

WRITTEN FARMLAND LEASE CHECKLIST

J. David Aiken, UNL Water & Ag Law Specialist
402-472-1848; daiken@unl.edu

Author's note: the need for personal legal advice. Leasing and other legal dealings require a consideration of law and facts unique to each case. This Extension Fact Sheet is intended to provide general information to the public; it **must not** be used as a substitute for private legal counsel. Any person doing so may jeopardize his or her legal rights.

INTRODUCTION

Written farm leases in Nebraska are the exception, not the rule. Many landowners and operators may be reluctant to enter into a written lease as it may imply that they don't trust the other party or may reflect a lack of good faith on their own part. However, written leases remind the parties what their agreement was, and prevent either party's selective recall. If either party dies a written lease will protect heirs as well as the surviving party. A carefully drafted lease can allow for adjustment of the lease terms if unanticipated conditions make such changes necessary. Having to sign a written document makes people consider more closely each provision as well as the overall lease objectives. A written lease is likely to be more complete than an oral lease, can specify a definite lease term, and can satisfy written contract requirements. Finally, if the lease describes the way the farm will be operated the lease can act as a partial history of the farming operation. Farm leases should be prepared by a competent attorney.

In negotiating with your landlord or tenant, landlords and tenants alike should take the long-run view, not the short-term view. Taking advantage of a short-term legal advantage by e.g. the tenant can result in the eventual loss of the lease. Thus both parties should try to balance a short-term and long-term perspective. If the lease inevitably will be terminated, then negotiating strategy can change accordingly. However, both parties will be best served if they can keep the long-term perspective in mind when negotiating agricultural leases.

WRITTEN FARMLAND LEASE CHECKLIST

Parties may write a lease virtually any way they wish. The italicized information in this publication indicates *how Nebraska courts would most likely resolve common farm lease legal issues if they are not addressed in a lease*, and further indicates common or typical farmland lease provisions. The italicized information is important: if it suggests that the court would do something different than you think the court should, or something different from what you would want done, you need a written lease to address that issue.

A written lease should be signed by both parties, and include a legal description of leased land, the length of lease term, and the date the lease begins.

Crop selection & farming methods. Unless the lease specifies otherwise, *the tenant has the right to select the crops grown and farming methods used* so long as they do not constitute "bad husbandry." The lease, however, may specify the crops to be grown and the farming methods

used (e.g. tillage, weed control). If the tenant fails to perform a required farming operation the lease should give the landlord the right to enter the property to perform the work, and (if appropriate) to terminate the lease.

The lease could specify that the tenant will comply with any governmental regulations regarding soil, water and agricultural chemical use (e.g. chemigation regulations), and that the tenant will be liable for any damages resulting from violation of such requirements.

Tenants must return the land in same condition as they received it, subject to normal wear and tear, whether or not the lease so requires.

Emblements. Emblements refer to crops grown as the result of human labor and not spontaneously growing crops. *If the lease is terminated early, the tenant has the right to come back and harvest crops planted before the lease was terminated*, unless the lease specifies otherwise. If a lease has been properly terminated, and the tenant plants a crop after the lease has been terminated, however, Nebraska courts have ruled that the tenant is not entitled to harvest the crop planted after the lease was terminated. The difference in the two outcomes depends on when the crop was planted: (1) if the crop was planted before the lease is terminated the tenant is entitled to harvest the crop; (2) if the crop was planted after the lease was terminated, the tenant is not entitled to harvest the the crop (unless the landlord consents).

Division of expenses. The lease should specify each party's share of expenses: maintenance, chemicals, repairs, utilities, taxes, etc.

Duty to maintain & repair. Unless the lease specifies otherwise, *the landlord is under no legal obligation to make repairs, and the tenant need only repair any damage resulting from the tenant's negligence. However the tenant is under some obligation to maintain the property*, unless the lease specifies otherwise. Under most leases the tenant will be responsible for maintenance and the landlord will be responsible for repairs. The tenant may wish to include a ceiling on the annual maintenance expense. *Neither the landlord nor the tenant are obliged to replace buildings destroyed by fire or other casualty unless the lease specifies otherwise. However the tenant is required to continue to pay rent despite such casualty loss unless the lease specifies otherwise.* If the tenant is renting buildings, the tenant might wish to include a clause suspending the tenant's obligation to pay rent if the buildings are not usable.

Insurance & taxes. The lease should clearly specify who is responsible for purchasing insurance (especially on improvements) and paying taxes. Unless the lease specifies otherwise, *the landlord is responsible for paying all taxes*. The landlord may wish to specify that the tenant is liable for taxes resulting from the tenant's improvements. *The tenant (not the landlord) is potentially liable for virtually all injuries to third parties on leased premises unless the lease specifies otherwise.* Both parties should have liability insurance.

The risk of crop loss may be allocated in the lease. *In a cash share lease the tenant bears the entire loss (and is liable for the cash rent) unless the lease specifies otherwise. In a crop share lease, both parties share the loss proportionally, unless the lease specifies otherwise.*

Fixtures & improvements. The lease may require the landlord's permission before improvements are made. If improvements are made, a method should be included for specifying either the landlord's share or how the tenant will be reimbursed for the improvements when the lease terminates. A common lease provision provides for paying the tenant when the lease ends the appraised value of fixtures installed and paid for by the tenant. The lease should also include a general statement specifically identifying what improvements may be removed by the tenant at the end of the lease and what improvements may not be removed.

Generally tenants have no right to remove "fixtures" but may remove "personal property" after the lease term has expired unless the lease states otherwise. Tenants have no general right to be reimbursed for improvements they have made which as fixtures cannot be removed unless the lease states otherwise. Many leases specify the period after the lease term within which the tenant must remove any removable personal property. Windmills, pumps, fences and barns have been found in Nebraska court cases to constitute fixtures (and therefore cannot be removed by the tenant), while irrigation equipment and grain bins have been considered personal property (and can be removed by the tenant).

Lease assignment & subleasing. Subleasing involves the tenant's transferring the lease to a third party for less than the remaining lease term. Assignment of the lease involves the tenant's transferring the lease for the remaining lease term. Generally courts do not favor lease terms restricting a tenant's right to assign or sublease the property.

The lease should clearly specify tenant's right to assign or sublease. If the lease is silent, *the tenant's right to sublease or assign will be presumed*. Any sublease or assignment must be within the terms of the original lease. *A crop share lease may be determined in court to be non-assignable because of the lease is essentially a personal contract, i.e. depends on the tenant's particular farming skills.* The landlord may wish to specify in the lease that any assignment or sublease must be approved in writing by landlord.

Rent payment. The type of rent paid (cash, share, etc.), and how rent will be calculated should be specified as well as when rent payments are due. Unless the lease specifies otherwise *cash rent is due at the end of the lease term. For crop share leases, the landlord's share is due within a reasonable time after harvest.* If the lease is crop share, the lease should specify how the landlord's share will be handled: stored, sold by the tenant, picked up by landlord, etc.

For cash rent, the landlord should obtain a security interest in the crop to secure cash rent payment. The security interest should also cover any advances by the landlord for expenses. The landlord should get tenant's operating lender to subordinate to landlord. The tenant also needs to sign an Farm Services Agency form if the landlord seeks to use farm payment as collateral for cash rent payment.

Farm program. If land is in the farm program, the lease may specify that the tenant obtain the landlord's approval prior to program signup, etc. The lease should specify that the tenant would be responsible for complying with all FSA requirements. The lease should specify the division (if any) of farm program payments. In most crop share leases government payments are divided on the same basis as the crop. The landlord needs the tenant's signature on an FSA form to terminate

a farm lease and put the land into the Conservation Reserve Program.

Lease termination & renewal. *In Nebraska a written lease terminates when it expires and there is no automatic right of renewal unless one is included in the lease. The lease should clearly state whether it is automatically renewed without notice to the contrary by either party, or e.g. whether the lease automatically terminates unless the landlord gives notice to tenant that the lease is renewed. If the lease is automatically renewed, then the type of termination notice should be specified (e.g. written notice received 30 days before lease terminates, etc.). Similarly, if the lease is automatically terminated, the type of notice to continue the lease (if any) should be specified.*

Right of entry. The tenant has all the legal rights of a landowner regarding trespass once the tenant is in possession of the leased premises. *The landowner does not have a general right of entry onto leased lands unless such right is included in the lease. Unless the lease specifies otherwise, the landlord may enter leased premises only: to collect rent, to prevent "waste," and to make improvements.* The landlord's right of entry should be specified in the lease to avoid misunderstandings.

Sale of property. *Leased property is sold subject to the lease, unless the lease specifies otherwise. The lease may include a statement that any sale of property is subject to the lease, or alternatively that a sale of the land terminates the lease on the date of the sale, at the end of the growing season, etc.*

Death of parties. The lease should include a statement that the lease is binding on the heirs of both parties. If not, the lease should state what happens if either party dies. *The tenant's family has the right to harvest a crop planted by the tenant before the tenant died (emblems)* unless the lease provides otherwise.

Recording. In Nebraska leases longer than one year must be filed with the county recorder of deeds. Otherwise the lease is legally enforceable for only one year. The lease must be signed by the landlord and notarized.

Oral modifications of written leases. If the parties have a written lease and later agree to modify the written lease terms, the changes should (1) be written into the lease and then initialed or signed by both parties, or (2) the written lease rewritten and signed (best approach). Otherwise, *if disputes arise the court will enforce the terms of the written lease regardless of the oral change unless both parties agree in court as to what the oral lease modification was.*

Cleanup Liability. The landlord as the property owner is ultimately liable for cleanup costs for pollution from improper chemical handling or waste disposal on leased lands. The tenant is primarily liable for cleanup costs. However, *a landlord is liable for cleanup costs not covered by the tenant or his insurer.* The landlord's best protection is to select a tenant who uses good chemical handling, storage and disposal practices.