

Agricultural ECONOMICS

Legal Affairs

Legal Aspects of Indiana Farmland Leases and Federal Tax Considerations



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Introduction

When there is dissatisfaction with a lease, problems may arise, for example, confusion over lease termination rules. What are the lease termination requirements? How does the law protect the interests of tenants and landlords? What are a tenant's rights when rented or leased land goes into a decedent's estate or the land is sold?

Recent changes in the Indiana lease law and federal tax law should come to the attention of landlords and tenants. For example, *If a lease for a period longer than three (3) years is not recorded within forty-five (45) days after its execution, the lease is void against any subsequent purchaser, lessee, or mortgagee who acquires the real estate in good faith and for valuable consideration* (See IC 32-31-2, Appendix A).

Landlords and tenants are advised to be knowledgeable about the security arrangements for their rent as well as the federal tax law. The type of lease and involvement of a landlord in the farm production has significant implications for federal income tax, self-employment tax and estate tax liability, and Social Security entitlement. This publication deals with just a few important tax issues.

Lease Terms & Basic Elements

An important lesson learned from numerous lease disputes is the importance of a binding written rental or lease agreement. Oral leases can be enforced under Indiana law. However, problem-solving, written terms may pay huge benefits (See IC 32-31-1-1, Appendix A).

Few words are needed for a valid written lease. Basics include the following information.

- A. The date of making the lease.
- B. The names and addresses of the landlord and tenant.
- C. A description of the leased property.
- D. The period or crop years(s) covered by the lease.



- E. The cash rent or shares of costs and crops and resource contributions of a landlord and a tenant.
- F. Indication of when and how the rent is to be paid.
- G. Signatures of the landlord and tenant.

More extensive and additional provisions usually are advisable. Other provisions may include negation of a partnership arrangement, reimbursement for carry-over fertilizer and lime, shifting of liability for environmental violations, and landlord as a named insured in the tenant's farm operator's liability policy, to name a few.

Legal Issues

Term Leases

Leases may be for a specific term (date to date), usually for a year, and require no termination notice (IC 32-31-1-8 in Appendix A). Term leases are usually in writing, but they may also be oral. A term lease may encourage a discussion about needed adjustments in a lease, because there is no lease for the following year until there is a new agreement. It is typical that landowners and tenants start with a written lease, perhaps a term lease, and then continue on after initial year or years with an oral lease. Later, problems may arise as to what the respective rights and obligations may be.

No Discussion

No discussion may mean approval. A tenant may have started with a written or oral lease. If a tenant remains in possession of the leased property, he or she has a lease with the same terms as the prior year. In subsequent years, the tenant may be entitled to a three-month advance notice to terminate, unless he or she agrees to a term lease.

Termination of a Lease

Termination of a lease or rental agreement may be necessary for a number of reasons. The most common reason may be to make the land available for another tenant. A landlord or a tenant may feel it is necessary to terminate before renegotiating in case the negotiations are not satisfactorily concluded. The land may be for sale and cannot

be sold free of a lease unless the lease arrangement is properly terminated. Indiana law (IC 32-31-1-3 in Appendix A) says a three-month notice may be required. Whether a legal notice is required depends upon the existing landlord-tenant arrangement. This notice is to be in advance of the end of the lease year.

When a lease agreement does not otherwise specify, the end of the lease year is likely to be the last day of February. This implies that the lease notice must be delivered before December 1 of the prior year. However, a dispute may arise over whether another date is the actual lease-year end, which could make an otherwise timely notice late. Appendix B includes the form of termination notice that follows the sample notice form in Indiana law at IC 32-31-1-5 in Appendix A.

Outgoing Tenant's Rights in Growing Crops

An outgoing tenant has a right to growing crops (emblemments) if three conditions are present:

- A. The tenancy was of an uncertain duration.
- B. The tenant was terminated due to no fault of his or her own.
- C. A crop was planted by the tenant.

The "doctrine of emblemments" says the tenant who planted the crop and then was legally terminated before the crop matures has: (1) a right to harvest the crop for his or her share under the lease or (2) a right to be provided the returns from the crop, less the expenses of harvest and transportation to market. A logical extension of the doctrine of emblemments is that if a tenant continues in good faith until a lease is terminated, he or she should be fairly compensated for the expenses incurred and profit from a growing crop.

However, the law has a policy that it is folly for a tenant to plant when he or she has no assurances of a right to harvest. The doctrine of emblemments might also support a tenant who leaves mature crops at the end of the lease if there is a good excuse for not having completed harvest. Unusual weather or a tenant's disability may be examples of sufficient alibis.

Another legal doctrine, unjust enrichment, might favor an outgoing tenant who has not been compensated for his or her efforts. This doctrine is based on the premise that one party should not benefit at the expense of another.

Advisability of a Landlord Obtaining a Lien

A landlord may want to obtain a lien (security interest) in his or her tenant's crops. Many feel that in case of a tenant's financial stress, and perhaps bankruptcy, a landlord with a share lease has a clear right to his or her portion of the crop as opposed to other creditors who may have a security interest in a tenant's crops. It seems logical that a tenant's creditor should not be able to take a security interest (lien) in a landlord's crop share without his or her permission. However, in common law, a tenant owns the entire crop until it comes out of the field, even for a share lease.

Especially for landlords relying on cash rent, the best strategy may be for the landlord to obtain a Uniform Commercial Code (UCC) security interest in the crop to be grown on his or her land as a condition of the cash rental arrangement. To obtain a UCC security interest in the crops to be grown, first there must be a security agreement signed by the tenant, which may be part of a written lease, and there must be a proper filing of a financing statement. For full protection of the law, even with a UCC lien, Indiana retains an additional requirement. Creditors must give the debtor/tenant potential buyers of the tenant's crop notice of their UCC lien. This notice is to insure a joint check for crop proceeds to the tenant and to all creditors who have given the buyer(s) notice of a lien in the crop.

Beginning July 1, 2002, Indiana has a central filing system for crop, livestock, and other farm product liens and other farm products maintained by the Secretary of State. This revision will require buyers of farm products to check with the Secretary of State's Office for existing security interests in farm products. Most landlords will need legal assistance with the UCC lien process. Since December of 1986, a 1985 federal law

requires a central filing system or a direct buyer notice in order to keep the burden of a UCC lien on the buyer of farm products. Indiana now has both systems in operation.

However, if a landlord or any creditor of an Indiana farmer wishes to keep a farm crop or livestock buyer liable for the lien on secured farm products, the landlord must give notice each year in advance of a sale of secured farm products directly to the buyers in a specified manner (IC 26-1-9.1-320 in Appendix C).

If a tenant has other creditors with a lien in the crop to be grown on a landlord's land, a landlord may ask a tenant's other creditor(s) to subrogate to (substitute) a landlord's interest. Alternatively, a landlord may require a letter of credit (which guarantees payment of the rent) from a tenant's banker or other primary lender when the above alternatives are not practical or do not provide sufficient assurances. In place of a security interest or other arrangement with a tenant's creditors, a landlord might require advance payment of the entire cash rent.

When a landlord in Indiana without a security arrangement, discussed above, suspects his or her rent is in jeopardy, he or she may obtain a landlord's lien. The statute for a landlord's lien requires a filing at least 30 days before the crop matures, but during the year the crop is growing (IC 32-31-1-19 in Appendix A). A landlord's lien has priority over liens filed or obtained later, including subsequent UCC liens. A landlord's lien will be inferior to prior UCC liens and is avoided in bankruptcy. A landlord's lien is available without the consent or direct knowledge of the tenant. A landlord's lien is better than no lien at all and may be adequate protection if his or her tenant does not go into bankruptcy.

Renting from a Life Tenant

A landlord may only have a life estate—a historically popular estate-planning tool. A tenant who rents from a life tenant is a “stand in” or “under” tenant. The “stand in” tenant may be wise to join the remainder people in a lease with a life tenant to avoid an interruption of his or her lease

on the date of death of a life tenant landlord. Indiana law (IC 32-31-1-18) controls the entitlement to rents between a life tenant's estate and the remainder people.

Selected Federal Tax Issues

The type of lease matters for a landlord's income, self-employment, and the federal estate tax that may be imposed on his or her estate. A landlord with sufficient involvement, referred to as "material participation," and who shares expenses and income will report his or her net farm income and expenses to the Internal Revenue Service on Schedule F, just as does a tenant farmer. Both the tenant and landowner will pay self-employment (SE) tax on his or her net farm income.

A federal tax regulation (Reg. Sec. 1.1301-1, *Averaging of farm income*) **requires** a landowner who otherwise qualifies to use income averaging as a share-lease landlord to have a **written lease** starting January 1, 2003. Further, this regulation says there is a bar to income averaging without a written agreement, even if the landowner is materially participating. This is one more reason to have a written lease.

More information on income tax law may be found in the annual *Farmer's Tax Guide*, IRS Publication #225 <<http://www.irs.gov/publications/p225/index.html>>; in the annual *Tax Planning and Management Considerations for Farmers*, Purdue Extension <<http://www.agecon.purdue.edu/extension/pubs/taxplanning.asp>>; and in numerous other tax publications.

Share Leases and Material Participation

The involvement required for the landowner to pay SE tax is referred to as "material participation" (MP). MP is in the tax law as a criterion by which to establish whether a landlord was liable for self-employment tax on net farm income. (See the *Farmer's Tax Guide*, IRS Publication #225, Chapter 15, for the landlord's alternative material participation tests.)

For example, a landlord may satisfy one of the MP tests with a share lease with which he or she reserves and exercises authority over decisions

made throughout the year (such as what to plant and whether to treat for a crop insect infestation). When materially participating, a landlord has veto power over key production decisions.

A landlord must also inspect production activities periodically to satisfy MP requirements. An agent (e.g., a farm manager) cannot perform the MP tasks for a landlord. However, a farm manager may assist a landlord who is materially participating. A landlord who is materially participating in a farming business reports income and expenses on Schedule F and pays the SE tax.

However, a crop-share lease need not involve material participation by a landlord. If it is a non-MP crop-share lease, the landlord reports his or her farm income and expenses on the IRS Form 4835. In this case, there is neither a requirement nor a right to pay the SE tax.

A myth about Social Security retirement is that it is necessary for the retiring farmland owner to rent his or her land for cash. Apparently, one of the issues is whether the retired landowner would be generating earned income—income subject to the "monthly" and "annual earnings" tests, and subject to the SE tax. Clearly, a crop-share lease will avoid SE tax as long as the landlord does not materially participate. MP income is earned (active) income for Social Security retirement purposes, while crop-share income from a non-MP arrangement is not—just as cash rent income, generally, is not earned income.

Earned Income in Social Security Retirement

Starting in the year 2000, landlords age 65 and older on Social Security (SS) retirement were no longer required to count MP income or other earned income toward the maximum amount of income that they may earn before SS retirement benefits are reduced. The "monthly earnings test" and the "annual earnings test" were repealed for SS retirees who have reached the normal retirement age, formerly age 65. These "tests" that formerly applied until the SS retiree reached age 70 still do apply for early SS retirees—those who have not reached the NRA, formerly age 62-64.

Note that a prior (pre-retirement) year's crop sold from inventory does not count as income for the "monthly earnings test," though the sales may be subject to SE tax. Any earned (active) income remains subject to the SE tax despite the age of the retiree.

Cash Rent as Unearned Income

The cash rent lease, generally, is not a materially participating arrangement. The income to a cash-rent landlord is "unearned income," which is reported on a Schedule E. Just as for a non-materially participating landlord with a crop-share lease, SE tax is not due on cash rent income.

When non-material participation status is desired, a lease may clearly indicate that a landlord does not have farm-operating or other decision-making powers during the production period. However, not materially participating does not prevent a landlord from dictating by the terms of a rental agreement or crop-share lease which crops may be grown on his or her land as well as a range of other farm management decisions.

Landlord Conservation Expenses

Conservation improvements for farmland are important, and perhaps increasingly so. Certain conservation expenses are ordinary income tax deductions, within limits, for landlords in the "farming business." Landlords receiving farm rental payments based on farm production, either in cash or crop shares, are in the business of farming. Landlords receiving a fixed-rental payment not based on farm production are in the farming business only if they materially participate in operating or managing their farm. Again, tests for material participation are in the *Farmer's Tax Guide*, Chapter 15, "Landlord Participation in Farming." Cash-renting landlords without active participation in their farm's production cannot deduct soil and water conservation expenses, but will capitalize the expenses and add them to the basis of the land.

Federal Estate Tax Considerations

Lease type and material participation are also considerations for farm landowners or farmers being qualified for federal estate tax savings.

The special use valuation (SUV) of farm and ranch land allows up to an \$850,000 (as indexed for year 2004) reduction in land value otherwise to be included in a decedent's federal estate tax estate. SUV has both an "at risk" and a material participation requirement for a deceased landowner's land to be qualified. Generally, to be at risk requires a share lease. MP is required five of the last eight years the landowner lived. However, a landowner may maintain SUV eligibility with a cash rental to a "family member."

A family member may satisfy both the MP and "at risk" requirements required by SUV. Note that the MP requirement is suspended once the landowner is in disability or ordinary Social Security retirement. Thus, a retired landlord could maintain SUV eligibility with a non-MP share lease to a non-family member. (More details on SUV may be obtained from the author and from other SUV references.)

The family-owned business interest deduction (FOBID) permitted the deduction of up to \$675,000 of qualified business interest(s) from a deceased farmer's estate tax estate. While part of the federal estate tax law for several years, FOBID is repealed at the end of 2003. Generally, to qualify, a deceased farmer must have been running a "trade or business." For a tenant this was not much of an issue, but for a landowner who is renting the land, material participation, as explained above, is sufficient to meet the "trade or business" requirement.

For both SUV and past FOBID elections:

1. A retired farmer need not have personally been in an MP relationship. Instead, a decedent's family member(s) may have satisfied the retiree's MP requirement.
2. A deceased landowner may have been cash renting to a "family member(s)."
3. The qualified heirs may cash rent to a family member who is a lineal descendant of a deceased farmer or farmland owner. Family members may satisfy both the MP and at risk requirements for qualified heirs.

SUV does not (nor did FOBID) apply in determining the taxable Indiana inheritance. Readers are advised to check with other sources such as their tax and legal counsel for more information on, and planning for, the federal estate and Indiana inheritance tax.

Conclusion

This publication discusses some of the many important issues surrounding legal aspects of Indiana farmland leases and federal tax considerations. As has been stated throughout, readers are advised to see the information sources cited here and to consult appropriate counsel before making decisions.

Disclaimer: This paper is intended as a source of information for landlords and tenants that is believed to be accurate. Individuals and businesses with problems and questions should seek the services of legal counsel and other experts and references as the situation merits.

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Appendix A

Selected Indiana Code Sections for Farmland Leases

32-21-1-1. Statute of Frauds –Writing Requirements

Paraphrasing, this statute provides that several categories of activities such as those dealing with marriage, debts, sale of lands, agreements that can not be performed in a year ... shall be in writing, **“however, excepting, leases not exceeding the term of three (3) years.”**

32-31-1-3 Determination of year to year tenancy

A tenancy from year to year may be determined by a notice given to the tenant not less than three (3) months before the expiration of the year.

32-31-1-5. Form; notice determining tenancy from year to year (See Appendix B for sample form)

The following form of notice may be used to terminate a tenancy from year to year: (insert date here)

To (insert name of tenant here):

You are notified to vacate at the expiration of the current year of tenancy the following property: (insert description of property here).

(insert name of landlord here)

32-31-1-6. Rent; refusal or neglect to pay

If a tenant refuses or neglects to pay rent when due, a landlord may terminate the lease with not less than ten (10) days notice to the tenant unless:

- (1) the parties otherwise agreed; or
- (2) the tenant pays the rent in full before the notice period expires.

32-31-1-7 Forms; notice to quit; failure or refusal to pay rent

Sec. 7. The following form of notice may be used when a tenant fails or refuses to pay rent:

(insert date here)

To (insert name of tenant here):

You are notified to vacate the following property not more than ten (10) days after you receive this notice unless you pay the rent due on the property within ten (10) days: (insert description of property here).

(insert name of landlord here)

32-31-1-8 Notice to quit; when not necessary

Notice is not required to terminate a lease in the following situations:

- (1) The landlord agrees to rent the premises to the tenant for a specified period of time.
- (2) The time for the determination of the tenancy is specified in the contract.
- (3) A tenant at will commits waste.
- (4) The tenant is a tenant at sufferance.
- (5) The express terms of the contract require the tenant to pay the rent in advance, and the tenant refuses or neglects to pay the rent in advance.
- (6) The landlord-tenant relationship does not exist.

32-31-1-9 Service of notices

(a) Notice required under sections 1 through 7 of this chapter may be served on the tenant.

(b) If the tenant cannot be found, notice may be served on a person residing at the premises.

The person serving the notice must explain the contents of the notice to the person being served.

(c) If a person described in subsection (b) is not found on the premises, notice may be served by affixing a copy of the notice to a conspicuous part of the premises.

32-31-1-10 Conveyance by landlord

A conveyance by a landlord of real estate or of any interest in the real estate is valid without the attornment (agreement) of the tenant. If the tenant pays rent to the landlord before the tenant receives notice of the conveyance, the rent paid to the landlord is good against the grantee.

32-31-1-18 Death of life tenant demising land; recovery of rent

If a life tenant who has demised any lands dies on or after the day on which rent is due and payable, the executor or administrator of the life tenant's estate may recover from the under tenant the whole rent due.

If the life tenant dies before the day on which rent is due:

- (1) the executor or administrator of the life tenant's estate may recover the proportion of rent that accrued before; and
- (2) the remainderman may recover the proportion of rent that accrued after; the life tenant's death.

IC 32-31-1-19 Crop paid as rent (Landlord's Lien)

(a) In a case where a tenant agrees under contract to pay as rent:

- (1) a part of the crop raised on the leased premises;
- (2) rent in kind; or
- (3) a cash rent;

the landlord may have a lien on the crop raised under the contract for payment of the rent. If the tenant refuses or neglects to pay or deliver to the landlord the rent when it is due, the landlord may enforce the lien by selling the crop.

(b) A landlord who desires to acquire a lien on a crop raised under a contract on leased premises must file a financing statement under IC 26-1-9.1-501 at least thirty (30) days before the crop matures and during the year in which the crop is grown. The financing statement must:

- (1) give notice of the landlord's intention to hold a lien upon the crop for the amount of rent due;
- (2) specifically set forth the amount claimed; and
- (3) describe the lands on which the crop is being grown with sufficient precision to identify the lands.

(c) A lien created under this section relates to the time of filing and has priority over all liens created thereafter. However, a tenant may, after giving written notice to the landlord or the landlord's agent, remove the tenant's portion of the crop from the leased premises and dispose of the tenant's portion of the crop when the rent is to be paid in part of the crop raised. If the tenant does not give written notice to the landlord, the tenant may remove not more than one-half (1/2) of the crop growing or matured.

IC 32-31-2. Recording Leases Longer Than Three Years

Sec. 1. Not more than forty-five (45) days after its execution, a lease of real estate for a period longer than three (3) years shall be recorded in the Miscellaneous Record in the recorder's office of the county in which the real estate is located.

Sec. 2. If a lease for a period longer than three (3) years is not recorded within forty-five (45) days after its execution, the lease is void against any subsequent purchaser, lessee, or mortgagee who acquires the real estate in good faith and for valuable consideration.

Appendix B
Notice to Quit
(Sample)

***** Farmland Lease Termination *****

To _____
name and address of tenant

You are notified to vacate at the expiration of the current year of tenancy the following property:

description of property here or refer to and attach

name and address of the landlord

x _____ _____
landlord signature date

Note: This form is believed to be consistent with IC 32-31-1-4. Effective delivery is a critical matter. The best evidence (as a legal matter) of delivery may be a "return receipt" from a sheriff's delivery. The notice-maker is urged to have a lawyer draft (or proof) his or her notice to quit and give counsel on delivery or whether notice is necessary or will be effective once delivered.



Appendix C

Indiana's Direct Notice for Farm Product Liens

IC 26-1-9.1-320 Buyer of goods

(a) Except as otherwise provided in this subsection and subsection (e), a buyer in ordinary course of business takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence. The following apply whenever a person is **buying farm products** from a person engaged in farming operations who has created a security interest on the farm products:

- (1) A person buying farm products from a person engaged in farming operations is not protected by this subsection if, within one (1) year before the sale of the farm products, the buyer has received prior **written notice** of the security interest. "Written notice" means any writing that contains the following:
 - (A) The full name and address of the debtor.
 - (B) The full name and address of the secured party.
 - (C) In the case of a debtor doing business other than as an individual, the United States Internal Revenue Service taxpayer identification number of the debtor.
 - (D) A description of the collateral, including the type and amount of farm products, the crop year, the county of location, and a description of the real property on which the farm products were grown or produced.
 - (E) Any payment obligations imposed on the buyer by the secured party as conditions for waiver or release of the security interest.

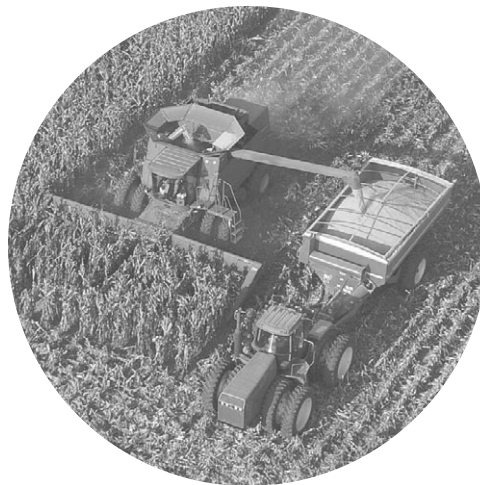
Notice must be received before a buyer of farm products has made full payment to the person engaged in farming operations for the farm products if the notice is to be considered "prior written notice". The written notice lapses on either the expiration period of the statement or the transmission of a notice signed by the secured party that the statement has lapsed, whichever occurs first.

(2) A secured party must, within fifteen (15) days of the satisfaction of the debt, inform in writing each potential buyer listed by the debtor whenever a debt has been satisfied and written notice, as required by subdivision (1), had been previously sent to that buyer.

(3) **A debtor engaged in farming operations who has created a security interest in farm products must provide the secured party with a written list of potential buyers of the farm products at the time the debt is incurred if such a list is requested by the secured party.** The debtor may not sell farm products to a buyer who does not appear on the list (if the list is requested by the secured party) unless the secured party has given prior written permission to the debtor to sell to someone who does not appear on the list, or the debtor satisfies the debt for that secured party on the farm products he sells within fifteen (15) days of the date of sale.

A debtor who knowingly or intentionally sells to a buyer who does not appear on the list (if the list is requested by the secured party) and who does not meet one (1) of the above exceptions, commits a Class C misdemeanor. A secured party commits a Class C infraction if the secured party knowingly or intentionally gives false or misleading information on the notice required by subdivision (1) or the secured party fails within fifteen (15) days of satisfaction of the debt to notify purchasers to whom a written notice had been previously sent under subdivision (1) of the satisfaction of the debt.

- (4) **A purchaser of farm products buying from a person engaged in farming operations must issue a check for payment jointly to the debtor and those secured parties from whom he has received prior written notice** of a security interest as provided for in subdivision (1). A purchaser who fails to issue a jointly payable check as required by this subsection is not protected by this subdivision. A purchaser of farm products (on which there is a perfected security interest) buying from a person engaged in farming operations who withholds all or part of the proceeds of the sale from the seller, in order to satisfy a prior debt (“prior debt” does not include the costs of marketing the farm product or the cost of transporting the farm product to the market) owed by the seller to the buyer, commits a Class C infraction.
- (b) Except as otherwise provided in subsection (e), a buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys:
- (1) without knowledge of the security interest;
 - (2) for value;
 - (3) primarily for the buyer’s personal, family, or household purposes; and
 - (4) before the filing of a financing statement covering the goods.
- (c) To the extent that it affects the priority of a security interest over a buyer of goods under subsection b), the period of effectiveness of a filing made in the jurisdiction in which the seller is located is governed by IC 26-1-9.1-316(a) and IC 26-1-9.1-316(b).
- (d) A buyer in ordinary course of business buying oil, gas, or other minerals at the wellhead or minehead or after extraction takes free of an interest arising out of an encumbrance.
- (e) Subsections (a) and (b) do not affect a security interest in goods in the possession of the secured party under IC 26-1-9.1-313.



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