resources, and if so, whether there are any restrictions or requirements. It can be helpful to itemize the resources, or even have a separate facilities or equipment manual that provides more specific details on rules and restrictions that the farmer must abide by. This manual could be in the form of a separate agreement such as a memorandum of understanding or it could be a simple bulleted list of restrictions or requirements that the farmer initials and agrees to follow. Either way, it is a good idea to have something in writing.

- Does the farmer get use of any farm equipment or resources (e.g., timber, equipment, buildings, etc.) that may be on the property? If so, is there a schedule or protocol that needs to be followed? How will equipment breakdown and maintenance be handled? Who pays for maintenance and repair and when does it need to be performed?
- Does the farmer have access to any storage? If so, are there associated terms on storage use such as types of products stored or the timeframe for storage?
- Does the farmer have access to pack shed facilities or refrigerated storage?
- Is water for packing and processing provided in the lease? If so, where? Are any associated costs included in the lease agreement or are they separate?

- Who pays for utilities?

Utilities are another key element that needs to be addressed upfront in the lease so the parties are clear on who pays what.

- Who pays for any utilities to the property such as electric, trash, etc.?
- If the party responsible for paying a utility bill misses a payment, can the other party pay it to prevent penalties? If so, how is that party compensated (e.g., tenant can deduct it from future rent payments if tenant pays)?
- If irrigation water is provided, who pays for the running of the pump and any repairs that may be necessary?

□ Who pays for taxes?

Similarly, the parties need to decide who is responsible for taxes. The parties could decide to share in the cost, or require one party to pay all. If the tenant pays the taxes, the rent is often reduced to account for this inherent cost, which can be a significant benefit to the landowner.

- Who is responsible for paying property taxes on the premises?
- If the party responsible misses a payment, can the other party pay to prevent penalties? If so, how is that party compensated (e.g., tenant can deduct it from future rent payments if tenant pays)?

□ Who is responsible for large-scale capital improvements to the land (e.g., access roads, drainage management, perimeter fencing, etc.)?

Over the course of a long-term lease, the buildings, roads, and other large-scale capital elements of the land will inevitably erode. The parties need to determine who is responsible for the repairs and upkeep of any such essential capital on the premises.

- Who is responsible for large-scale capital improvements to the land (e.g., maintaining access roads, drainage, perimeter fencing, etc.)?
- When and how will needed capital improvements be assessed and completed?
- Who pays for the capital improvements (e.g., landowner, farmer, or both share in the costs)?

□ How are disputes handled if and when they arise?

While the parties may initially believe that disputes will never happen, they can and do. It's best that the parties consider upfront how they want any disputes to be resolved should they arise.

- How will the parties manage potential conflicts and disputes (e.g., required mediation, creation of a dispute resolution committee, straight to court, etc.)?

□ Can the lease be terminated early?

Early termination often happens when one party “defaults” or doesn’t follow through with a significant term of the agreement. If one party defaults, the other party can then terminate the lease. Termination could also occur from conditions outside the parties’ control, such as rezoning of the property or the government purchasing the property through eminent domain. The parties should consider what types of events will lead to early termination.

- Can the lease be terminated early by either party? If so, under what circumstances?
- Are there acts that you would like to designate as triggering a “default” (e.g., failure to pay rent by a certain time, using certain chemicals or practices)?
- Have the parties checked the comprehensive plan for the municipality? Are there concerns about potential rezoning of the property or neighboring development? What happens if the property is rezoned and agricultural or other permitted uses under the lease are no longer allowed?
- Is eminent domain a possibility? If so, how would the parties like to allocate any potential compensation provided under eminent domain in the future?

□ What happens when the lease terminates, whether early or at the end of the term?

Whether the lease terminates early or at the end of the term, the parties need to be clear on what happens when the handover takes place.

- If the lease terminates early because of the fault of one of the parties, must the defaulting party compensate the other party for any damages? If so, how are these damages calculated (e.g., decide on a “liquidated damages” amount or equation upfront in the lease that specifies exactly what the damages are or how they are to be calculated should a default occur)?
- Are there any duties the tenant must fulfill when the lease terminates (e.g., plant cover crops, repair damage from removal of trees if permitted, etc.)? If so, must the tenant fulfill these duties regardless of how and

when the lease is terminated (e.g., only needs to plant cover crops if the tenant defaults on the lease)?

- Must the landowner compensate the tenant for any increased land value resulting from improvements when the lease terminates (e.g., construction of infrastructure such as buildings and irrigation systems, improved soil quality, presence of mature perennials)? If so, must the landowner compensate the tenant for these improvements regardless of how and when the lease terminates (i.e., is the outcome different if the landowner defaults or if the farmer defaults)? If compensation is required, how will this amount be calculated (e.g., hire an appraiser to assess the value of the improvements, decide on a liquidated damages amount or equation upfront in the lease)?
- Does the tenant have the right to remove temporary improvements when the lease ends? If so, are there conditions or limitations (e.g., improvements can only be removed if it results in no permanent damage and/or tenant must repair or compensate landowner for any damage from removal)?

□ How do the parties ensure ongoing and open communication?

Regular communication can help the farmer and landowner avoid problems. Open and honest communication throughout the arrangement is essential. Depending on the history and personality of the parties, this may come naturally. However, it could be helpful to actually require communication at certain points—whether at particular times such as quarterly or annual meetings or for particular issues.

The parties also need to consider how they may go about amending the agreement. Things change. It may be that a party agrees to one thing, and later realizes that she or he simply cannot abide by the term. Rather than pushing the issue under the carpet, the better approach is to bring it up and address it head on. The parties can then discuss ways to change the agreement accordingly or otherwise alter the arrangement before it ends in a full-on dispute.

- Are annual or quarterly meetings appropriate? If so, when will they be held? What issues will be discussed at meetings?
- Are there specific issues that the parties agree to communicate about on an ongoing basis (e.g., machinery and equipment condition, animal health)?
- What's the process for amending or changing the agreement?

## Sample Annotated Long-Term Agroforestry Lease Agreement

This sample long-term agroforestry lease agreement serves to help farmers and landowners through the process of solidifying an effective lease agreement. It includes annotations to help explain legal aspects and the significance of key terms and sections. This agreement is not comprehensive, nor will it meet the needs of all long-term agroforestry ventures. It is not intended to be a template. Do not cut and paste, in whole or in part! The best lease agreements will be those co-crafted by the parties in a way that addresses their specific circumstances. A good approach is to walk through the checklist and refer to this sample agreement as a guide, carefully noting the specifics for how the parties ideally want to address each particular issue.

Farm Commons strongly urges folks to seek the assistance of an attorney when negotiating and drafting the terms of a long-term lease agreement. Getting the insights and expertise of an attorney will save you headaches down the road, as it will ensure your agreement is comprehensive, legally sound, and consistent—all of which are essential for a successful long-term lease and amiable relationship. Doing the legwork by working through this workbook will save you time and money when working with an attorney.

### Sample Long-Term Lease Agreement

This lease (“this Lease” or “the Lease”) is effective as of April 1, 2016.

The parties to this Lease (collectively, “the Parties” or singularly, “the Party”) are as follows:

Lisa Landowner  
123 Country Land Rd.  
River City, Sun State<sup>1</sup> 12345  
Hereafter referred to as the “Lessor,”  
and  
Phil Farmer-Tenant  
321 Agroforestry St.  
Tree City, Sun State 12344  
Hereafter referred to as the “Lessee.”



- 1 We are using the fictitious Sun State here given this agreement is not written pursuant to the rules of any particular state in the U.S. Each state has its own laws that govern leases which establish baseline rules for what the parties can agree to. Be sure to consult with an attorney familiar with leases in your state to confirm that all the sections and terms of the lease are congruent with your state’s laws.

### Recitals. Whereas,

The Lessor, a natural person and resident of Sun State, is the owner of the Premises discussed within this Lease. The Lessor's goal is to ensure that the Premises is utilized to develop the scientific knowledge and implementation of ecological farming practices;

The Lessee, a natural person and resident of Sun State, has training and experience in agroforestry and ecological farming practices. The Lessee's goal is to develop the scientific knowledge and implementation of ecological farming practices;

The Lessee is providing significant ecological benefits to the Premises in the form of carbon sequestration, soil stabilization, reduced nutrient leaching, reduced greenhouse gas emissions, biological diversity, pollinator habitat, and agricultural disease and pest suppression;

Lessor and Lessee mutually understand and accept that the terms and conditions of this Lease further their shared goal over an extended period of time and through successive owners<sup>2</sup>;



- 2 Including recitals or objectives is not necessary; however, it can be helpful to remind the parties of their overarching shared vision. It also helps illustrate that the lease arrangement is mutually beneficial. Having mutual benefit—or “consideration”—is a required element for a contract to be legally enforceable, so including a summary of the mutual benefit somewhere in the lease is advisable.

### Therefore, the Parties agree to all of the following:

#### Section 1: Property and Term

- Premises:** Lessor agrees to lease to Lessee for agricultural purposes the 20-acre parcel (River County Parcel #456) located in the northwest  $\frac{1}{4}$  of the northeast  $\frac{1}{4}$  of Section 2 Township 12 S, Range 5 E, in River County in the state of Sun, as identified in Exhibit A. The property being leased shall be referred to as the “Premises.”<sup>3</sup>
- Term:** This Lease shall continue in force for 50 years, terminating on March 31, 2066.



- 3 It is essential to clearly describe the exact premises being leased. An ideal approach is to use the legal description, found on the deed or at the county recording office. It's a good idea to also Include a map, pictures, or whatever else may be helpful and necessary to specify the boundaries. This is particularly significant if the premises being leased is only part of a larger parcel.



## Section 2: Renewal

- a. Renewal Procedures:** The Parties may elect to renew the Lease by the following process:
- i. Before October 1, 2065, Lessee shall give written notice to Lessor of Lessee's intent to renew the Lease. If notice is not given, absent mutual agreement by the Parties, the Lease shall not be eligible for renewal.
  - ii. Lessor shall respond to any written notice of Lessee's intent to renew by December 1, 2065. If Lessor agrees to renewal, the Lease shall be renewed for 50 years beginning on April 1, 2066, unless the parties agree otherwise.<sup>4</sup>



- 4 Most often long-term leases do not automatically renew, and instead require some action on the part of the parties. This is one example of how a renewal process could work. The parties will need to agree on their own terms and timeline.

## Section 3: Rent and Payment

- a. Rent Amount:** Lessee shall pay Lessor rent in the amount of \$3,000 per year.<sup>5</sup>
- b. Rent Payment:** The rent amount shall be paid biannually; the first payment of \$1,500 is due on April 1 and the second payment of \$1,500 is due on August 1 of each year throughout the term of the lease beginning in 2016. If rent is not received within 30 days of the due date, Lessor may assess interest on the payment at a rate not to exceed 2%, compounded monthly. Rent is to be paid in the form of a check sent to Lessor or via an electronic funds transfer.<sup>6</sup>
- c. Rent Adjustment:** The rent amount shall be reevaluated every 10 years, unless the parties otherwise agree. The reevaluation shall be based upon the appraised value of the land only (without improvements, including trees and perennials). The parties shall hire a third-party appraiser to assess the value of the land only, on or before April 1, 2016 ("initial appraised value") and between the months of January 1 and March 1 every 10 years thereafter (2026, 2036, 2046, and 2056). The cost of the appraiser shall be shared equally between the parties. The rent amount shall be adjusted in accordance with the appraised value of the land only every 10 years to equal the base percentage, unless the parties otherwise mutually agree. The base percentage for the rent amount adjustment will be the initial rent amount of \$3,000 divided by the initial appraised amount.<sup>7</sup>
- d. Recognition of Reduced Fair Market Value:** The Parties recognize that the uses of the Premises are restricted in such a way that the fair rental value of the Premises may be reduced, and that the contribution of ecological services provided by Lessee's use of the land increase Lessor's consideration for this Lease.<sup>8</sup>



- 5 This is a basic cash rent arrangement for which the rent amount is consistent each year. The parties also have the option of entering a crop share arrangement or a hybrid between the two. For more information on these options, see Section 2 Q&A—*What are the tax and financial implications for the landowner in receiving rent payments?*
- 6 It's important to include the specifics of when rent payments are due and where they are to be sent. Here, the landowner may charge interest if the payment is later than 30 days.
- 7 Long-term lease agreements generally have what's called an escalation or rent adjustment clause, which requires the parties to reevaluate the lease at a certain point or points throughout the lease. Such a clause helps ensure that both parties maintain their level of mutual benefit in the arrangement—or “legal consideration”—which is required for the lease agreement to be enforceable. Here, the lease requires the parties to evaluate the rent amount every 10 years. Any adjustment to the rent is based on the value of the land. The parties could also agree otherwise. A periodic rent evaluation and adjustment is just one option for an escalation clause. For more information on options for escalation clauses, see Section 3 Checklist—*What are the rent arrangement, amount, and payment requirements?*
- 8 This again reiterates that the parties are getting mutual benefit—or “consideration”—from this lease arrangement. Here, the initial rent amount of \$3,000 is less than the going-rate for agricultural leases in the area. This is in part because the landowner is requiring the farmer to use only sustainable practices (e.g., no GMOs, no aerial spraying) and because the farmer is helping add ecological balance and value to the property through the agroforestry venture. The clause affirms that the landowner recognizes this added value, which does not necessarily equate to a dollar amount. Such a clause is not necessary, but it can be helpful to remind the parties and inform the courts of this ecological value should an issue or discrepancy ever arise.

#### **Section 4: Transfer of Interest**

- a. **Transfer of Lessee's Interest:** Lessee may transfer or assign Lessee's interest in this Lease at any time and without the consent of Lessor, so long as the transfer is to a family member of Lessee.<sup>9</sup>
- b. **Transfer on Death:** If Lessee holds the Lessee's interest in this Lease at the time of his death, his interest in this Lease shall transfer to the individual or entity as dictated in Lessee's will or, if there is no will, pursuant to the laws of intestate succession in Sun State.<sup>10</sup>
- c. **Sublease:** Notwithstanding the forgoing, Lessee reserves the right to sublease all or portion(s) of the Premises to anyone to engage in Permitted Uses as defined herein without the written consent of the Lessor.<sup>11</sup>



- 9 Should the farmer get injured, fall ill, or for whatever reason not want or be able to continue with the lease, this section provides the farmer the option to assign or transfer the lease to a family member. The family member would then be bound by the terms of the lease. Leases are generally transferrable; however, landowners often want some restriction or limitation on transfers. After all, it is their land. By keeping it in the family, the landowner may feel more assured that the assignment will be to someone the original farmer-tenant trusts and respects.
- 10 Should the farmer-tenant die, the lease will automatically transfer to his heirs, whether designated by will or through the state's intestate laws if he has no will at the time of death.
- 11 A sublease is different than a full transfer. A sublease simply allows someone else the right to use and occupy part or all of the leased premises for a certain period of time. The farmer-tenant may want to sublease a portion of the premises to someone else if he doesn't have the time or capacity to do it all on his own. Or, he might want to take a break for a couple years and sublease the whole property to someone else. The way this section is written, the farmer-tenant has full freedom to enter a sublease whenever and to whomever he wants. This gives him flexibility to run his farm operation wisely and seek the help he needs. Some landowners may require written consent first, or prohibit subleases outright.

### **Section 5: Right of First Refusal**

- a. **Intent to Sell Notice:** In the event that Lessor intends to sell the Premises, including by intending to accept an unsolicited offer, Lessor shall give Lessee notice in writing at least 135 days before offering the Premises for sale or 60 days before accepting an unsolicited offer (the "Intent to Sell Notice").<sup>12</sup>
- b. **Notice of Exercise:** Upon receipt of an Intent to Sell Notice, Lessee shall have the option to purchase Lessor's interest in the Premises at the Premises' agricultural use value, according to the following requirements:
  - i. Lessee shall arrange for an appraisal of the Premises with a mutually agreed upon appraiser within 30 days of receiving the Intent to Sell Notice. Lessee and Lessor agree to split equally the appraiser's costs. If the parties do not mutually agree upon an appraiser, each party shall hire an appraiser and cover the costs of their appraiser and the agricultural use value will be the average of the two appraisals
  - ii. The Premises shall be appraised for its agricultural use value, which takes into account the net income likely to be earned generally in River County, Sun State, by producers of the commodity crop rotation of corn and soybeans as commonly conducted on land similar to that of the Premises.<sup>13</sup>
  - iii. Lessee may elect to purchase the Premises at a price equal to the prepared agricultural use value.

- iv. If Lessee elects to purchase Lessor’s interest in the Premises, Lessee shall notify Lessor of such within 30 days of receipt of the prepared agricultural use value by delivering written notice of Lessee’s decision which must include the appraised agricultural use value of the Premises (the “Notice of Exercise”). Lessee’s purchase of the Premises must be completed within 90 days of the Notice of Exercise. The time for completion of the purchase may be extended by mutual agreement of the Parties.
  - v. If Lessee does not submit the Notice of Exercise, or the sale of the Premises is not completed within 90 days, at the fault of Lessee, and the Parties have not mutually agreed to extend the purchase period, Lessor may sell the Premises to another party.
  - vi. Lessee may revoke Lessee’s Notice of Exercise. If Lessee revokes the Notice of Exercise, Lessor may sell the Premises to another party.<sup>14</sup>
- c. Remedies for Failing to Follow Right of First Refusal:** Any proposed sale of the Premises not made in compliance with the requirements of this Section 5 shall be null and void. Lessor acknowledges and agrees that any breach of this Section 5 would result in substantial harm to Lessee for which monetary damages alone could not adequately compensate. Therefore, Lessor agrees that Lessee shall be entitled to seek injunctive relief and other remedies available at law or in equity (including, without limitation, seeking specific performance or the rescission of any purchase and sale of the Premises not made in compliance with this Section 5).<sup>15</sup>



- 12 This section—also known as an “option to purchase”—provides the farmer-tenant the option to purchase the property should the landowner decide to sell it or get an unsolicited offer from a purchaser. The farmer basically gets the right to refuse the purchase before someone else buys it. Farmers often want to include such a section to preserve their opportunity to own the land outright. Here, the landowner must give the farmer-tenant notice and an opportunity to buy it well before she sells it.
- 13 This section is included for purposes of coming up with a purchase price should the farmer have the option to purchase the property. It is a critical section, as it is the basis for determining who owns the value of the trees if and when the property is sold. Here, the purchase price is tied to a generic “agricultural use”—which in the fictitious region of Sun State is growing corn and soybeans. You may be asking, why not tie the purchase price to the value of growing the trees and any benefits resulting from integrating agroforestry practices? That is because this particular lease is a straightforward cash rent lease and the landowner did not make any investment in the upfront purchase of the trees. The landowner has no stake in the agroforestry venture. All of the added value resulting from the mature trees and agroforestry practices is a result of the farmer’s efforts and resources, not the landowner’s. As such, the “value of the trees” ultimately belongs to

the farmer, and the farmer should not have to repurchase it so to speak. Accordingly, the purchase price for the farmer, should the option arise, reflects more of a generic price for commodity crops so as to not account for any added value from the trees. If the landowner had invested in the agroforestry venture or purchased the trees upfront, or if the lease arrangement was written so that the ownership of the trees changed over time, this section would need to be written differently. Ultimately, to be effective, this section must be written in a way to reflect the allocation of the value of the trees between the landowner and the farmer at any given time.

- 14 If the parties include a right-of-first-refusal option in the lease, it needs to clearly outline how the process will take place. The section included here is just one example. The key is to include a specific timeline as well as a way to assess the value of the property, whether it is through a formal appraisal or something else. The parties could also consider applying some or all of the previous rental payments to the purchase price.
- 15 This section highlights the fact that if the landowner fails to provide the farmer-tenant a right of first refusal or doesn't follow the process outlined, the farmer would lose his opportunity to purchase the land. It's hard if not impossible to put a value on such a lost opportunity. Therefore, if this were to happen, the farmer has the option of filing a lawsuit for an injunction or other legal remedies, which would legally prevent the landowner from selling it to someone else until she followed the protocol.

## **Section 6: Lessee's Permitted Uses and Prohibited Uses**

### **a. Permitted Uses:**

- i. Agricultural and Ecological Restoration Uses:** Lessee is permitted to use the Premises for agricultural and ecological restoration purposes. Agricultural use is defined as the raising of crops or for the purpose of selling agricultural products in the course of business. Although the permitted use of the property for agricultural uses is broad, the Parties acknowledge limitations on that use in this Lease. Examples of permitted agricultural uses include but are not limited to seeding pollinator plants, installing warm season grasses, and planting agricultural crops such as fruit trees, nut trees, shrub fruits, rhubarb, and asparagus. In addition, the Parties mutually agree that although perennial plants such as chestnut trees are not commonly thought of as agricultural, the planting and maintenance of food-producing horticultural plants shall be included in the definition of agricultural use. Ecological restoration uses includes ecological farming practices, experimentation, and other activities that are intended to result in carbon sequestration, soil stabilization, reduced nutrient leaching, reduced greenhouse gas emissions, increased biological diversity and pollinator habitat, agricultural disease and pest suppression, and other ecological benefits.<sup>16</sup>

- ii. Such Other Activities that Support Agricultural and Ecological Restoration Uses:** Lessee is permitted to use the Premises for all other activities that are incidental to and support the permitted agricultural and ecological restoration uses. Such activities include, but are not limited to:
- **Chemical Use:** Lessee is permitted to apply herbicides and pesticides on the Premises, at Lessee's sole discretion.
  - **Educational Use:** Lessee is permitted to use the Premises for educational and demonstration purposes, including but not limited to hosting tours, educational classes, and workshops.
  - **Research Use:** Lessee is permitted to use the Premises for research purposes and may direct Lessee's agents to conduct research on the Premises. Lessor has no interest in any intellectual property that may extend from this research.
  - **Monitoring Use:** Lessee is permitted to install and operate one or more electronic monitoring devices on the property, including but not limited to time lapse and motion sensor cameras for management or documentation purposes.
  - **Camping:** Lessee is permitted to allow overnight camping on the property by no more than 25 people at a time and only incident with tours or other educational activities.
  - **Hunting:** Lessee is permitted to hunt on the property, within the constraints of the law.
  - **Signage:** Lessee is permitted to install temporary signs on the property and along the road without prior written approval by Lessor.
  - **Livestock:** Lessee is permitted to engage in the raising of pasture-based livestock and/or poultry. Lessee is responsible for providing and maintaining removable or mobile fencing systems to ensure that all raised animals are contained within the Premises at all times. Lessee agrees to treat all raised animals humanely and in accordance with the Animal Welfare Approved standards.<sup>17</sup>
  - **Fire:** Lessee is permitted to use fire as a management tool on the Premises, including but not limited to controlled burns of areas of the farm, burn piles of plant materials, and bonfires.
  - **Point of Access:** Lessee may access the Premises from any point connecting to a road.
  - **Vehicle Parking:** Lessee and Lessee's agents may drive and park vehicles anywhere on the Premises.

**b. Lessee's Prohibited Uses:**

- i. **No GMOs:** Lessee shall not plant or intentionally grow any genetically modified organism.
- ii. **No Aerial Spraying:** Lessee shall not utilize aerial spraying techniques.
- iii. **Unlawful Activity:** Lessee shall not engage in any unlawful activities.<sup>18</sup>



- 16 The lease should clearly specify what the permitted uses are. This section will vary depending on the type of farming or agroforestry operation, as well as the landowner's preferences in how the property will be used.
- 17 When animals are involved it presents a level of complexity. Can the farmer construct and operate a confined animal feeding operation (CAFO)? Does the farmer have to abide by any animal husbandry standards, and if so, what are they? Who's responsible for fencing? Can the farmer sublease grazing rights to someone else? The lease should address all of these issues. Here, the livestock and poultry must be pasture-raised, which precludes a CAFO. The farmer must also abide by the Animal Welfare Approved standards to ensure humane treatment. Another option would be to include a set of animal husbandry standards within the lease, or to have a separate Animal Husbandry Manual that the farmer acknowledges and agrees to abide by. Here also, the farmer is responsible for erecting fencing to be sure the animals are contained on the Premises. Note that in some states the landowner is legally required to maintain fencing for grazing operations. It's best to consult the advice of an attorney to be sure the lease is in compliance with your state's fence laws. Note that Section 4(c) of this Lease allows the farmer to sublease any portion of the Premises for permitted uses. Therefore, as this lease is written, the farmer could sublease his grazing rights to someone else. However, that person would need to follow these terms.
- 18 Instead of relying solely on a general section, it's best to be as specific as possible when outlining permitted and prohibited uses. This list here provides a good example of the types of issues the parties should consider and include related to permitted and prohibited uses. For more thoughts and ideas on this element of the lease, see Section 3 Checklist: *What are the uses or activities that the farmer is permitted or prohibited from doing?* and *Are there standards and land use practices that either of the parties must follow?*

### **Section 7: Lessee's Rights and Obligations**

- a. Conservation Reserve Program Enrollment:** Lessee reserves the right to enroll all or part of the Premises into the Conservation Reserve Program or other similar government programs with prior written approval by Lessor so long as the term of those programs ends prior to the ending of the term of the Lease. Lessee will incur all establishment and management costs associated with enrolling land into such programs, and, consequently, Lessee will receive all payments from such programs.<sup>19</sup>
- b. Improvements:**
- i. Temporary Improvements:** Lessee may make or add temporary improvements to the Premises

without prior written approval by Lessor. Temporary improvements include but are not limited to: trees, shrubs, and perennial plants; mobile or removable structures such as greenhouses and hoop houses, removable or mobile fencing, removable parts of irrigation systems, and structures required for monitoring activities and signage permitted under Section 6(a)(ii). Unless otherwise agreed in writing, any temporary structures that Lessee erects on the Premises are the property of Lessee, and Lessee may remove them at any time throughout the duration of the Lease. Lessee is responsible for remedying or compensating Lessor for any damages incurred to the Premises from the removal of temporary improvements.

**ii. Permanent Improvements:** Lessee may not make any permanent improvements to the Premises without prior written approval by Lessor. Permanent improvements include building or adding any structure or object that is irremovable or would cause permanent damage to the Premises if removed.<sup>20</sup>

**c. Insurance:** Lessee shall, at Lessee’s sole expense, continuously maintain the following insurance:<sup>21</sup>

- i. Workers’ compensation insurance, where required by the laws of Sun State.
- ii. Liability insurance of not less than \$1,000,000 for injury to or death of any one person; and \$2,000,000 for injury to or death of any number of persons in one occurrence; and \$100,000 for property damage. The dollar amounts of this coverage shall be adjusted in 10-year intervals by mutual agreement of the Parties with the first adjustment beginning 10 years from the effective date of this Lease. Such insurance shall insure Lessee against all liability assumed under this Lease and imposed by law. Lessee shall name Lessor as an additional insured on any liability policy.
- iii. Automobile liability insurance on all automotive equipment used in conjunction with operations in amounts not less than \$100,000 for bodily injury and the same for property damage and liability.



19 If the parties wish to enroll the land in a conservation program, the lease will need to specify who is responsible and who gets the payments.

20 The lease needs to specify how the parties will handle any improvements that the farmer-tenant may add to the property. These include things like buildings, structures, wells, irrigation systems, and so on. For an agroforestry lease, it could also include trees, plants, and shrubs—if the parties choose to treat these as improvements. Here, improvements are divided into temporary (i.e., removable) and permanent (i.e., irremovable). The farmer-tenant can add temporary improvements without prior approval of the landowner. Because these are “removable,” the farmer-tenant in effect owns them and can remove them at any time. However, the farmer-tenant needs written permission to add any permanent improvements. Because these are “irremovable”—that is, can’t be removed without causing permanent damage to the Premises—the landowner in effect owns them. Here, the trees, plants, and shrubs are considered temporary improvements—owned by the tenant—until and unless they cannot



be removed without permanent damage. This is one creative way the parties could account for the value and ownership of the trees and perennials throughout the duration of the lease. However, many other options are available and it will depend on the circumstances of the parties and their particular arrangement. For more information on this issue, see Section 2 Q&A: *How are the trees valued and accounted for throughout the lease?* In addition, see Section 3 Checklist: *How are improvements handled and accounted for, including the addition of trees?*

- 21 The lease needs to specify any insurance requirements for the farmer-tenant, including premium amounts. Here, the tenant is required to obtain worker's compensation when required, liability insurance, and automobile insurance.

### Section 8: Lessor's Right of Entry

- a. **Lessee's Exclusive Use:** Lease of the Premises is exclusive.
- b. **Right of Entry:** Lessor or Lessor's agents may enter the Premises only upon providing 24-hour written notice to Lessee.<sup>22</sup>



- 22 This is an exclusive lease. Therefore, it's akin to renting an apartment or a house. The landlord can't simply just walk in and check things out. Some landowners may want to reserve some usage rights. If that's the case, the parties will need to clearly outline the parameters and protocols for preventing and addressing conflicts between the parties' respective uses and activities. If the landowner wants to reserve substantial usage rights, a lease may not be the best option. By nature, a lease must provide some level of exclusivity or primary usage to the tenant. If the landowner wants to retain primary usage rights, a better option may be a license or an easement. For more on this issue, see Section 2 Q&A: *What's the difference between an agricultural lease and an easement?* and *What's the difference between an agricultural lease and a license?* Be sure to also see Section 3 Checklist: *Does the landlord retain rights to use the premises?*

### Section 9: Lessor's Obligations

- a. **Provide Utilities:** Lessor must provide Lessee with occasional access to electricity for light uses such as charging batteries. Lessor must also provide access to trash disposal for incidental refuse generated from Lessee's agricultural activities.
- b. **Pay Taxes:** Lessor shall pay any and all taxes, assessments, and charges, when due, that are charged against the Premises.

- c. Lessee's Payments in Event of Delinquency:** If Lessor does not timely pay the relevant water, utility, and refuge bills or taxes charged against the Premises, Lessee may pay the unpaid bills or delinquent taxes and either invoice Lessor for the amount paid or use the payment to offset future rental payments. Lessor shall pay Lessee any invoiced amount for unpaid bills or delinquent taxes within 30 days of receipt of invoice in the form of a check at a current address provided to Lessor by Lessee on the invoice. Lessee may assess interest on any overdue balance of the invoiced amount at a rate not to exceed 2%, compounded monthly.<sup>23</sup>



<sup>23</sup> This section provides that the landowner is required to pay for the utilities and taxes. All these fees are accounted for in the rental amount. Sometimes leases account for them separately. It's up to the parties to decide what arrangement is best for them. The last paragraph specifies that if for whatever reason the landowner fails to make a payment on time, the farmer-tenant can go ahead and make it so there's no interruption or issue with the services.

## **Section 10: Mutual Duties and Responsibilities**

### **a. Access to Water:**

- i. Lessor must provide and maintain access to water through an irrigation hookup on the Premises throughout the term of the Lease. Lessee acknowledges and agrees to reasonable delay in the provision of water should water pressure drop, available capacity decrease, or other contingency occurs that is outside the control of Lessor. Lessor agrees to use best efforts to remedy any adverse contingency and resume the provision of water as soon as is reasonably possible.
- ii. Lessee is responsible for building and maintaining all infrastructure necessary to carry water from the irrigation hookup to and throughout the Premises, including piping, drip table, sprinklers, and valves. Lessee must use the irrigation hookup in a responsible way, and is responsible for paying any repair or replacement costs should damage result beyond ordinary wear and tear. Lessee will use water responsibly and sustainably including taking actions necessary to prevent erosion on the Premises and to control the flow of excess water and runoff.<sup>24</sup>

### **b. Indemnification:**

- i. Lessor shall indemnify, defend, and hold harmless Lessee against any liability and pay for any and all damages, losses, or expenses that are incurred by Lessee in connection with the Premises that extend from Lessor's negligence or failure to perform the terms of this Lease.
- ii. Lessee shall indemnify, defend, and hold harmless Lessor against any liability and pay for any and all damages, losses, or expenses, up to the limits of Lessee's insurance policy where available, that are incurred by Lessor in connection with the Premises that extend from the Lessee's negligence or failure to perform the terms of this Lease.<sup>25</sup>

- c. **No Pledge of Credit:** Neither Party shall pledge the credit of the other Party for any purpose without the consent of the other Party.<sup>26</sup>



- 24 Depending on the region and geography of the area, water usage may be a significant concern. A separate water or irrigation section may be helpful to fully address all the issues surrounding water usage—including timing, flow rate, repairs, cost, etc. This is just one example of the arrangement for water access and usage that the landowner and farmer may agree upon.
- 25 An indemnification clause is simply a promise by the other party to cover your losses if he or she does something that causes you harm or causes a third party to sue you. This is a mutual indemnification clause, which means that both parties agree to compensate the other for damages, losses, or expenses that result from their actions or inactions.
- 26 This is another way of saying that the farmer-tenant may not enter a debt and pledge the property as collateral. Similarly, the landowner may not take out a lien on the property for any value that is rightfully the farmer-tenant's—including the value of the trees, any equipment, or other improvements that belong to him.

### Section 11: Enforcement of Effect

- a. **Dispute Resolution:** Prior to taking any action in a court of law, the Parties to this Lease agree to appoint a committee to evaluate the dispute and make recommendations for its resolution. The committee shall consist of three persons: 1) One adult appointed by Lessee who is not a member, partner, director, or employee of Lessee or an immediate family member of Lessee; 2) One adult appointed by Lessor who is not a member, owner, partner, director, or employee of Lessor or an immediate family member of Lessor; and 3) One adult who is appointed by the Parties' designees and is a qualified and experienced mediator or professional in a relevant field such as an extension officer, an experienced farmer, or a representative from an agricultural or environmental agency (altogether, the "Dispute Resolution Committee"). The Dispute Resolution Committee shall review written submissions and supporting evidence submitted by both Parties within 30 days of the committee's creation. The Dispute Resolution Committee shall make findings of fact and propose a resolution for the dispute within 60 days of the Dispute Resolution Committee's creation. The Parties may accept the resolution if they wish. Lessor and Lessee agree to each assume 50% of the costs of the Dispute Resolution Committee, as costs are incurred.<sup>27</sup>
- b. **Binding Effect:** The provisions of this Lease shall be binding on the heirs, executors, successors, administrators, and assignees in a like manner as upon the original Parties, except as provided by mutual written agreement.<sup>28</sup>

- c. Memorandum of Lease:** Lessee has the right to record a Memorandum of Lease in the River County Office of the Recorder of Deeds and in the River County Farm Service Agency Office.<sup>29</sup>



- 27 This is a creative approach to resolving disputes, which may or may not be preferred by the parties. If a dispute were to arise, the parties must first go through a dispute resolution committee that they themselves create. The parties may decide to accept or reject the resolution of the committee. If they reject it, they can then go to court. This helps facilitate open communication throughout, and can help prevent the parties from ever going to court—which is risky, expensive, and time consuming.
- 28 Leases are generally binding on future landowners. That means that if the landowner dies or sells the property, the subsequent landowner must continue with the lease as they will be bound by the terms. The parties could agree otherwise. Either way, it is essential that the lease specify whether it is binding on future landowners or not. Here, this section explicitly states that the lease carries on with future landowners.
- 29 Leases grant the tenant a property interest. Therefore, just like a real estate sales agreement, it should be recorded with the official recording office in the county or region where the property is located. This recording process basically notifies any future landowners that the property is subject to a lease. It's yet another step to provide the tenant a sense of security that the lease will carry on if the initial landowner were to sell the property or die and pass it on to her heirs. In some counties, long-term leases must be recorded to have any legal validity in court. It's best to play it safe and record your lease.

## **Section 12: Amendments and Early Termination**

- a. Amendments:** Any amendment to this Lease is ineffective unless in writing and signed by both Parties.<sup>30</sup>
- b. Early Termination:**
- i. This Lease may be terminated before its date of expiration upon the written consent of both Parties.<sup>31</sup>
  - ii. If Lessee is unable or unwilling to comply with the terms of this Lease for the full term or any renewal or extension, then Lessee may terminate the Lease early by giving one-year written notice to Lessor. If Lessee terminates the Lease early, Lessor may suffer a loss in the form of rent proceeds. Therefore, within two years and two months of providing notice of early termination, Lessee shall pay Lessor liquidated damages in the amount of one year's rent less any proceeds the Lessor receives from leasing, assigning, or otherwise using the Premises in the first year after termination. Lessor agrees to take reasonable steps to mitigate damages upon receiving notice of early termination from Lessee.<sup>32</sup>
  - iii. If Lessor is unable or unwilling to comply with the terms of this Lease for the full term or any

renewal or extension, then Lessor may terminate the Lease early by giving one-year written notice to Lessee. If Lessor terminates the Lease early, the Lessee may suffer a loss in the form of the cost of establishing and maintaining perennial crops and the increasing value over time of established perennial crops. Therefore, within one year and one month of providing notice of early termination, Lessor agrees to pay Lessee liquidated damages in the amount of \$8,000 per acre planted with woody crops plus \$4,000 per acre per year that those woody crops have been in place. For example, if Lessee establishes three acres of woody crops in year one and two acres of woody crops in year two, and then Lessor terminates the Lease in year three, the liquidated damages owed to Lessee are  $5 \text{ acres} \times \$8,000 + 3 \text{ acres} \times 2 \text{ years} \times \$4,000 + 2 \text{ acres} \times 1 \text{ year} \times \$4,000 = \$72,000$ . Lessee agrees to take reasonable steps to mitigate damages upon receiving notice of early termination from Lessor.<sup>33</sup>

- c. No Amendment by Performance:** The conduct, representation, or statement of either Party, by act or omission, shall not be construed as a material alteration of this Lease, unless such a provision is put in writing and signed by both Parties as an amendment to this Lease.<sup>34</sup>
- d. Waiver of Performance:** The failure of either Party to insist on strict performance of this Lease is not a waiver of any subsequent default or failure of the other Party to comply with the terms of this Lease. The Parties may waive performance of this Lease, but the waiver must be in writing and signed by both Parties to be effective.<sup>35</sup>



- 30 The parties must get any agreed-to changes to the lease agreement in writing. The parties thus need to be careful not to simply rely upon anything said in a conversation. Get it in writing.
- 31 If the parties both agree, they can terminate the lease early. This gives them an out should something unexpected arise.
- 32 This is a form of a liquidation clause. It sets an amount for calculating damages if the farmer-tenant decides to terminate the lease early for whatever reason. It recognizes that the landowner may suffer a loss in rent proceeds. It requires the landowner to mitigate or prevent that loss by trying to find another tenant or otherwise use the land in a way that brings in some profit. Essentially, the farmer-tenant will have to pay the landowner one year's rent minus whatever the landowner is able to bring in from the land over the course of two years and two months. This is one creative approach to addressing the possibility that the farmer-tenant may have to back out of the long-term lease. It is an attempt to strike a balance of fairness to both parties. The parties are free to negotiate whatever approach is best for them under their circumstances. Note that liquidated damages must be fair and reasonable to be upheld by a court; they cannot excessively penalize the other party. It's best to tie liquidated damages to a real-life scenario like the example here.

- 33 This is a liquidated damages clause that will kick in if the landowner terminates the lease early for whatever reason. Here, the liquidated damages are based on an equation that accounts for the value of the trees and shrubs that the farmer-tenant invests in and plants over the course of the lease. This addresses the issue in an agroforestry lease that the venture takes time to become profitable. If the landowner suddenly terminates the lease, the farmer has a lot at stake. Again, this is just one option. The parties are free to negotiate an approach that works best for them. Of course, it will depend on how the parties account for the value of the trees in other places of the lease, including the rent amount (is it less to account for the added value of mature trees?) as well as improvements (are the trees considered temporary improvements and is the farmer-tenant permitted to take them when the lease terminates?). Also note that anytime the parties include a formula in a lease or other agreement, it's a good idea to also provide an example, as done here, so that the parties clearly understand how it works.
- 34 This is legal language explaining that simply saying or doing something isn't enough to amend the lease agreement. An amendment must be in writing to be effective.
- 35 This is legal language explaining that if one of the parties doesn't comply with a term and the other party doesn't say anything, it doesn't mean the party can thereafter get away with doing it again. The only way the parties can get out of any of the terms or obligations of the lease is by getting it in writing.

### **Section 13: Additional Terms**

- a. **Notice of Address Change:** Each Party shall provide the other Party written notice of any change in their mailing address within 30 days of the address change.<sup>36</sup>
- b. **Notice of Bank Account Change:** Lessor shall provide Lessee written notice of any change in the bank account information for electronic fund transfer within 30 days of the bank account change, but no less than 10 days prior to a rent payment due date.<sup>37</sup>
- c. **No Use of Identifiers:** Neither Party shall use the name, trademark, or other identifier of the other Party in any advertisement, promotion, publicity, or other purpose without the prior written approval of the other Party.<sup>38</sup>
- d. **Compliance with Laws:** Lessee shall use the Premises in a manner that does not cause harm to others or create any nuisances. Lessee shall maintain the Premises in a safe condition, in full compliance with all applicable laws and regulations, and as required to maintain both Parties' insurance policies. Neither Party shall permit illegal activities to be conducted on the Premises.<sup>39</sup>

- e. **Attorney's Fees:** The prevailing Party shall have the right to collect from the other Party its reasonable cost and necessary disbursements and attorneys' fees in enforcing this Agreement. <sup>40</sup>
- f. **Governing Law:** This Lease is governed by the laws of Sun State. The language in this Lease in all cases should be construed according to its fair meaning and not strictly for or against Lessor or Lessee. <sup>41</sup>
- g. **Severability:** If any part of this Lease is or becomes invalid or unenforceable, such material shall be read out of the Lease and the remainder of the Lease shall remain effective. <sup>42</sup>
- h. **Partnership:** This Lease does not create a partnership or joint venture and neither Party has the authority to obligate the other without written consent. <sup>43</sup>
- i. **Notice:** Unless stated otherwise, notice must be given in writing and delivered in person or mailed through the United States Postal Service by registered or certified mail to the last known address of the other Party. Notice is effective 72 hours after being deposited in the United States Postal Service mail with a return receipt or in the case of personal delivery, upon receipt. <sup>44</sup>

### Signatures

We set our signatures to this document.

\_\_\_\_\_  
Phil Farmer-Tenant

\_\_\_\_\_  
Date

\_\_\_\_\_  
Lisa Landowner

\_\_\_\_\_  
Date



- 36 The parties must notify each other of any address change. This ensures that rent payments and other written notifications are sent to the right place and are received on time.
- 37 If the landowner expects the farmer-tenant to pay rent through direct deposit, she must provide an updated bank account.
- 38 This protects the branding and intellectual property—such as trademark, copyright, etc.—of each of the parties. The parties can use each other's brand, but only with written permission.
- 39 This reiterates that the farmer-tenant must engage in only those activities that are permitted under the lease and comply with the law. He can't create a "nuisance" which is a legal term that means an unreasonable, unwarranted, or unlawful use of one's property. Activities causing a nuisance could include things like dumping toxic chemicals, knocking down buildings without permission, and so on.

- 40 This means that if the parties were to go to court or take other measures to enforce the agreement, whoever “loses” will have to pay the other party’s attorney fees.
- 41 This means that if the parties were to ever go to court the laws of Sun State would apply. Generally, it will be the laws of the state where the property is located. But the parties could agree otherwise if, for example, one of them lives in another state.
- 42 This is legal language saying that if a court were to conclude that one of the provisions or sections of the lease is invalid for whatever reason, the remainder of the lease is still intact and enforceable.
- 43 Lease arrangements run the risk of being deemed a general partnership in the eyes of the law, even if it’s not what the parties intended. If for whatever reason a court finds that the lease arrangement between the parties is a general partnership, the parties will have what’s called joint authority and joint liability. This means that both parties will be on the hook for the actions or inactions of the other party, including incurring debt or legal liability. This clause helps prevent that from happening, should the parties want to not treat their arrangement as a business venture together. If the parties want to create a business venture together, it would be advisable to form an official business entity together, such as an LLC or corporation, in addition to the lease. Unlike a general partnership, the formal entity provides the individuals involved some level of personal liability protection for the business’ liability. For more on this issue see Section 2 Q&A: *What are the tax and financial implications for the landowner in receiving rent payments? (d) Accidental partnerships.*
- 44 This specifies how the parties must officially notify each other if important issues in the lease come up, such as renewal, default, invoices, etc.



Do you have questions or thoughts on how to improve this document? We want to hear from you. Please email us!

[info@farmcommons.org](mailto:info@farmcommons.org)

## CONNECT WITH US!



[www.twitter.com/farmcommons](https://www.twitter.com/farmcommons)



[www.facebook.com/farmcommons](https://www.facebook.com/farmcommons)



[rachel@farmcommons.org](mailto:rachel@farmcommons.org)



**RACHEL**  
REPONDS

Was this resource not quite what you were looking for? Do you still have more questions? Send your questions to Farm Commons and we will do our best to feature an answer in our blog. Read the most recent questions and answers in our “Rachel Responds” column.