

USDA faces pressure to implement farm bill heirs' property provisions

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The 2018 farm bill included provisions that advocates described as the most substantive step the federal government has taken to address heirs' property, a type of ownership that has led numerous black Americans to lose their land.

But eight months after President Donald Trump signed the [farm bill](#) into law, the heirs' property provisions have yet to take effect. One of the provisions, which authorizes tens of millions of dollars for a federal loan program, has been held up by appropriations gridlock on Capitol Hill. The other, which makes it easier for producers operating on heirs' property to register for a farm number, depends on the Agriculture Department to implement it.

Either way, advocates and some lawmakers are expressing frustration over the wait.

“On the heirs' property provisions, the farm bill was seen as so groundbreaking, but often the devil is in the details,” said Thomas Mitchell, a law professor at Texas A&M University who [worked to draft a law](#), since adopted by a dozen states, that makes it easier for those claiming ownership of heirs' property to hold on to the land. “Promises can be frustrated, especially if you don't have it on the appropriations side.”

Heirs' property is land held in common by a web of descendants of the original landowner, generally because that person died without a will. The land lacks a clear title, leaving it ripe for sale to outside interests based on the consent of just one of the tenants-in-common, even if they've never lived on the land itself.

Heirs' property dates to Reconstruction and is especially prevalent among rural black families who faced discrimination and exclusion from the legal system for generations — and often lack the capital and the legal firepower to fight off land-hungry developers.

The lack of a will or title to the property has historically made it difficult for tenants-in-common who live on or farm heirs' property to get a farm serial number from USDA — thereby precluding them from accessing the pool of government services, loans and grants the department provides. It also makes it difficult to use a farm or crop as collateral to secure a private loan.

The devastating effect heirs' property has had on black farm ownership was recently highlighted in a [report co-published by ProPublica and The New Yorker](#) that told the story of two brothers from North Carolina who waged a decadeslong fight in an attempt to retain land that had been in their family for more than a century.

The story noted USDA has called heirs' property “the leading cause of black involuntary land loss” and reported that more than one-third of land owned by blacks in Southern states is heirs' property — some 3.5 million acres.

The farm bill authorized \$50 million over five years for a re-lending program. Certain groups would be able to access loans and then re-lend the money to heirs' property tenants, to help them offset the costs of establishing a clear title to the land. The loans would require a succession plan to be drafted.

The measure also defined the terms of alternative documentation tenants-in-common can use to register property with the Farm Service Agency in lieu of a deed.

For the re-lending program, Congress must pass a fiscal 2020 appropriations measure for USDA to free up the authorized funding so partner organizations can begin applying for loans to assist tenants-in-common.

Lorette Picciano, executive director of the [Rural Coalition](#), a nonprofit that helped introduce some of the heirs' property language that was incorporated into the farm bill, expressed frustration at the lack of spending bill action. She said there's no guarantee the full amount of funding authorized by the farm bill will materialize.

The window to capitalize on the \$10 million the bill authorized for fiscal year 2019 has already passed. The package of fiscal 2020 spending bills that cleared the House in June appropriates \$5 million, while the Senate has yet to pass an appropriations measure for USDA.

Unlike the re-lending program, USDA can put the alternative documentation provision into effect without congressional action. As such, some activists thought its implementation would be "automatic," Mitchell said.

But that assumption has been proven to be false. The department has yet to release a regulation to implement the change, though it has held [two listening sessions on the issue](#) this summer — one in Mississippi in July and another in Washington, D.C., last week.

A USDA spokesperson told POLITICO in an emailed statement last week that the department is "in the process of gathering feedback and writing the rule." The statement did not say when the rule would be released.

A second spokesperson added in a follow-up statement to POLITICO that, in the interim, "if a producer has records to identify the land in which they have an interest, even if it was heirs' property, FSA would likely have sufficient information to establish a farm number."

But Picciano said that without a rule firmly establishing which of the documents outlined in the farm bill will be accepted, there's room for ambiguity and confusion as producers navigate the various handbooks that govern qualification for USDA programs.

In a written comment to the department, she argued that "an interim rule should be set in place with instructions to offices on how to immediately implement the new alternate documentation requirements, with opportunity for additional public comment prior to adoption of a final rule."

Sens. [Doug Jones](#) (D-Ala.) and [Tim Scott](#) (R-S.C.) raised the issue in a [letter to Agriculture Secretary Sonny Perdue](#) last month. They argued that allowing heirs' property to qualify for farm serial numbers from the USDA would result in "leveling the playing field for countless minority farmers and ranchers who have been locked out of our federal support programs for far too long."

They urged Perdue to implement the farm number provision "expeditiously" and to pursue another element of the law, which authorized the National Agricultural Statistics Service to study "the various ways in which unresolved land tenure issues preclude heirs' property interest holders from successfully operating farms and ranches."

"As representatives of states that are largely considered to be ground zero for this issue, timely and efficient implementation is paramount for heirs' property owners," the letter said, requesting a response from the secretary.

Staffers from both offices told POLITICO they have yet to receive a response from the department.

The issue has also caught the attention of presidential hopeful Sen. [Elizabeth Warren](#) (D-Mass.), who pledged in a farm economy plan she released earlier this month to support and build on the farm bill's provisions.

In her plan, Warren called for full funding of the farm bill re-lending program and vowed to allow heirs' property owners to present additional types of documentation to qualify for USDA programs (as well as those run by the Federal Emergency Management Agency and the Department of Housing and Urban Development).

None of the other 2020 Democratic presidential candidates appear to have released proposals related to heirs' property, according to a POLITICO review of candidates' rural and economic proposals.

Mitchell said he understands why advocates are upset. USDA has been accused of institutional bias against black farmers for decades and has faced a series of lawsuits brought by minority farmers and ranchers alleging discrimination.

"Having black farmers being frustrated with USDA is not a new thing," he said, adding that "it might be a little early to come to the conclusion that this is just the same old pattern."

"Certainly, if we're talking six months from now and we still have issues, that may be another story," he said.

Mitchell noted that writing rules to implement the sprawling, five-year farm bill is a significant undertaking, and the heirs' property provisions are just one of many regulations the department is working on to roll out policy changes. USDA has faced political pressure, for example, to stand up a new [dairy support program](#) and to write regulations to make hemp a commodity. The new dairy program is in effect but hemp regulations have yet to be released.

But Picciano said the farm bill's treatment of heirs' property is a more straightforward change than the regulations needed to make hemp a commodity.

"This is not rocket science," she said. "Without alternate documentation, you're leaving money on the table."