



Agricultural Contracting

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Keeping Up with Ag & Food Law Developments



- Issues every 2 weeks (once only in December)
- Concise ag law & policy updates w/ links to NALC resources



Basic Outline

- Background
- Types of agricultural contracts
- Types of agricultural leases
- Related issues (including federal government contract termination)



Background: Why Use Written Contracts & Leases?

- “The palest ink is better than the best memory”
- “A verbal contract isn’t worth the paper it’s written on”
- Without written leases, it’s all he said/she said, and you can end up with significantly conflicting stories
 - That’s why there are limits to the type of oral contracts and leases that will be enforced
- These limits are part of the “Statute of Frauds”
 - The Statute of Frauds lists specific types of contracts that MUST be in writing, or they will not be enforced--
 - Contracts in consideration of marriage (including prenups)
 - Contracts that cannot be performed within one year
 - Contracts for the transfer of an interest in land
 - Contracts by the executor of a will to pay a debt of the estate with his own money
 - Contracts for the sale of goods for \$500 or more
 - Contracts in which one party promises to pay another person’s debt



Background: Why Use Written Contracts & Leases?

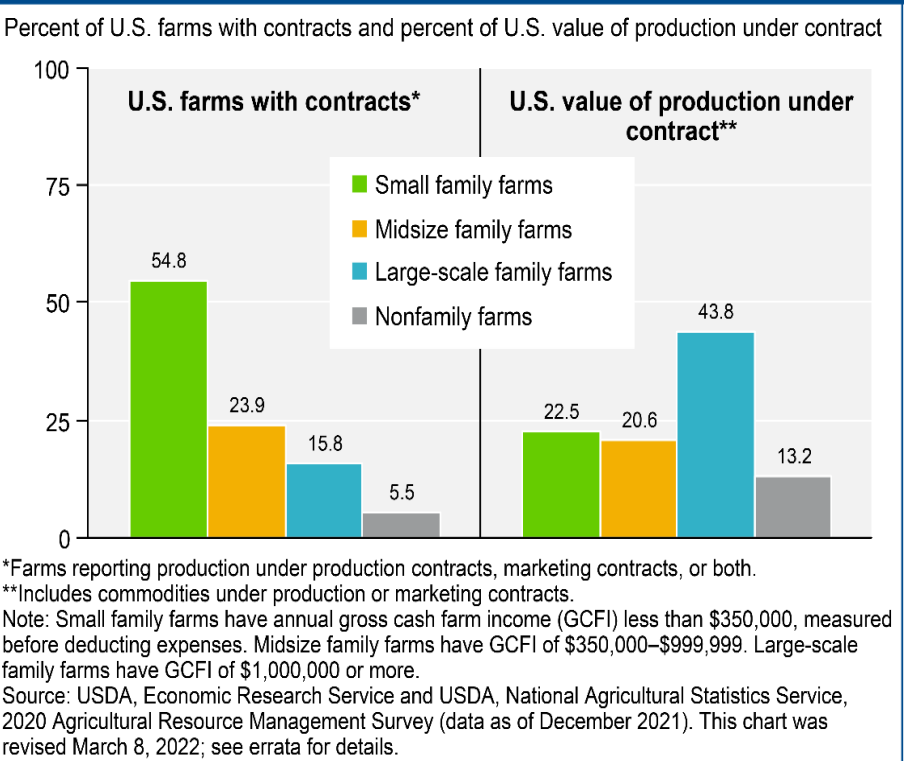
- What do casinos, insurance companies, and agriculture have in common?
- Agriculture is all about moving dirt, water, and money
- Success in agriculture is all about managing risk



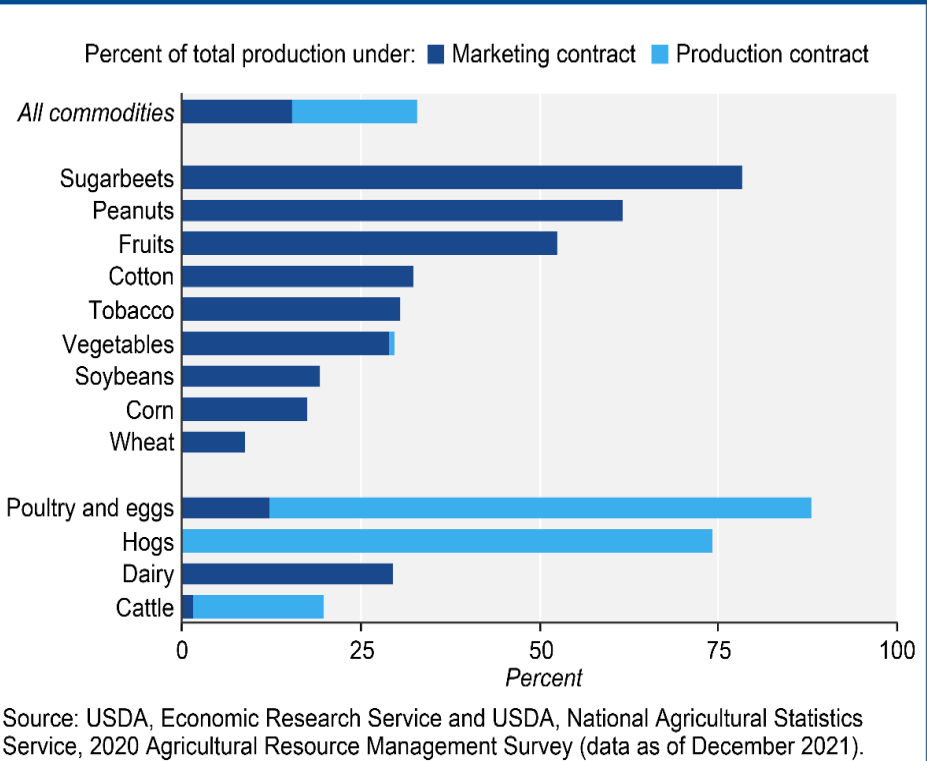


Relevance in Today's Markets: USDA ERS

Distribution of farms with contracts and value of production under contract, by farm type, 2020



Percent of production under contract, by contract type, for selected commodities, 2020



Types of Agricultural Contracts

- Very generally: 1) Production contracts, and 2) Marketing contracts
- More broadly can include:
 - Custom farming/harvesting
 - Input suppliers
 - Lending
 - Employment
 - Crop consultants
 - Grain storage
 - Contracts with local, state, or federal government (voluntary federal conservation programs, crop insurance, H2A, etc.)
 - Ag leases



Production Contracts

- **Production contract:**

- Contractor usually owns the commodity during production, and the farmer is paid a fee for services rendered
- Contract specifies farmer and contractor responsibilities for inputs and practices
- Contractor often provides specific inputs and services, production guidelines, and technical advice
 - Ex: Contractors in livestock contracts typically provide feed, veterinary services, transportation, and young animals
- Contract is finalized before production of the commodity



Marketing Contracts

- **Marketing contract:**

- Ownership of the commodity remains with the farmer during production
- Contract sets a price (or a pricing formula), product quantities and qualities, and a delivery schedule
- Contractor involvement in production is minimal, and the farmer provides all the inputs
- For crops, the contract is finalized before harvest. For livestock, the contract is finalized before the animals are ready to be marketed



Leases...What are they?

- Legally enforceable agreements between two or more parties for the use of some good or property
- Reminder: Leases are just one of many different forms of contracts



Types of Agricultural Leases

- Most common type of lease in ag production is a land lease
 - Cash Rent Leases
 - Lessor is guaranteed a steady stream of income
 - Doesn't depend on whether or not the tenant's crop makes, if crop prices fall, or if production prices increase (so long as they can collect the money from them)
 - Crop-share Leases
 - After the crop has been harvested the landlord will take between $\frac{1}{4}$ and $\frac{1}{2}$ of the crop in exchange for rent and their share of the inputs.
 - Hybrid Leases
 - Some combination of cash rent and crop-share leases
 - More complex, and thus should strongly consider that it be in writing



Additional Types of Agricultural Leases

- Pasture lease
- Hunting/Fishing/Recreational Use
- Agritourism
- Equipment/machinery
- Grazing
- Energy

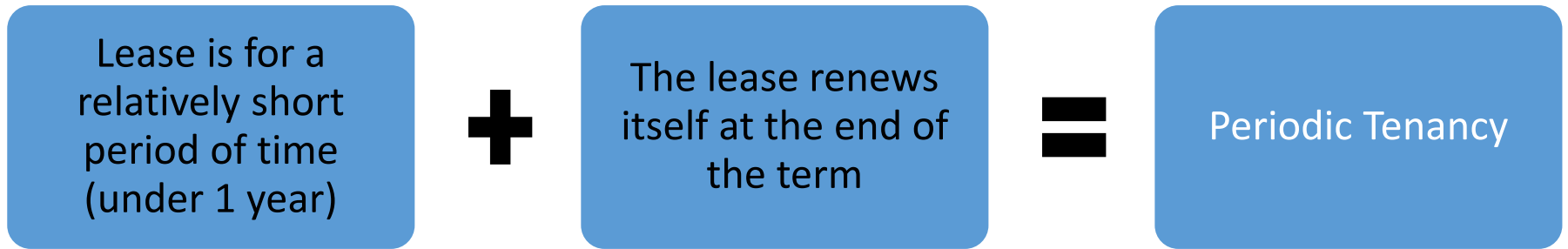


Lease Duration

- Tenancy for a term of years
 - Written leases that may cover more than one year and they terminate at the end of the lease unless other arrangements are made.
 - Majority of recreational use leases fall in this category.
 - Remember: it's usually in everyone's best interest to have an ending date!
- Periodic Tenancy
 - The lease is for a relatively short period of time (less than 1 year)
 - The lease renews itself at the end of the term *unless* the parties have either given adequate notice to terminate or have agreed to end the lease.
 - Typically, oral agricultural leases fall in this category.



Periodic Tenancy



Unless the parties have EITHER

- given adequate notice to terminate OR
- have agreed to end the lease.

General rule: Oral agricultural leases are considered to be periodic tenancies.



Oral and Written Leases and Contracts

- Are Oral Leases and Contracts even valid?
 - Yes, under certain circumstances.
 - You don't actually have to shake hands either...



Notes on Oral Leases

- Oral leases and contracts are valid (enforceable) only under certain circumstances
 - Leases must be for terms of less than one year
 - Contracts must be able to be performed in less than one year
 - Oral contracts for the sale of goods must be under \$500.
- How about:
 - A verbal agreement to lease land that begins on Jan. 1 and ends on Dec. 31?
 - A verbal agreement to perform custom harvesting for this growing season?
 - A verbal agreement to perform custom harvesting for the next three crop years?



Ag Contracts & Leases: Related Issues

Related Issues to Consider

- Rules #1 and #2
 - Words matter
 - Assume that whoever wrote the (proposed) contract wrote it with their interests in mind



Related Issues to Consider: Attorney

- An attorney can be immensely valuable to you in drafting, reviewing, or negotiating a contract/lease
- Especially true if nature of contract is material to overall production, income, or involves a long-term investment/relationship
- Cost vs. investment (remember you're managing risk)



Related Issues to Consider

- Generally, the only enforceable item is what is in writing
 - Very risky to rely on oral/verbal communications, either before the contract is signed or even during contract performance
 - If what is verbalized is material or important, consider getting it in writing (including as incorporating as an amendment during the life of the contract)
 - Recordkeeping can be important here as well (emails, letters, checks, copy of contract itself, etc.)
- Know the party/entity you are contracting with – e.g., financial situation, reputation, performance history



Related Issues to Consider

- Think about what could go wrong during the contract/lease and use that to mitigate risk
 - What if the buyer becomes insolvent?
 - What if one of the parties becomes incapacitated?
 - How (and/or where) are disputes to be resolved?
 - How/when does termination occur?
 - What types of notice provisions are or should be included?
- Example: industrial hemp production
- An ounce of prevention is worth a pound of cure



Related Issues to Consider

- Communication -- both before and during contract/lease
 - Sometimes the little things are the big things
 - This includes individuals such as insurance agent as well
- Negotiation is not a bad word; proposed contracts are always subject to negotiation or at least an attempt at negotiation
 - “Speak now or forever hold your peace!”
- Time and place for everything – negotiate on the front end/before signing!
- Use common sense – specifically, e.g., make sure you understand all parts of the contract language and that you ask questions whenever clarification or confirmation may be needed
 - If answer is material/important, make sure it is put into the written contract
 - Understand clearly the compliance and performance obligations (failure to perform is not likely to be excused)
 - Are there definitions, or should there be definitions of some terms



Related Issues to Consider: State (or Federal) Laws

- Over time some states have enacted additional wrinkles for ag or hunting leases
 - Court decisions can come into play here
- Agricultural liens
- Liability protection – e.g., agritourism statute, equine activity statute, recreational use statute
- Foreign ownership laws



Related Issues to Consider: Contracts with Government

- Potential of contract being paused or terminated?
- Implications of cost-share contracts
- Government contract as collateral



Related Issues to Consider: Leases

- Some basic areas to consider with a lease, generally (besides money):
 - Maintenance of any fixed assets
 - Access rights/restrictions
 - Property boundaries
 - Duration and termination of lease
 - Death/incapacitation of either party
 - Assignment and/or subleasing rights
 - Liability and insurance



Related Issues to Consider: Hunting Leases

- ATV use
- Prohibition on shooting from a vehicle
- Following hunting regulations
- Close gates on ingress and egress
- No damage to timber/property
 - Limitations on types of stands and the clearing of shooting lanes
- Bag limit clause
- Tree stands and blinds
- Conservation practices
- Reporting problems to the landowner



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