VOLUME 17, NUMBER 8, WHOLE NUMBER 201 JULY 2000

INSIDE

- Agricultural law bibliography
- The Agricultural Risk Protection Act of 2000: crop insurance

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

- Crop share rental arrangements and sample lease

Federal Circuit affirms dismissal of claims against FGIS

In its decision in *Collehon Farming v. United States*, 207 F.3d 1373 (Fed. Cir. 2000), the Federal Circuit has affirmed the dismissal of a damages action brought by wheat farmers and grain elevators against the United States. The action alleged negligence and mismanagement by the USDA Federal Grain Inspection Service (FGIS) in its transition from near-infrared reflectance technology (NIRR) equipment to near-infrared transmittance technology (NIRT) equipment to measure wheat protein content. The plaintiffs claimed that they lost money on their wheat sales because the NIRT equipment under-represented the protein in wheat during the transition period.

FGIS establishes uniform grain standards and provides grain inspection and measurement services under the Grain Standards Act, 7 U.S.C. §§ 71-87. Though it is not the only measurer of the quality and condition of wheat and other grains, it provides official measurement services when wheat is shipped from elevators pursuant to its sale. These measurements include ascertaining the wheat's protein content. Wheat with a higher protein level typically commands a higher price.

Elevators also measure protein levels when they acquire wheat from farmers. Because a FGIS measurement will apply to their sale of the wheat, elevators have a strong incentive to correlate their equipment with the equipment used by FGIS.

During a period in the transition by FGIS from NIRR equipment to NIRT equipment, the NIRT equipment under-represented wheat protein content because of calibration problems. Elevators responded by adjusting their equipment, most of which used NIRR technology, so that their equipment also under-represented protein content. As a result, the farmers whose wheat was measured by the elevators and the elevators whose wheat was measured by FGIS allegedly received less money for their respective wheat than they should have received.

The plaintiffs premised their action to recover their alleged losses on the Little Tucker Act, 28 U.S.C. § 1346(a)(2), and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680.

The Tucker Act claim essentially asserted that FGIS had violated the Grain Standards Act by failing to ensure that the NIRT equipment was properly calibrated. To state a claim under the Tucker Act, however, the plaintiffs were required to show that the statute upon which their claim was founded, the Grain Standards Act, is "money-mandating" in the sense that it can be "fairly interpreted as mandating compensation from the United States." *Gollehon Farming*, 207 F.3d at 1379 (citing *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983)). The plaintiffs attempted to make this showing by arguing that the Grain Standards Act imposed on FGIS a fiduciary duty in their favor, the breach of which through the erroneous measurement of protein content mandated compensation. They argued that their relationship with FGIS was analogous to the role assigned by law to the Department of Interior over Native American timberlands that the Supreme Court held created a fiduciary relationship mandating compensation for its breach in *United States v. Mitchell*, 463 U.S. 206 (1983).

The Federal Circuit rejected this argument. It contrasted the comprehensive control over Native American timberlands exercised by the Department of Interior in *Mitchell* with the absence of any FGIS authority to control wheat production and distribution. While acknowledging that FGIS "was an important component of the nation's grain production and distribution system," the court reasoned that "this cannot imply that the United States has, via the Grain Standards Act, assumed the responsibility to ensure that farmers and grain elevators generate a minimum return on investment." *Id*. at 1380. Thus, concluded the Federal Circuit, the "Grain Standards Act cannot be fairly read to mandate compensation." *Id.*

The plaintiffs' FTCA claims fared no better. The Federal Circuit held that the farmers' tort claim amounted to a misrepresentation claim because it was based on the contention that the elevators had lowered the protein measurements for their wheat in response to the misinformation provided by the faulty FGIS measurements. *Id*. at 1380-81. Misrepresentation claims are not within the FTCA's waiver

Continued on page 2

certain specified features, and it establishes research and development priorities, including the development of a pasture, range, and forage program.

The Act also authorizes the FCIC to reimburse any applicant seeking reimbursement for its crop insurance policy research and development costs if the policy is approved by the FCIC Board of Directors and, if applicable, is offered for sale. Such costs will also reimbursed with respect to policies approved by the Board before the enactment of the Act. In either case, reimbursement will be made only if the Board determines that the policy is marketable based on a reasonable marketing plan.

Reimbursement will also be made for the maintenance costs associated with the annual cost of underwriting a policy for which the research and development costs have been reimbursed for up to four years. Thereafter, the approved insurance provider responsible for the maintenance of the policy may charge a fee to other approved insurance providers that elect to sell the policy or transfer the responsibility for maintenance to the FCIC.

The Act provides that the reimbursement amount for an approved policy is to be based "on the complexity of the policy and the size of the area in which the policy or material is expected to be sold." Reimbursement payments are "considered as payment in full by the Corporation for the research and development conducted with regard to the policy and any property rights to the policy."

Crop insurance pilot programs

The Agricultural Risk Protection Act authorizes the FCIC to conduct pilot programs to test the marketability and suitability of new crop insurance policies. In addition to giving the FCIC the general authority to conduct pilot programs, the Act specifically directs the FCIC to conduct at least one pilot program for livestock, revenue insurance, and a premium rate reduction pilot program. Otherwise, the range of permissible and required pilot programs is remarkable for it extends from the destruction of bees due to pesticides to coverage for wild salmon losses. The Act also expands the existing options pilot program.

Education and risk management assistance programs

The Agricultural Risk Protection Act requires the FCIC and the Secretary, acting through the Cooperative State Research, Education, and Extension Service, to provide crop insurance education and information in states where crop insurance participation has traditionally been low and where producers are underserved by the crop insurance program. The Act also authorizes the transfer of monies from the insurance fund for the purpose of awarding grants to colleges, universities, and other qualified public and private entities to educate producers about risk management strategies.

The Secretary must provide cost share assistance to producers in not less than ten nor more than fifteen states in which participation in the crop insurance program is low historically. Producers may use this assistance for the following uses:

(A) construct or improve–

(i) watershed management structures; or

(ii) irrigation structures;

(B) plant trees to form windbreaks or to improve water quality;

(C) mitigate financial risk through production diversification or resource conservation practices, including–

(i) soil erosion control;

(ii) integrated pest management; or transition to organic farming;

(D) enter into futures, hedging, or options contracts in a manner designed to help reduce production, price, or revenue risk;

(E) enter into agricultural trade options as a hedging transaction to reduce production, price, or revenue risk; or

(F) conduct any other activity related to the activities described in subparagraphs (A) through (E), as determined by the Secretary.

Beginning in the 2001 fiscal year, the Commodity Credit Corporation is authorized to make available $10 million in cost share funds for this assistance. Individual producer payments are limited at $50,000 per person.

Other miscellaneous changes

The Agricultural Risk Protection Act makes various other changes to the FCIA. In general terms, these changes include the following:

- Removing any federal crop insurance policy or plan from the jurisdiction of the Commodity Futures Trading Commission or the Securities and Exchange Commission.
- Requiring the FCIC to make information electronically available to producers and approved insurance providers and, "to the maximum extent practicable," to "allow producers and approved insurance providers to use electronic methods to submit information required by the Corporation."
- Permitting the FCIC to renegotiate the Standard Reinsurance Agreement once during the 2001 through 2005 reinsurance years.
- Limiting revenue coverage for potatoes to whole farm policies or plans of insurance.
- Beginning with the 2001 crop year, requiring the FCIC to offer coverage for cotton and rice losses resulting from the failure of irrigation water supplies due to drought and saltwater intrusion.
- Permitting producers who had obtained a 1999 Crop Revenue Coverage policy that had been voided by FCIC Bulletin MGR-99-004 to receive full indemnities under the policy.

FGIS/continued from page 1

of sovereign immunity. *Id*. at 1380 (citing 28 U.S.C. § 2680(h)).

As to the elevators' tort claim, the Federal Circuit held that the claim was barred by the "discretionary function exception" to the FTCA's waiver of sovereign immunity. The court reasoned that the various decisions involved in making the transition from NIRR technology to NIRT technology involved choices and judgments of a policy nature that were not directly constrained by applicable statutes or regulations. Hence, the discretionary function exception embodied in 28 U.S.C. § 2680(a) applied to bar the plaintiffs' claim. *Id*. at 1381-82.

—*Christopher R. Kelley, University of Arkansas*

VOL. 17, NO. 8, WHOLE NO. 201 July 2000

AALA Editor..........................Linda Grim McCormick
Rt. 2, Box 292A, 2816 C.R. 163
Alvin, TX 77511
Phone: (281) 388-0155
FAX: (281) 388-0155
E-mail: lgmccormick@teacher.esc4.com

Contributing Editors: Christopher R. Kelley, University of Arkansas, Fayetteville, AR; Drew Kershen, University of Oklahoma

For AALA membership information, contact William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

Agricultural Law Update is published by the American Agricultural Law Association, Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313. All rights reserved. First class postage paid at Des Moines, IA 50313.

Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, Rt. 2, Box 292A, 2816 C.R. 163, Alvin, TX 77511.

Agricultural law bibliography: second quarter 2000

Animals — animal rights

Comment, *"Four Legs Good, Two Legs Bad": The Issue of Standing in Animal Legal Defense Fund, Inc. v. Glickman and its Implications For the Animal Rights Movement.* (*Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, D.C. Cir. 1998, *cert. denied*, *National Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc.*, 119 S. Ct. 1454, 1999), 65 Brook. L. Rev. 895-933 (1999).

Kelch, *The Role of the Rational and the Emotive in a Theory of Animal Rights*, 27 B.C. Envtl. Aff. L. Rev. 1-41 (1999).

Note, *At the Intersection of Constitutional Standing, Congressional Citizen-suits, and the Humane Treatment of Animals: Proposals to Strengthen the Animal Welfare Act*, 68 Geo. Wash. L. Rev. 330-360 (2000).

Note*, A Common Law Basis For Animal Rights.* (*Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, D.C. Cir. 1998, en banc.), 29 Stetson L. Rev. 495-530 (1999).

Bankruptcy

Farmers: general

Harl, *The Hidden Tax Traps in Abandonment*, 11 Agric. L. Dig. 65-66 (April 28, 2000).

Biotechnology

Adler, *More Sorry than Safe: Assessing the Precautionary Principle and the Proposed International Biosafety Protocol*, 35 Tex. Int'l L.J. 173-205 (2000).

Beach, *No "Killer Tomatoes": Easing Federal Regulation of Genetically Engineered Foods*, 53 Food & Drug L. J. 181 (1998).

Casenote, *Bioprospecting on Federal Lands, Public Loss or Public Gain?* (*Edmonds Institute v. Babbitt*, 42 F. Supp. 2d 1, D.C. Cir. 1999), 4 Great Plains Nat. Resources J. 50-73 (1999).

Comment, *Transgenic Crops: A Modern Trojan Horse*, 3 J.L. & Soc. Challenges 127-137 (1999).

Comment, *Chilling of the Corn: Agricultural Biotechnology in the Face of U.S. Patent Law and the Cartagena Protocol*, 4 J. Small & Emerging Bus. L. 377-410 (2000).

Note, *The Negotiation of the Cartagena Protocol on Biosafety*, 6 Envtl. L. 577-602 (2000).

Redick & Bernstein, *Nuisance Law and the Prevention of "Genetic Pollution": Declining a Dinner Date with Damocles*, 30 Envtl. L. Rep. 10378 (2000).

Uchtmann, *Regulating Foods Derived From Genetically Engineered Crops*, 17 Agric. L. Update 4-7, 3 (May 2000).

Cooperatives

General

Borst, *Going Global: Export Certificates a Valuable Tool Helping Co-ops Tap Overseas Markets*, Rural Coop. 18-21 (March/April 2000).

Lauck & Adams, *Farmer Cooperatives and the Federal Securities Laws: The Case for Non-application*, 45 S.D. L. Rev. 62-93 (2000).

Environmental issues

Centner, *Concentrated Feeding Operations: An Examination of Current Regulations and Suggestions for Limiting Negative Externalities*, 25 Colum. J. Envtl. L. 219-252 (2000).

Comment, *The Ones that Got Away: Regulating Escaped Fish and Other Pollutants from Salmon Fish Farms*, 27 B.C. Envtl. Aff. L. Rev. 75-121 (1999).

Forestry

Leffler, Rucker & Munn*, Transaction Costs and the Collection of Information: Presale Measurement on Private Timber Sales*, 16 J.L. Econ. & Organization 166-188 (2000).

International trade

Chen, *Globalization and its Losers*, 9 Minn. J. Global Trade 157-218 (2000).

Kennedy, *Resolving International Sanitary and Phytosanitary Disputes in the WTO: Lessons and Future Directions*, 55 Food & Drug L. J. 81 (2000).

Koo & Uhm, *U.S.-Canadian Grain Disputes*, 9 Minn. J. Global Trade 103-119 (2000).

McNiel, *Furthering the Reforms of Agricultural Policies in the Millennium Round*, Minn. J. Global Trade 41-86 (2000).

Ritchie & Dawkins, *WTO Food and Agricultural Rules: Sustainable Agriculture and the Human Right to Food*, 9 Minn. J. Global Trade 9-39 (2000).

Scher, *The WTO and America's Agricultural Trade Agenda*, 9 Minn. J. Global Trade 1-7 (2000).

Scott, *Exported to Death: The Failure of Agricultural Deregulation*, 9 Minn. J. Global Trade 87-102 (2000).

Thompson, *Globalization, Losers, and Property Rights*, 9 Minn. J. Global Trade 602-609 (2000).

Land use regulation

Land use planning and farmland preservation techniques

Centner, *Curbing the Right-to-Farm*, Choices 41-45 (1st Q. 2000).

Centner, *Anti-Nuisance Legislation: Can the Derogation of Common Law Nuisance be a Taking?,* 30 Envtl. L. Rep. 10253-10260 (2000).

Hamilton, *Preserving Farmland, Creating Farms, and Feeding Communities: Opportunities to Link Farmland Protection and Community Food Security*, 19 N. Ill. U. L. Rev. 657-669 (1999).

Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 Envtl. L. 441-501(2000).

Thompson, "*Hybrid" Farmland Protection Programs: A New Paradigm for Growth Management*, 23 Wm. & Mary Envtl. L. & Pol'y Rev. 831-355 (1999).

Leases, landlord-tenant

Grossman, Leasehold Interests and the Separation of Ownership and Control in U.S. Farmland in C. Geisler & G. Danekar, *Property and Values: Alternatives To Public And Private Ownership* ch. 6, pp. 119-148 (Island Press, 2000).

Livestock and packers & stockyards

Head, *Local Regulation of Animal Feeding Operations: Concerns, Limits, and Options for Southeastern States*, 6 Envtl. L. 503- 575 (2000).

Legislative Developments*, Council Directive 98/58/EC Concerning the Protection of Animals Kept for Farming Purposes*, 1998 O.J. (L 221) 23, 5 Colum. J. Eur. L. 497-501 (1999).

Note, *Where's the Beef? A Reconciliation of Commercial Speech and Defamation Cases in the Context of Texas's Agricultural Disparagement Law*, 19 Rev. Litig. 261-288 (2000).

Stewart, Cannon, Salonen, Nuxoll, *Trade and Cattle: How the System is Failing an Industry in Crisis*, 9 Minn. J. Global Trade 449-587 (2000).

Patents, trademarks & trade secrets

Comment*, Protein Variants: A Study on the Differing Standards for Biotechnology Patents in the United States and Europe*, 13 Emory Int'l L. Rev. 629-685 (1999).

Ross & Zhang, *Agricultural Development and Intellectual Property Protection for Plant Varieties: China Joins UPOV*, 17 UCLA Pac. Basin L.J. 226-244 (1999).

Pesticides

Comment, *Opportunities to Improve Pesticide Policy in Central America*, 11 Colo. J. Int'l Envtl. & Pol'y 151-181 (2000).

Watnick, *Risk Assessment: Obfuscation of Policy Decisions in Pesticide Regulation and the EPA's Dismantling of the Food Quality Protection Act's Safeguards for Children*, 31 Ariz. St. L.J. 1315-1372 (1999).

Public lands

Miller, *Public Lands and Waters: Who Will Prevail—Man or Beast?* 31 Urban L. 883-899 (1999).

Souder & Fairfax, In Lands We Trusted: State Trust Lands as an Alternative Theory of Public Land Ownership in C. Geisler & G. Danekar, Property and Values: Alternatives To Public And Private Ownership ch. 5, pp. 87-118 (Island Press, 2000).

If you desire a copy of any article or further information, please contact the Law School Library nearest your office. The AALA website < http://www.aglaw-assn.org > has a very extensive Agricultural Law Bibliography in the Members Only sector of the website. If you are looking for agricultural law articles, please consult this bibliographic resource on the AALA website.

—Drew L. Kershen, Professor of Law,
The University of Oklahoma,
Norman, OK

The Agricultural Risk Protection Act of 2000: federal crop insurance

By Christopher R. Kelley

On June 20, 2000, President Clinton signed the Agricultural Risk Protection Act of 2000, Pub. L. No. 106-224, 114 Stat. 358. The Act makes significant changes to the federal crop insurance program and to the Non-Insured Crop Disaster Assistance Program (NAP). It also provides for direct financial assistance to producers of various crops; makes certain changes to the USDA's nutrition, commodity, and credit programs; funds biomass research and development; and establishes the Plant Protection Act as an omnibus means for regulating the movement of plant pests, plants, plant products, biological control organisms, noxious weeds, and related matters.

This Article describes the major changes made to the federal crop insurance program. In a subsequent *Agricultural Law Update*, changes to the NAP and the domestic commodity and other farm programs will be discussed. Citations for the discussion of federal crop insurance are omitted because of space limitations. An electronic version with citations is available from the author at <crkelley@mindspring.com>.

Authorized by the Federal Crop Insurance Act (FCIA), the federal crop insurance program provides subsidized crop insurance for farmers. It is administered by the Federal Crop Insurance Corporation (FCIC or the Corporation) under the supervision of the USDA Risk Management Agency (RMA).

Federal crop insurance policies are sold and serviced by private insurance providers that are approved by the FCIC. These approved providers are reinsured by the FCIC with respect to these policies, and they receive an amount for their operating and administrative expenses. The FCIC also approves the terms and conditions of federal crop insurance policies.

Federal crop insurance currently provides both yield-based coverage and revenue insurance. Yield-based coverage compensates farmers for yield losses, measured either by the quantity or the value of their yield, depending on the policy. A form of yield-based coverage known as multiple peril crop insurance (MPCI) is the most widely available and used type of federal crop insurance. MPCI provides comprehensive protection against losses caused by weather and other unavoidable perils.

Christopher R. Kelley is Assistant Professor of Law at the University of Arkansas School of Law and is Of Counsel to the Vann Law Firm in Camilla, GA.

Revenue insurance generally protects against revenue or gross income losses caused by yield or price declines. A relatively new form of crop insurance, revenue insurance policies vary in their definition of "revenue" and in the manner in which they provide coverage. For example, group revenue insurance (GRIP) pays indemnities when the average county revenue for the insured crop declines below the revenue level chosen by the farmer. Adjusted gross revenue insurance (AGR) insures the revenue of the entire farm, not just the revenue derived from individual crops, by guaranteeing a percentage of the farm's average gross revenue. Crop revenue coverage (CRC) protects against price and yield losses below a guarantee based on the higher of an early-season price or the harvest price. Income protection policies (IP) protect farmers against reductions in gross income when the insured crop's price or yield falls from early-season expectations. Revenue assurance (RA) allows farmers to select a dollar amount of target revenue from a range expressed in term of percentages of expected revenue.

Changes to Multiple Peril Crop Insurance coverage

The Agricultural Risk Protection Act substantially amends the MPCI provisions of the FCIA effective with the 2001 crop year.

Standard MPCI policies insure producers against yield losses caused by natural disasters, such as drought, excessive moisture, hail, wind, frost, insects, and disease. In certain circumstances, however, coverage for fire and hail losses can be deleted from an MPCI policy.

Two levels of MPCI coverage are available. The first is known as "catastrophic risk protection." This level of protection is often called "CAT" coverage. The second level is known as "additional coverage." Additional coverage provides greater protection than CAT coverage and is often referred to as "buy-up" coverage. An administrative fee applies to both levels, but the premium for CAT coverage is completely subsidized while the premium for additional coverage is only partially subsidized.

CAT coverage changes

For the 1995 crop year, producers had to obtain at least CAT coverage to be eligible for the federal domestic commodity programs and certain other USDA programs. Since then, participants in these programs could waive any claim to emergency crop loss assistance in lieu of obtaining CAT or additional coverage.

In 1998 and 1999, Congress extended emergency crop loss assistance benefits to producers who had waived their claim to them. To receive these benefits, these producers were required to purchase CAT or additional coverage in the subsequent two years for all crops of economic significance produced by such person for which insurance is available.

CAT coverage extends to yield losses and prevented planting resulting from natural disasters, but it is very limited. An indemnity is paid only if the insured suffers at least a fifty percent loss in yield, and the price level is fifty-five percent of the expected market price for the insured crop. These yield loss and price level percentages were not changed by the Agricultural Risk Protection Act.

<u>New alternative for determining loss</u>

Though the Act did not change the yield loss and price level percentages, the available bases for determining the yield loss were changed. Beginning with the 2001 crop year, producers have a choice between two alternatives for determining yield losses. Under the first alternative, producers can elect to have their loss determined on an individual yield or area yield basis. This alternative was the only alternative available under existing law. However, a producer did not always have the choice between an individual yield basis or area yield basis because the FCIC had the discretion to decide whether both bases would be offered.

Under the second alternative, the alternative created by the Act, a producer can chose protection that:

(i) indemnifies the producer on an area yield and loss basis if such a policy or plan of insurance is offered for the agricultural commodity in the county in which the farm is located;

(ii) provides, on a uniform national basis, a higher combination of yield and price protection than the coverage available under ... [the first alternative]; and

(iii) the Corporation determines is comparable to the coverage available under ... [the first alternative] for purposes ... [of the premium to be paid by the Corporation].

By its terms, this provision is intended to give producers who obtain CAT coverage the election to insure on an area yield and loss basis in lieu of an individual yield basis. It also directs the FCIC to provide "a higher combination of yield and price protection" than the coverage available under the first alternative. Nevertheless, it appears to give the FCIC the discretion to determine the availability of this alternative on a commodity and county basis.

"Expected market price" defined

CAT indemnities are based on a percentage of the "expected market price" for the insured commodity. This phrase, however, was not defined in the FCIA. The Agricultural Risk Protection Act establishes a statutory definition of "expected market price." This definition also applies to "additional coverage"and to revenue insurance, although the resulting price may vary depending on the type of insurance coverage.

Under the statutory definition, the FCIC will either establish or approve a price level for each agricultural commodity for which insurance is available. This price level will be the "expected market price." As a general rule, the expected market price cannot be less than the projected market price of the commodity, as established by the FCIC. For some types of policies, however, the expected market price can be different from that dictated by the general rule. For example, in the case of revenue and other similar plans of insurance, the expected market price can be the actual market price of the commodity.

Administrative fee for CAT coverage changed

Producers who purchase CAT coverage do not pay a premium. Instead, because the FCIC pays the premium, they pay only an administrative fee. Effective beginning with the 2001 crop year, the administrative fee will be $100 per crop per county. This fee can be waived for limited resource farmers.

The Act eliminates the additional fees that were required to be paid under the FCIA. It also authorizes a cooperative association or a nonprofit trade association to pay the CAT administrative fee on behalf of its members if such an arrangement is permitted by state law.

Additional coverage changes

The Agricultural Risk Protection Act makes several changes to "additional" MPCI coverage. The most significant change is an increase in the premium subsidies. The following table provides a comparison between the percentages of the premium paid by the FCIC at various coverage levels before and after the amendments made by the Act. The first number of the coverage level represents the percentage of the yield insured and the second percentage represents the percentage of the price insured.

In addition to increasing the premium subsidies, the Act requires that all policies or plans of insurance disclose the dollar amount of the portion of the premium paid by the FCIC.

Under the existing FCIA, producers could increase coverage in one-percent increments. The Agricultural Risk Protection Act temporarily suspends this option by giving the FCIC the authority to offer only five-percent increments "beginning at 50 percent of the recorded or appraised average yield" during each of the 2001 through 2005 reinsurance years.

The Act also authorizes the FCIC to "provide a performance-based premium discount for a producer of an agricultural commodity who has good insurance or production experience relative to other producers of that agricultural commodity in the same area, as determined by the Corporation."

Under the existing FCIA, producers who purchased additional coverage were required to pay an administrative fee, the amount of which varied depending on the level of coverage purchased. The Agricultural Risk Protection Act changed this provision so that an administrative fee of $30 per crop per county will apply to all levels of additional coverage. This fee can be waived for limited resource farmers.

Changes to revenue insurance subsidies

The Agricultural Risk Protection Act removes a limitation on the percentage of the premium to be paid by the FCIC for approved policies providing coverage other than multiple peril coverage, such as revenue insurance. Except with respect to insurance policies for livestock, the premium subsidy for policies other than MPCI generally will be equal to the percentage specified for a similar level of MPCI coverage of the total amount of the premium used to define the loss ratio. During a transition period covering the 2001 reinsurance year, however, the subsidy cannot exceed the dollar subsidy amount authorized by the Act for MPCI.

Changes regarding excluded losses, assigned yields, and actual production history adjustments

Excluded losses

The FCIA excludes coverage for losses caused by the producer's neglect or malfeasance; the producer's failure to reseed the same crop where and when it is customary to reseed; or the producer's failure to follow good farming practices. The Agricultural Risk Protection Act amends this provision by providing that "good farming practices" includes "scientifically sound sustainable and organic farming practices."

The Act also requires the FCIC to establish an informal administrative appeal process to provide producers with a right to a review of a determination regarding good farming practices. Such determinations are expressly deemed not to be "adverse decisions" for purposes of the USDA National Appeals Division administrative appeal process. Producers who receive such a determination have the right to seek judicial review without exhausting the informal administrative appeal process, but the "determination may not be reversed or modified as the result of judicial review unless the determination is found to be arbitrary or capricious."

Assigned yields

Crop yields for crop insurance purposes are based on the farmer's actual production history (APH) for the crop over the preceding four to ten consecutive crop years. Farmers who do not have satisfactory evidence for establishing an APH are assigned a yield. When less than four years of actual yield data are available, an estimated yield known as a "transitional yield," or "T-yield," established by the FCIC for the crop is used.

The Agricultural Risk Protection Act amends the assigned yields provisions of the FCIA by requiring the FCIC to assign a yield for a crop in four instances:

(1) when the farmer has not provided satisfactory evidence of the yield of the crop;

(2) when the farmer has not had a share of the production of the crop for more than two years;

(3) when the farmer has not farmed the land before; or

(4) when the farmer rotates to a crop that has not been produced on the farm previously.

Actual production history adjustments (APH)

Because a farmer's APH for a crop is based on recent past yields, yield losses in these years caused by natural disasters can lower the APH. As a result, the farmer's yield for crop insurance purposes is lower than it would have been if the earlier yield losses had not occurred. The Agricultural Risk Protection Act addresses this situation by providing for the adjustment of APH beginning with the 2001 crop year. The Act provides that if in one or more of the crop years used to establish the farmer's APH for a crop, the farmer's appraised or recorded yield was less than sixty percent of the transitional yield, the farmer may elect to exclude that yield and replace each excluded yield with a yield equal to sixty

Coverage Level	50/100	55/100	60/100	65/100	70/100	75/100	80/100	85/100
Prior Law	55%	46%	38%	42%	32%	24%	17%	13%
2000 Act	67%	64%	64%	59%	59%	55%	48%	38%

Continued on p. 6

CROP INSURANCE/*Continued from page 5*

percent of the applicable transitional yield. If, however, a farmer makes an election under this provision, the FCIC is required to "adjust the premium to reflect the risk associated with the adjustment made in the actual production history of the producer."

The Act also directs the FCIC to develop a methodology for adjusting APH for farmers who have increased yields as a result of successful pest control efforts. Three conditions must be satisfied before such an adjustment can be made:

- First, the producer's farm must be "located in an area where systematic, area-wide efforts have been undertaken using certain operations or measures, or the producer's farm is a location at which certain operations or measure have been undertaken, to detect, eradicate, suppress, or control, or at least to prevent or retard the spread of, a plant disease or plant pest ...."
- Second, "[t]he presence of the plant disease or plant pest [must have been] found to adversely affect the yield of the agricultural commodity for which the producer is applying for insurance."
- Third, the efforts must have been effective. The resulting adjustment must "reflect the degree to which the success of [the] systematic, area-wide efforts ..., on average, increases the yield of the commodity on the producer's farm, as determined by the Corporation."

Availability of quality loss adjustment coverage

The Agricultural Risk Protection Act requires the FCIC to offer quality loss adjustment coverage, although the FCIC already offered such coverage. Under the Act, an insurance policy offering this coverage will provide "for a reduction in the quantity of production of the agricultural commodity considered produced during a crop year, or a similar adjustment, as a result of the agricultural commodity not meeting the quality standards established in the policy or plan of insurance."

A special "unit" option will be available for quality loss adjustment coverage. Acreage insured under the federal crop insurance program is insured in "units." A "basic unit" generally is all of the insurable acreage of the insured crop in the county in which the farmer has a 100 percent share or which is operated by a landowner and tenant on a share basis. Under certain policies and in certain circumstances, a basic unit can be divided into "optional units." With respect to quality loss adjustment coverage, the Act requires the FCIC to offer farmers the option of insuring on a smaller than a unit basis if all of the following requirements are satisfied:

(i) The agricultural commodity is sold on an identity-preserved basis.

(ii) All quality determinations are made solely by the Federal agency designated to grade or classify the agricultural commodity.

(iii) All quality determinations are made in accordance with standards published in the Federal Register.

(iv) The discount schedules that reflect the reduction in quality of the agricultural commodity are established by the Secretary.

Because of the restrictive nature of these requirements, not all crops will qualify. Cotton is currently the only crop that qualifies.

The FCIC is also required to "set the quality standards below which quality losses will be paid based on the variability of the grade of the agricultural commodity from the base quality for the agricultural commodity." Finally, the Act requires the FCIC to obtain the services of a qualified person to review its quality loss adjustment procedures "so that the procedures more accurately reflect local quality discounts that are applied to [insured] agricultural commodities ...." Based on this review, the FCIC must modify its procedures, "taking into consideration the actuarial soundness of the adjustment and the prevention of fraud, waste, and abuse."

New procedures for double insurance and prevented planting

Double or "substitute" insurance

The Agricultural Risk Reduction Act establishes new procedures for handling losses when one crop follows another on the same acreage during the same crop year. In such circumstances, the "first crop" is the first insured commodity planted for harvest or prevented from being planted on that specific acreage during that crop year. The "second crop" is a second crop of the same or a different commodity planted on the same acreage as the first crop for harvest in the same crop year, excluding a replanted crop. A "replanted crop" is a crop replanted on the same acreage of the first crop to satisfy the requirements of an insurance policy covering the first crop.

The Act gives producers whose first crop suffered a total or partial insurable loss two options:

- Under the first option, the producer may elect not to plant a second crop and collect an indemnity payment equal to 100 percent of the insurable loss for the first crop.
- Under the second option, the producer can elect to plant a second crop and collect an indemnity payment on the first crop in an amount established by the FCIC, but not exceeding 35 percent of the insurable loss for the first crop.

Under the second option, if the producer does not suffer an insurable loss to the second crop, the producer can collect an indemnity payment of 100 percent of the insurable loss for the first crop less the amount previously paid as an indemnity on the first crop. Under this option, the premium related to the first crop will be adjusted to reflect either the partial or full indemnity payment.

As discussed below, different provisions apply to established double-cropping practices, and producers who plant a crop subsequent to the second crop are ineligible for crop insurance and NAP, except with respect to established double-cropping.

Prevented planting

The Act also provides that if a first insured crop is prevented from being planted, the producer may elect one of two options. First, the producer may elect not to plant a second crop and collect an indemnity payment equal to 100 percent of the prevented planting guarantee for the acreage for the first crop. This option, however, is available only in "those situations in which other producers, in the area where a first crop is prevented from being planted is located, are also generally affected by the conditions that prevented the first crop from being planted."

Under the second option, the producer may plant a second crop and collect an indemnity payment established by the FCIC for the first crop not to exceed thirty-five percent of the prevented planting guarantee for the acreage for the first crop. This option is available only if other producers in the area where the first crop is prevented from being planted are also generally affected by the conditions that prevented the first crop's planting and the producer plants the second crop after the latest planting date established by the FCIC for the first crop. If this option is elected, the FCIC is required to "assign the producer a recorded yield for the crop year for the first crop equal to 60 percent of the producer's actual production history for the agricultural commodity involved, for purposes of determining the producer's actual production history for the subsequent crop years."

As discussed below, established double-cropping practices are treated differently, and producers who plant a crop subsequent to the second crop are ineligible for crop insurance and NAP, except in the case of established double-cropping.

Established double-cropping practices

The Agricultural Risk Protection Act provides that a producer may receive full indemnity payments on two or more insured crops planted for harvest in the same crop year if each of the following conditions are satisfied:

(1) There is an established practice of planting 2 or more crops for harvest in the same crop year in the area, as determined by the Corporation.

(2) An additional coverage policy or plan of insurance is offered with respect to the agricultural commodities planted on the same acreage for harvest in the same crop year in the area.

(3) The producer has a history of planting 2 or more crops for harvest in the same crop year or the applicable acreage has historically had 2 or more crops planted for harvest in the same crop year.

(4) The second or more crops are customarily planted after the first crop for harvest on the same acreage in the same year in the area.

Disqualification for planting a crop subsequent to the second crop

The Act provides that, except in the case of double-cropping, "if a producer elects to plant a crop (other than a replanted crop) subsequent to a second crop on the same acreage as the first crop and second crop for harvest in the same crop year, the producer shall not be eligible for [federal crop] insurance ... or noninsured crop assistance ... for the subsequent crop."

Measures intended to improve program integrity

The Agricultural Risk Protection Act provides for the initiation of a variety of measures to improve the integrity of the federal crop insurance program. In general, the measures contemplate coordinated efforts among the FCIC, approved insurance providers, and other USDA agencies and offices, such as the Farm Service Agency and the USDA Office of Inspector General.

The first of these measures requires the FCIC to provide written notification to reinsured insurance providers within three years after the end of the insurance period of any error, omission, or failure to follow FCIC regulations or procedures by the provider that may result in a debt being owed by the provider to the FCIC. This limitation, however, does not apply "with respect to an error, omission, or procedural violation that is willful or intentional." The FCIC's failure to give timely notice to the provider will relieve the provider from any debt owed by the provider to the FCIC.

The Act also directs the Secretary of Agriculture to develop and implement a coordinated plan for the FCIC and the Farm Service Agency (FSA) to reconcile all relevant information received by each agency from a producer who obtains crop insurance coverage. Beginning with the 2001 crop year, this information must be reconciled annually to identify and address any inconsistencies.

The Secretary is also required to develop and implement a plan for the FSA to assist FCIC in conducting ongoing monitoring of the crop insurance programs. The Act specifies that the FSA must report to the FCIC if it has reason to suspect the existence of program fraud, waste, and abuse. The FSA must assist the FCIC and approved insurance providers "in auditing a statistically appropriate number of claims made under any policy or plan of insurance...."

The FSA may conduct its own inquiries if the FCIC does not respond within five days after receiving a report from the FSA. If the FSA concludes that further investigation is warranted, but the FCIC declines to undertake that investigation, the FSA may refer the results of its inquiries to the USDA Office of Inspector General. The FSA is directed by the Act to assign appropriate numbers of personnel within the field offices to carry out the monitoring plan and to train them to the level of competency as is required of loss adjusters for approved insurance providers.

The Act obligates the FCIC to notify the appropriate approved insurance provider of reports received from the FSA regarding program fraud, waste, and abuse. Providers, however, are not relieved of their audit obligations.

If an approved insurance provider reports suspected wrongdoing or waste to the FCIC, the FCIC must respond with a written report within ninety days describing its intended actions. If it fails to do so, the provider may request the FSA for assistance "in an inquiry into the alleged program fraud, waste, or abuse."

Under the Act, the Secretary must establish procedures for the FCIC to use in identifying insurance agents with abnormally high loss claims and claims adjusters with abnormally high accepted or denied claims. In addition to reviewing the performance of these agents and adjusters and taking remedial action where appropriate, the FCIC is directed by the Act to develop procedures for approved insurance providers to use in conducting annual reviews of each agent and claims adjuster used by the provider.

In support of the compliance measures, approved insurance providers will be required to report to the FCIC the name and identification number of each insured, the commodity insured, and the elected coverage level approximately thirty days after the applicable insurance sales closing date. Currently this occurs after acreage reporting.

The Act also establishes sanctions for any person, including producers and approved insurance providers, who willfully and intentionally provides false or inaccurate information to the FCIC or an approved insurance provider with respect to an insurance policy or plan. The sanctions also apply to any person who willfully and intentionally fails to comply with a requirement of the FCIC.

The sanctions include the imposition of a civil fine for each violation in an amount not to exceed either the greater of the amount of the financial gain obtained as a result of the false or inaccurate information or noncompliance or $10,000. Producers may also be disqualified from other farm program benefits for up to five years. Persons other than producers, such as agents and claims adjusters, may be disqualified from participating in or benefitting from the crop insurance program for up to five years. The Secretary is required to consider the gravity of the violation in determining whether a sanction is to be imposed and, if one is imposed, the type and amount of the sanction. Insurance policies and plans are required to disclose these potential sanctions.

Measures to protect information furnished by producers

The Agricultural Risk Protection Act establishes a general prohibition against public disclosure by the USDA and approved insurance providers of information furnished by a producer with respect to federal crop insurance. Producers, however, may consent to the public release of information furnished by them, but crop insurance benefits cannot be conditioned on the producer providing such consent. The general prohibition does not apply to statistical or aggregated data that does not allow the identification of the person who supplied particular information. The violation of this prohibition can result in the imposition of penalties.

Research and development for new crop insurance policies

The Agricultural Risk Protection Act provides for research and development relating to crop insurance policies. Effective October 1, 2000, the FCIC must terminate its research and development activities. Thereafter, all research and development will be done by parties outside of the FCIC.

The Act gives the FCIC the authority to contract for research and development services with persons or entities with experience in crop insurance or farm or ranch risk management, including colleges and universities, approved insurance providers, and trade or research organizations. The Act also requires the FCIC to enter into research and development contracts for certain types of policies, such as revenue coverage plans with

Continued on page 2