



NATIONAL FAMILY FARM COALITION

# Federal Laws on Land: An Overview



## Introduction

A major transition is underway in the farm sector, as the current generation of farmers and landowners retires. [Four hundred million acres](#) of U.S. farmland will change hands in the next decade. The trends of this transition are already cause for concern: wealthy buyers are purchasing large plots of land at prices unattainable for small-scale independent farmers, especially young and beginning farmers and farmers of color, for whom land access has become a major barrier to starting or continuing to farm. According to U.S. Department of Agriculture (USDA) statistics, farmland prices [nearly doubled](#) from 2005 to 2019, with even greater increases in some states. Without secure land tenure, these farmers are economically vulnerable, unable to make long-term business plans, and less able to access USDA programs for support.



A troubling development has arisen in the same period. Since the 2008 financial crisis, a new kind of buyer has entered the farmland market: Wall Street investors, pension funds, private equity firms, and other financiers looking for a safe place to park their money.<sup>1</sup> These entities are buying large tracts of land both in the U.S. and abroad in transactions that effectively amount to land grabs.

With domestic and international allies, NFFC has launched the [Stop Land Grabs campaign](#) - a coalition of organizations, unions, and individuals that are placing pressure on institutions and investment funds to cease buying - grabbing - farm and forest lands from local, indigenous, and peasant families. This campaign has a particular focus on pension funds, namely Teachers Insurance and Annuity Association of America (TIAA), that hold trillions of dollars in assets, including immense holdings of farmland globally.

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<sup>1</sup>Jonathon Hettinger, Foreign Investment in U.S. Farmland is On the Rise, Midwest Center for Investigative Reporting, <https://investigatamidwest.org/2017/06/22/foreign-investment-into-u-s-farmland-on-the-rise/> (last visited April 14, 2021).

There are numerous avenues for our campaign to achieve its goals; one of them is through federal and state legislation. To provide an understanding of the potential points of political pressure in this campaign, we offer this overview of federal laws impacting land preservation and ownership. Companion fact sheets offer an overview of state laws.

## Federal Laws on Land

Over the last century, Congress has made it clear that laws on land ownership are a matter for the states. However, following several federal studies on the rate and risks of farmland loss, Congress passed legislation impacting farmland in a number of ways, including assistance for states protecting farmland from development; easing tax burdens on farm inheritance; and helping new farmers to access capital. We will examine these studies and laws.

Additionally, an examination of these laws has raised questions about other ways that the federal government might assist in preventing land grabs – in particular, can the federal government incentivize state regulations of corporate agricultural land grabs through conditions of federal funding? We will address that question as well.

### **Congressional Farmland Studies and Mandated Reporting**

Despite Congressional reticence to have a hand in the question of farmland ownership, it has expressed concern over decades about the loss of farmland to development. The 1981 National Agriculture Lands Study (NALS)<sup>2</sup> reviewed more than 130 federal programs and found that 90 of them contributed to the conversion of agricultural land to non-agricultural land.<sup>3</sup> The study concluded that while farmland protection programs like agricultural zoning illustrated states' resolve to combat agricultural land conversion, there lacked federal attention to major causes of conversion.<sup>4</sup> Another 1981 Congressional report found farmland conversion rates to be alarming, following a decade

*The Farmland Protection Policy Act and the Agricultural Foreign Investment Disclosure Act were meant to reform federal agricultural land policy - but both acts lack oversight and funding, and have failed to address farmland loss.*

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<sup>2</sup> 127 Cong. Rec. S1121 (1981) (“The proposed legislation responds to the findings of the national agricultural lands study, by requiring Federal agencies to review policies and programs that may encourage the conversion of farm-land to other uses.”) (statement by Senator Leahy).

<sup>3</sup> NATIONAL AGRICULTURAL LAND STUDY: EXECUTIVE SUMMARY OF THE FINAL REPORT, United States Department of Agriculture (1981).

<sup>4</sup> *Id.* at 6 (“until quite recently, however, the conversion of agricultural land has caused little concern at the national level”).

of urban sprawl through the 1970s.<sup>5</sup> Prime farmland<sup>6</sup> was found to be at greatest risk, and loss of prime farmland drove farmers to work more marginal lands, increasing erosion and flood risk.<sup>7</sup>

In response to these findings, the Farmland Protection Policy Act (FPPA)<sup>8</sup> was included in the 1981 Farm Bill. The FPPA directed federal agencies to identify and account for their impacts on farmland conversion, consider alternatives, and ensure that federal actions are compatible with nonfederal farmland retention programs.<sup>9</sup> But FPPA had no bite: Congress did not authorize the federal government to regulate the use of private or non-federal land or affect the property rights of owners of such land, and federal funds could not be withheld on the basis of a review.<sup>10</sup> A review of the policy five years after passage was subtitled, “A Stillbirth of a Policy.”

The 1978 Agricultural Foreign Investment Disclosure Act (AFIDA) has had a similar fate. The act requires that any non-U.S. person or corporation who acquires an interest in agricultural land must report it to USDA within 90 days. USDA is to publish an annual report on foreign land holdings, and pass along specific information to each state.

AFIDA was passed at a time of increasing foreign investments in farmland. Congress and the Government Accountability Office had found a lack of data on these transactions. The act was not an attempt to mitigate foreign investment in farmland, but rather



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<sup>5</sup> *Id.* at 8 (The report relied on contemporary studies from the Soil Conservation Service as well as the GAO).

<sup>6</sup> NRCS has defined prime farmland as “Land that has the best combination of physical and chemical characteristics for production ([https://www.nrcs.usda.gov/wps/portal/nrcs/detail/null/?cid=nrcs143\\_014052](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/null/?cid=nrcs143_014052))

<sup>7</sup> *Compact Cities*, see *supra* note 76.

<sup>8</sup> See Corwin W. Johnson & Valerie M. Fogleman, *The Farmland Protection Policy Act: Stillbirth of a Policy*, 1986 U. ILL. L. REV. 563 (1986)

<sup>9</sup> U.S.C. § 4202(a)-(b) (1982).

<sup>10</sup> *Id.* §4208(a)



to gather information that would allow Congress and the public to make an informed decision on the matter.<sup>11</sup>

However, like the FPPA, the AFIDA lacks teeth. All data is self-reported by the buyers and unverified by USDA. Just one year after the enactment of AFIDA, a Government Accountability Office report exposed its shortcomings:<sup>12</sup> only half of foreign entities were reporting their farmland transactions, and the majority reportedly did not know the law existed.<sup>13</sup> The report observed

that a lack of awareness, lack of desire to be identified, and a lack of resources at the USDA all contributed to the weak effect that the Act seemed to have after a year.<sup>14</sup>

Current legislation before Congress would amend AFIDA to “increase oversight and enforcement with respect to foreign investment in agricultural lands within the United States.”<sup>15</sup> The proposed update would require that USDA use its resources, including AFIDA reporting, to maintain a database of all foreign-owned agricultural land that is to be updated every 90 days.

*The remaining programs in this section are ways in which Congress has attempted to support working farmlands with federal action.*

## **Conservation Reserve Program**

The 1985 Farm Bill (Food Security Act of 1985) introduced a conservation cost-share and rental program that directly addressed natural resource protection. The Conservation Reserve Program

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<sup>11</sup> 124 Cong. Rec. 31615 (1978) (“Our bill is not an attempt to cut off foreign investment in farmland as we do not yet know the true impact of this type of investment. It is simply an attempt to gather the necessary information to make this determination and provides us with the necessary enforcement powers to insure that all relevant information is reported”) (statement by Rep. Don Clauson (R-Cal))

<sup>12</sup> U.S. Gov’t Accountability Office, IMPLEMENTATION OF THE AGRICULTURAL FOREIGN INVESTMENT DISCLOSURE ACT OF 1978, B-196874 (1979).

<sup>13</sup> *Id.*

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

<sup>15</sup> H.R. 8522, 116th CONGRESS, 2nd Session (2020) (introduced by Rep. Mark Pocan (D-WI)).

(CRP), administered by the Farm Service Agency, was designed to maintain farmland productivity, reduce soil erosion, and protect ecologically sensitive land.<sup>16</sup> The program provides financial compensation for landowners to voluntarily remove land from agricultural production, and provides federal cost-share payments to integrate conservation practices. The contracts for an enrolled parcel typically last 10 to 15 years.<sup>17</sup> CRP is the largest U.S. private-land retirement program,<sup>18</sup> and its success in reducing erosion and increasing biodiversity has led to it becoming permanent law, with funding for enrollment of 27 million acres by FY2023.



### **Farmland Conservation Easements**

The 1996 Farm Bill<sup>19</sup> (Federal Agriculture Improvement and Reform Act of 1996) created the Farmland Protection Program (FPP), which provided matching funds to organizations with existing farmland protection programs to purchase conservation easements to keep land from being used for non-agricultural purposes.<sup>20</sup> FPP and its successor programs (below) focus on working lands, keeping land available for agricultural use in the long-term.

FPP was expanded through a bipartisan amendment to the 2002 Farm Bill, and renamed the Farm and Ranch Lands Protection Program (FRPP).<sup>21</sup> The expansions included increased funding and relaxed criteria regarding eligible land and eligible participants (including Indian tribes and

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<sup>16</sup> Laurie Ristino & Gabriela Steier, *Losing Ground: A Clarion Call for Farm Bill Reform to Ensure a Food Secure Future*, 42 COLUM. J. ENVTL. L. 59, 88-95 (2016).

<sup>17</sup> See generally, CONG. RESEARCH SERV., R42783, CONSERVATION RESERVE PROGRAM (CRP): STATUS AND ISSUES (August 29, 2014).

<sup>18</sup> *Id.*

<sup>19</sup> FEDERAL AGRICULTURE IMPROVEMENT AND REFORM ACT OF 1996, PL 104-127, §388 (1996).

<sup>20</sup> JASPER WOMACH, CONG. RESEARCH SERV., RL97-905, AGRICULTURE: A GLOSSARY OF TERMS, PROGRAMS, AND LAWS CRS-53 (2005).

<sup>21</sup> U.S.C. 3838i, Pub. L. 107-171 §2503 (2002) (Amending the FAIR Act of 1996, Pub. L. 97-198 §1238H-J)

qualified non-profit organizations, such as land trusts).<sup>22</sup> The program was very popular, with FY2009 requests exceeding available funds by 200 percent.<sup>23</sup>

In the 2014 Farm Bill,<sup>24</sup> the program was consolidated into the new Agricultural Conservation Easement Program (ACEP).<sup>25</sup> The ACEP grants eligibility for an easement for cropland, rangeland, grassland, pasture, and certain private forest land with agricultural potential.<sup>26</sup> The easements are permanent or for the maximum term allowable under state law.<sup>27</sup> Conservation easements through ACEP give farmers the opportunity to extract equity from their land without selling it for development, by allowing entities to purchase easements on farmland that is at risk for conversion to non-agricultural use.<sup>28</sup>

In enacting ACEP, Congress added a new goal of conservation easements that was not mentioned in the previous Farm Bill: to “protect the agricultural use and future viability, and related conservation values, of eligible land by limiting non-agricultural uses of that land.”<sup>29</sup> This change reflects an emphasis on the need to protect farmland for future agricultural production.

The 2018 Farm Bill amended ACEP to include for the first time a provision that allows for the direct funding of a buy-protect-sell (BPS) transaction,<sup>30</sup> which is faster means of farmland protection. A BPS transaction allows an eligible entity, like a state agency or conservation organization,<sup>31</sup> to purchase farmland without an easement. The entity manages the land under specific terms, and then sells the land to a farmer or rancher within three years.<sup>32</sup> Before the 2018 revision, a qualified entity could not use federal funding to “temporarily hold land” without

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<sup>22</sup> *Id.*

<sup>23</sup> Jeffrey Zinn *et al.*, Cong. Research Serv., RL 32940, Agricultural Conservation Programs: A Scorecard, at CRS-13 (updated 2008).

<sup>24</sup> Agricultural Act of 2014, Pub. L. 113-79 §1265B, 128 Stat. 734 (2014).

<sup>25</sup> Wetland easements were added to the ACEP program as well. *Agricultural Conservation Easement Program*, Agricultural Department Documents and Publications, Washington D.C. (2016).

<sup>26</sup> National Resource Conservation Service., *ACEP Fact Sheet* (July 2019).

<sup>27</sup> Agricultural Act of 2014, Pub. L. 113-79 §1265B(c) (2014).

<sup>28</sup> South East Farm Press, *American Farmland Trust Celebrates Legislative Victories for Farmland Protection*, Informa PLC (March 18, 2021) <https://www.farmprogress.com/farm-bill/american-farmland-trust-celebrates-legislative-victories-farmland-protection>.

<sup>29</sup> Agricultural Act of 2014, Pub. L. 113-79 §1265(b) (2014) (emphasis added); *compare to* Food, Energy, and Conservation Act of 2008, Pub. L. 110-246 §2401 (“The purpose of the program is to protect the agricultural use and related conservation values of eligible land by limiting nonagricultural uses of that land.”)

<sup>30</sup> 16 U.S.C. §3865(b).

<sup>31</sup> MAINE FARMLAND TRUST, “Buy/Protect/Sell” <https://www.maineFarmlandTrust.org/farmland-protection-new/buyprotectsell/> (last visited March 20, 2021).

<sup>32</sup> 16 U.S.C. §3865(a)(2)

purchasing an easement with a qualified landowner,<sup>33</sup> which could be a time-consuming process. This meant that farmers with land in the path of development often could not qualify for an easement in time. BPS allows for quicker action between the entity and the landowner, and allows land that is in immediate danger of conversion to be purchased and held for a qualified transaction.

## Farmland Estate Tax Reform

As farmland values increased in the 2010s, Congress passed a “special use” federal estate tax tool in 2017 that allowed farmers to have their farmland assessed beneficially for estate tax purposes.<sup>34</sup> Increasing land values meant that more farm families did not qualify for an estate tax exemption and had to pay high taxes on their farmland.<sup>35</sup> The change meant that rather than use the historical “highest and best use,” the gross estate of a farmer may include farmland at its agricultural value for federal estate tax purposes. Where the decedent used the land for farming, and the recipient heir of the property continues to use the land for farming, the property is taxed on the agricultural value of the land.<sup>36</sup>

## Aggie Bonds

Congress created the “Aggie Bond” program in 1980 to help first-time farmers more easily access start-up capital. The state coordinates with a qualified lending institution to create a bond; the lender can offer the loan to beginning farmers at low interest rates.<sup>37</sup> The program is only administered in 15 states, though 24 states administered the program in the peak year of 1984.<sup>38</sup> The maximum amount for the bond has increased over time, jumping from \$250,000 to \$450,000 with the 2008 Farm Bill, and has increased to a 2022 limit of \$575,400.<sup>39</sup>

## Other Federal Possibilities

Finally, under the Anti-Commandeering doctrine, the federal government cannot require states to adopt or enforce a federal program or policy. However, Congress can require that states

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<sup>33</sup> *Id.*

<sup>34</sup> 26 U.S.C. §2032A

<sup>35</sup> Stanley S. Surrey, *Reflections on the Tax Reform Act of 1976*, 25 CLEV. ST. L. REV. 303 (1976).

<sup>36</sup> Stephen F. Matthews & Randall Stock, *Section 2032A: Use Valuation of Farmland for Estate Tax Purposes*, 14 IDAHO L. REV. 341 at 344 (1978).

<sup>37</sup> 26 U.S.C. §147(c)(2) (2017)

<sup>38</sup> See Williamson, J. M., & Katchova, A. L., *Tax-Exempt Bond Financing for Beginning and Low-Equity Farmers: The Case of ‘Aggie Bonds’*, *Journal of Agricultural and Applied Economics*, 45(3), 485-496 (2013).

<sup>39</sup> *Aggie Bond Beginning Farmer Loan Programs*, National Council of State Agricultural Finance Programs, <https://www.stateagfinance.org/> (last visited April 15, 2021).

*While land ownership laws are left to state governments to legislate, Congress is able to influence state decisions through conditional federal funding. Incentivizing federal funding is a tool Congress could use to encourage state-level protection of farmland.*

administer a policy or program as a condition of getting federal funding. Many environmental statutes use this approach: general policies and procedures are set by a federal agency, but enforcement and oversight happens at the state level.

Similarly, the Spending Clause allows Congress to “to encourage states and localities to adopt or enforce federal policies by paying them to do so,” but the Anti-Coercion Doctrine says that Congress cannot attach such strict conditions to federal funding that it turns

from encouragement to compulsion. A survey of several challenges brought to the Supreme Court under the Anti-Coercion Doctrine indicates that the Court does not see a threat to less than four percent of a state’s budget as coercive, while a threatened loss of over 10 percent of a state’s budget does amount to coercion. This indicates that if the federal government were to incentivize state regulations of corporate agricultural land grabs through a condition of federal funding, it would have to impact well below 10 percent of the state’s budget.

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