

Agricultural Law Update

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A Quick Introductory Note From Editors

In light of the recent passage of the 2018 Farm Bill (the Agriculture Improvement Act of 2018, P.L. 115-334, December 20, 2018), this issue of the AGRICULTURAL LAW UPDATE is exclusively focused on providing short summaries of many of the critical changes contained within this legislation, including Title I (Commodities), Title II (Conservation), Title IV (Nutrition), Title VI (Rural Development).

This issue also contains more in-depth articles focused on the impact of the hemp provisions in the bill, as well as the impacts of the Farm Bill on Indian Country.

Our regular format will resume in the next issue of AGRICULTURAL LAW UPDATE and is tentatively slated to address the impacts of recent right-to-farm litigation. We want to hear from you with your ideas on topics for future

issues, and we want to see your articles! If you have any interest in providing an article on the impacts of recent right-to-farm litigation in your jurisdiction or other topics of interest, please let the editors (Paul Goeringer, lgoering@umd.edu and Jess Phelps jphelps@dinse.com) know as we will begin recruiting submissions shortly.

Changes to Title I the Commodity Title of the 2018 Farm Bill

by Paul Goeringer, Extension Legal Specialist, University of Maryland

The 2018 Farm Bill will bring slight changes to commodity programs producers have come to know. The Price Loss Coverage (PLC), Agriculture Risk Coverage (ARC), Marketing Assistance Loans (MAL), and Loan Deficiency Payments (LDP) continue on in this new farm bill. The 2018 Farm Bill has made some key changes to the PLC and ARC programs.

The 2014 Farm Bill allowed for a one-time election of either the PLC or the ARC programs, but the 2018 Farm Bill will allow producers additional opportunities to switch between the two programs. Producers will make a program election for the 2019 and 2020 crop years. In the 2021 crop year, a producer will be able to make an annual election to the producer's choice of programs. Similar to the 2014 Farm Bill, the default program if a producer makes no election will be PLC.

The next change comes to the PLC program, which allows producers to update program yields. This program yield is used to calculate the PLC payment, if one is triggered. Updating program yields will be a one-time option with the following formula:

1. Calculate average yields for the crop on your farm for the five years 2013-2017,

2. Multiply the result in step 1 by 90 percent,

3. Multiply the result in step 2 by a factor between 90 and 100 percent, which depends on how much national yields for the crop grew between 2008-12 and 2013-17. These official factors are not yet announced by the Farm Service Agency (FSA), and

4. Compare the result in step 3 to existing program yields, and if it is higher, take the option to update.

Other changes to PLC include allowing for seed cotton as a covered commodity. The other covered commodities remain the same from the 2014 Farm Bill. The 2018 Farm Bill also includes an escalator for the statutory reference prices, which is a change from fixed reference prices in the 2014 Farm Bill. This change, called the effective reference price, allows for the statutory reference price to increase up to 115 percent of the statutory reference price, calculated as 85 percent of the 5-year Olympic moving average of the national marketing year average of prices. This increase would only occur when national prices are high for an extended period of time.

For example, if the Olympic average corn price over the five-year period

2017-2020 were to be \$4.70, the corn reference price in 2021 would increase from \$3.70 to 85 percent of that five-year average, or \$4.00. Producers will need to pay attention to these potential changes to determine if the program makes sense for them.

ARC also includes a few changes, the biggest change being that the substitute yield used when a producer experiences low yields will increase from 75 percent of the county's five-year average yield to 80 percent of the county's five-year average yield.

The 2018 Farm Bill also makes changes to base acres utilized in the ARC program. FSA will now be able to prevent payments on certain base acres if all the cropland was planted to pasture or grass in 2009-2017. Base acres and program yields will remain on record with FSA, but FSA will not be able to issue payments to those farms.

FSA is still finalizing the regulations to implement these changes to Title I. Signups for Title I programs based on these changes are expected later in 2019.

Title II: The Conservation Title

by Jess Phelps, Attorney, Dinse, PC, Burlington, Vermont

The new conservation title (Title II) of the 2018 Farm Bill does not represent a huge shift (as was the case in some ways with the 2014 Farm Bill), but it represents an increased investment in some programs with adjustments intended to better tailor existing programs to targeted needs.

A few of the highlights of the principal programs include:

Agricultural Conservation Easement Program (ACEP):

Funding in the ACEP was increased to \$450 million annually for the five-year life of the program. There were also changes made to provide flexibility for the Natural Resources Conservation Services (NRCS) to address land management issues, while attempting to align with IRS requirements for tax-incentivized conservation easements. Two significant changes from the land trust community perspective are:

1. Eliminating the requirement, for ACEP-Agricultural Land Easements (ACEP-ALE), that farmers/land trusts develop ALE plans for each enrolled parcel.
2. Clarifying the federal (NRCS) right of enforcement for the easement to situations where the easement-holder fails to provide monitoring reports for the enrolled parcel or if there are other causes/bases for concern.

The general trend in ACEP-ALE specifically is to increase reliance on partners for program delivery and to limit federal involvement with enrolled lands.

Conservation Reserve Program (CRP):

The CRP's acreage cap increased which will result in an increase in funding for the program over its five-year life, with some changes to the rental rate structure as a partial offset to this increased cap. As with other programs, there was an attempt to target some funding to specific initiatives and practices, including the new Clear Lakes Estuaries and Rivers Initiative (CLEAR), and to make it easier for producers to align the timing of Conservation Stewardship Program (CSP) / Environmental Quality Incentives Program (EQIP) contracts with CRP enrollments.

Conservation Stewardship Program (CSP):

Although the House bill called for this program's elimination or merger into EQIP, it continued to be funded as a standalone program at \$700 million for FY2019, rising to \$1 billion by the end of the Act (although this is a shift from an acreage-based funding to a specified amount of annual funding model). While this program remains administratively complex, the bill adjusted payment rates to target certain conservation practices and to tailor the thresholds and activities which are to be funded.

Environmental Quality Incentives Program (EQIP):

Funding for EQIP remained strong in the 2018 Farm Bill, raising the total investment in this program by \$1.125 billion over the 2014 Farm Bill's five-year term. The legislation now allows soil testing and remediation to qualify as an EQIP practice and made

targeted changes to allow for improved program delivery.

Regional Conservation Partnership Program (RCPP):

The NRCS is now required to issue regulations for this program, rather than merely publishing annual funding notices. The NRCS can now directly enter into agreements under RCPP (rather than entering into a contract for another conservation program (EQIP, ACEP, CSP)) among several notable efforts to streamline this extremely complex conservation program. Notably, funding for RCPP also enjoyed a significant increase.

Overall, recent conservation programs fit into three roughly defined buckets: (1) working lands programming (CSP and EQIP); (2) land retirement (CRP); and (3) easement acquisition (ACEP). Since the 2002 Farm Bill, funding has shifted away from land retirement towards working lands programming. Under the 2018 Farm Bill, this rebalancing has largely remained intact. To summarize, the 2018 Farm Bill's conservation title did not comprehensively re-tool USDA's conservation programming, but instead largely focused on improving program delivery and targeting conservation gains through increased funding and focused statutory changes.

Farm Bill Title VI - Rural Development

by Brianna J. Schroeder, Attorney Janzen Agricultural Law, LLC

Title VI of the Farm Bill addresses rural development. The 2018 Farm Bill includes funds and tools to fight the ongoing opioid epidemic, and provides loans and grants to process rural access to quality broadband internet.

The funds for broadband were authorized under the budget bill, but the Farm Bill Title VI provides guidelines for these funds, including the Community Connect Grants, Distance Learning and Telemedicine Grants, Rural Broadband Access Loan and Loan Guarantee, the

ReConnect Broadband Grant and Loan Program. In all, the Rural Utilities Service received \$350 million from the 2018 Farm Bill.

Title VI maintains funding for the Rural Development Loan and Grant program and the Guaranteed Underwriter Program. Title VI also addresses mental health care access in rural areas. The bill increases resources for quality treatment and access, and addresses recent record farmer and rural suicide rates by reestablishing the Farm and Ranch Stress Assistance Network.

The bill commissions a report on the state of behavioral and mental health among farmers and ranchers. Lastly, the bill appropriates \$10 million a year for training programs and workshops for farmers in crisis.

Title VI receives only a small proportion of Farm Bill spending, coming in far behind nutrition, crop insurance, commodities, and conservation.

2018 Farm Bill Summary: Nutrition Title

by Erin Parker, Research Director and Staff Attorney

Indigenous Food and Agriculture Initiative at the University of Arkansas

The Farm Bill's Nutrition Title is the legislative vehicle for reauthorizing a number of our domestic food assistance programs. This includes the Supplemental Nutrition Assistance Program (SNAP), the largest federal food assistance program in terms of both spending and participation.

Legislative wrangling over SNAP has long been a staple of Farm Bill discussions, and this year's legislative process continued the debate over the program, particularly regarding work requirements for able-bodied adults without dependents and related eligibility and certification criteria for SNAP participants. Ultimately, despite contentious debate and House and Senate bills that differed significantly on what changes--if any--should be made to work requirements and eligibility for SNAP, Congress largely preserved existing law around SNAP in the final legislation.

Though the SNAP debate tends to dominate Farm Bill discussions when it comes to the Nutrition Title, SNAP is only one of the food assistance programs reauthorized in the 2018 Farm Bill.

Additional programs reauthorized in the 2018 bill, along with any changes of note, include:

- The Food Distribution Program on Indian Reservations (FDPIR). This year's Farm Bill was an historic achievement for Indian Country, with over 63 tribal-specific provisions spread over 11 of the bill's 12 titles. In the Nutrition Title, the changes made to FDPIR include less burdensome administrative cost-sharing requirements, improved waiver processes for cost-sharing requirements, and the potential for a demonstration project that would apply the provisions of tribal self-governance contracting to USDA

nutrition programs for the first time. These changes will improve program delivery and increase the number of the local and traditional foods offered in the program.

- Gus Schumacher Food Insecurity Nutrition Incentive Program (FINI). Originally authorized in the 2008 Farm Bill, the FINI Program offers competitive grants to increase low-income individuals' ability to buy fresh fruits and vegetables. This program now has mandatory funding, which is a significant change, and has been renamed in the 2018 bill to honor the memory of noted anti-hunger and farm advocate, former USDA Undersecretary and Wholesome Wave co-founder Gus Schumacher.
- The Emergency Food Assistance Program (TEFAP). TEFAP's funding increased slightly.

- The Commodity Supplemental Food Program (CSFP). The bill makes some adjustments to the length of certification periods for participants, allowing for longer certification periods in some circumstances.

- Senior Farmers Market Nutrition Program (SFMNP). This program

was reauthorized at prior spending levels.

- The Community Food Projects. This competitive grant program had its mandatory funding reduced in the 2018 Farm Bill, from \$9 million annually to \$5 million.

- SNAP-related grant programs,

including SNAP Employment & Training (E&T). E&T programs saw increased funding in the 2018 bill.

These programs are all reauthorized through September 30, 2023, and when combined, represent over 75% of total Farm Bill spending.

Indian Country Farm Bill Update

by Blake Jackson, Policy Officer and Staff Attorney

Indigenous Food and Agriculture Initiative at the University of Arkansas

The 2018 Farm Bill holds a record 63 provisions relating to Native American communities and producers acknowledging tribal government sovereignty and furthering the development of unique opportunities in food and agriculture across Indian Country. The efforts of the tribal government leaders and Native Farm Bill Coalition lead to this historic moment of increased federal focus on and investment in Native agricultural production, rural infrastructure, economic development, conservation, nutrition, and forestry. Featured below is a brief Title-by-Title summary of a selection of these provisions:

Title I - Commodities:

- Now includes tribes and tribal organizations in the definition of “eligible producer” for the Supplemental Agricultural Disaster Assistance program.

Title II - Conservation:

- Requires USDA to enter into alternative funding arrangements with Tribes for the Environmental Quality Incentives Program (EQIP) and Conservation Stewardship Program (CSP)

Title III – Trade:

- Requires the Secretary to support greater tribal inclusion and participation on international trade missions.

Title IV – Nutrition:

- Establishes new “638” tribal self-

determination contract demonstration project allowing Inter-Tribal Organizations to purchase food for the Food Distribution Program on Indian Reservations (FDPIR) which furthers tribal self-governance and supports the inclusion of local, regional, and traditional foods produced by native producers in FDPIR.

Title V – Credit:

- Requires a GAO study on Indian Country access to the Farm Credit System.

Title VI – Rural Development

- Creates a permanent tribal technical assistance office across all USDA Rural Development funding authorities
- Improves tribal priority, inclusion, and access for two broadband programs to build infrastructure and economic development opportunities in Indian Country; increases broadband funding to \$325 million.

Title VII – Research

- Adds 1994 Land Grant Tribal Colleges and Universities (TCUs) to those eligible for the McIntire-Stennis Forestry program capacity funding.
- Creates a Native American student scholarship fund for tribal students who attend land grant universities and colleges.
- Creates TCU eligibility for Children, Youth and Families at Risk (CYFAR), Federally Recognized Tribes Extension Program (FRTEP).

Title VIII – Forestry

- Establishes a “638” Tribal Self-Governance Demonstration Project for direct tribal management of Forest Service and Bureau of Land Management lands adjacent to Indian lands under the Tribal Forest Protection Act.
- Extends Good Neighbor Authority to tribal governments.

Title X – Horticulture

- Legalizes hemp production under USDA approved tribal plans to self-regulate hemp production and allows transportation of hemp produced under an approved plan.

Title XI – Crop Insurance

- Includes tribal producers in USDA’s review and report of whether crop insurance is providing adequate coverage.

Title XII – Miscellaneous

- Maintains the Office of Tribal Relations within the Office of the Secretary to report directly to the Secretary of Agriculture.
- Expands tribal government and producer eligibility and permanent baseline funding for the newly combined Farming Opportunities Training and Outreach (FOTO) program for beginning and socially disadvantaged farmers and ranchers.
- Establishes a new 11-member Tribal Advisory Committee through the Office of Tribal Relations to provide advice to the Secretary on tribal-related issues and policies.

2018 Farm Bill Makes Hemp Production Legal Only In Certain Situations

by Paul Goeringer, Extension Legal Specialist, University of Maryland

Farmers across the country are looking to begin producing hemp. The 2014 Farm Bill allowed states to develop hemp research programs, but the 2018 Farm Bill significantly changes the classification of hemp, allowing states to begin drafting regulations for legal hemp production. The 2018 Farm Bill removes hemp from the definition of marijuana under the Controlled Substances Act and will enable states and tribal governments to begin developing hemp production plans. Hemp produced under these plans will potentially be eligible for federal crop insurance. Although the 2018 Farm Bill has made changes to hemp, it is still currently not legal to grow hemp in Maryland until the state develops and has an approved hemp production plan in place.

The 2018 Farm Bill declassifies hemp as a controlled substance. Under Section 12619 classification, the definition of marijuana does not include hemp. Section 10113 defines hemp to be “the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.” Any hemp plants with a delta-9 tetrahydrocannabinol concentration (THC) level greater than 0.3 percent on a dry weight basis are considered marijuana and still illegal under federal law.

Although hemp is no longer a Schedule 1 drug, this does not mean it is legal to grow. To be legal, Section 10113 requires that a state, tribe, or federal government develop a hemp production plan. Using such a plan, a state, tribe, or federal government will monitor producers and regulate hemp production. Section 10113 lays out two

routes for a producer to legally begin producing hemp. The first route is for a state or tribal government to take charge of regulating hemp production within their boundaries. To do so, a state department of agriculture will submit a hemp production plan to USDA for approval. The plan must include:

1. The system of land records of where hemp is being produced, including the legal description of the land. The system will need to maintain land records for at least three years.
 2. Testing procedures to demonstrate that hemp produced has less than 0.3 percent THC concentration level per dry weight basis.
 3. Methods for destroying any plants and products with THC concentrations higher than allowed by the law.
 4. Procedures to enforce the law.
 5. Procedures for conducting at minimum annual inspections of a random sample of hemp producers to verify hemp produced in the state does not violate the law.
 6. A system to convey hemp producers’ information to USDA.
 7. Certification for USDA that the state or tribe has the resources and personnel to carry out the requirements of the hemp production plan.
- A producer must comply first with the state’s hemp production plan before legally growing hemp. Currently, these plans are expected to take a year to 18 months for states to finalize and USDA to approve.

If the state or tribal government does not have an approved production plan, a producer may still be able to produce hemp under a USDA-developed hemp production plan. For example, if state law still classifies hemp as a controlled substance, then Section 10113 will not preempt this. Section 10113 explicitly allows states or tribal governments to prevent hemp production in their boundaries. If the state or tribal government does not criminalize hemp production, then the USDA hemp production plan will need to meet the same minimum criteria required for states and tribal governments.

Section 10113 lays out potential violations. A producer can negligently violate a state plan, tribal government plan, or USDA hemp production plan by not providing a proper legal description of the land where the hemp will be produced, by failing to obtain the required license or other authorization required under the plan before producing hemp, and by producing hemp with a THC level greater than 0.3 percent on a dry weight basis. These are just some examples of potential violations.

With the first negligent violation, a producer can correct the first negligent violation by complying with a corrective action plan developed by the state, tribal government, or USDA. Three negligent violations in five years will result in barring the producer from producing hemp for five years. Note that Section 10113 does not allow anyone with a felony drug conviction within the past ten years to grow hemp under a hemp production plan.

One important note about the 2018 Farm Bill: Section 10114 allows for hemp products to be transported freely through states. States can still ban hemp products, but the state cannot limit transportation through the state of hemp products bound for other states.

Until USDA approves hemp production plans, however, hemp can only legally be grown under existing state research programs.

States will also potentially need to act to take advantage of these changes. Some states may need to update existing state hemp laws to allow for state departments of agriculture to develop hemp production plans. Some states may still need to decriminalize hemp to allow for production.

Ag Law Update

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