

DROUGHT AND CROP INSURANCE:

COMMON ISSUES FACED BY INSURED FARMERS

WEBINAR FOR THE
NATIONAL AGRICULTURAL LAW CENTER
OCTOBER 19, 2022
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DROUGHT AND CROP INSURANCE

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- Drought- A natural and recurring cause of loss which threatens crop yields and producer revenue
 - Crop Insurance- A risk management tool specifically designed to protect against naturally occurring causes of loss such as drought conditions
 - Should be a simple fit, right?

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DROUGHT ALSO PRESENTS UNIQUE ISSUES IN THE CONTEXT OF CROP INSURANCE

- USDA has recognized that drought is a unique cause of loss as drought conditions can create a situation where planting may not be a “good farming practice”
- Drought conditions have resulted in litigation as to whether an insured can maintain irrigated practice coverage when availability of irrigation water is not certain
- Newer farming practices intended to conserve water may be uninsurable
- When should a farmer notify the AIP of a potential claim?
- When can a farmer stop spending money on a failed crop?

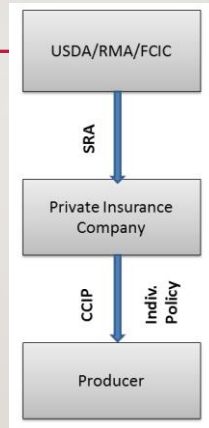
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CROP INSURANCE BACKGROUND

- Policies are sold through approved private insurance companies
- Companies’ losses are reinsured by USDA, with administrative and operating costs reimbursed
- Companies and Producers are Audited and Regulated by the USDA Risk Management Agency(RMA)

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CROP INSURANCE STRUCTURE



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GUIDING DOCUMENTS

- Policy is Codified as Federal Regulation
- Risk Management Agency (RMA) also promulgates guidance as to the administration of the Federal Crop Insurance Program:
 - Manager's Bulletins
 - Final Agency Determinations
 - Agency Interpretations of Policy Procedures

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CROP INSURANCE DISPUTE RESOLUTION

- The Crop Insurance Policy provides a unique dispute resolution process which includes an arbitration clause along with USDA administrative review requirements
- The party who makes the adverse determination decides the track on which the case will travel
- Generally:
 - 1) Disputes with an AIP go to Arbitration (some tort claims may go to Circuit Court)
 - 2) Disputes with an Agency of USDA go to Administrative Review
 - 3) Agent Negligence cases may be taken to Circuit Court.

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USDA/RMA GUIDANCE

- Final Agency Determination (FAD)
- Interpretations of Procedures
- RMA makes determinations as to the meaning and application of the policy or administrative guidance
- These determinations are binding in Arbitration

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FINAL AGENCY DETERMINATIONS RELATING TO DROUGHT

- FADs are available online
- RMA has repeatedly been called to opine as to the proper application of the crop insurance policy in regard to drought related causes of loss

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WHAT COULD BE THE PROBLEM? *EVERYONE KNOWS IT HASN'T RAINED!*

- Was the Cause of Loss 100% drought?
 - Did the lack of moisture cause all of the yield loss or did the farmer fail to employ good farming practices?
- Was the Claim Timely?
 - Was the AIP notified in time to verify the cause of loss?
- Adequate Documentation on a Claim
 - What documentation actually verifies the cause of loss?
 - Did it rain or did it not rain?

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GENERAL REPORTING REQUIREMENTS

- In general, a producer only has **72 hours** after the “initial discovery of damage or loss” to notify insurance provider
- For revenue coverage, notice generally must be provided no later than 45 days after the release of the harvest price
- “Prevented planting” claims are required to be submitted within 72 hours of the final planting date

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GOOD FARMING PRACTICES

- Under FCIA, coverage “shall not cover losses due to . . . failure of the producer to follow good farming practices, including scientifically sound sustainable and organic practices”. (7 U.S.C. § 1508(a)(3)(A)(iii)).
- When can a producer stop throwing good money after bad?

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TERMINATION OF A CROP

- AIP must approve in writing
 - EVEN IF YOU DON'T THINK THE POLICY REQUIRES IT!
- Cannot abandon a crop, even if it makes no economic sense
 - Abandonment will lead to claim denial
 - If there are multiple causes of loss, it is considered by many to be practically impossible for an attorney to prove that percentage of loss to be attributed to each independent cause of loss

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PRESERVATION OF CROP

- CCIP requires that the consent of the **insurance provider** be obtained before a farmer disturbs, harvests, or destroys the damaged crop or a required representative sample
- If consent provided, producer should have the consent documented in writing to avoid subsequent confusion in the claims process
- **Note:** Under the CCIP, policy provisions, including the federal regulations, may not be waived or varied in any way by the crop insurance agent or any other agent or employee of FCIC or the Company

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IN THE EVENT OF A DROUGHT RELATED LOSS

- Under the CCIP, the insured producer is responsible for notifying an agent of an insured loss and to initiate adjustment process
- Once loss is discovered, producer should immediately contact his or her agent
- Producer may want to follow up with written communication, even though it may not be required under the policy

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REPRESENTATIVE SAMPLES

- In general, a damaged crop should not be destroyed before a claims adjuster has finished the adjustment process
- Many policies require that representative samples be left undisturbed
 - another example of where the producer should be familiar with their specific policy

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PREVENTED PLANTING

- In times of drought, prevented planting coverage may still be available for producers who decide against planting when their neighbors choose otherwise
- RMA has recognized that drought presents a scenario where planting may not be a good farming practice. A producer may receive a payment so long as it can be determined that planting into ground with insufficient moisture is a “poor farming practice.”

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FAD-012

- “In some cases, such as drought, it may be physically possible to plant the acreage even though soil moisture and weather conditions are such that there is insufficient soil moisture for germination of seed and progress toward crop maturity due to a prolonged period of dry weather. The decision by some producers to plant in conditions where the crop could not germinate and make normal progress toward maturity may not preclude other producers in the area with acreage with similar characteristics from receiving prevented planting payments. A determination would need to be made whether planting in dry conditions constitutes a poor farming practice, which would not be insurable under the terms of the policy.”
 - Clear as mud?

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EARLY PLANTING

- Dry conditions allow a producer to complete fieldwork during the winter months
- Planting before early planting dates makes you ineligible for a replant payment.
- Insurance guarantee should not be impacted if you follow good farming practices
 - *Early planting & good farming practices??*

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IRRIGATED PRACTICE COVERAGE

- Higher Guarantee
- Can be lost if there is no “reasonable expectation” of adequate irrigation water
- A very real concern in instances of multi-year drought

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IN THE CONTEXT OF PREVENTED PLANTING

- **prevented planting coverage will not be provided for any acreage:**
 - (10) Based on an irrigated practice production guarantee or amount of insurance **unless adequate irrigation facilities were in place to carry out an irrigated practice on the acreage prior to the insured cause of loss that prevented you from planting.**
- “farm management decisions by the policyholder are not considered in the determination for whether a reasonable expectation of adequate water exists in the county.”
 - FAD-310 dated April 14, 2022

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FAD 310

- “If the total amount of water allocated to a policyholder is for use in multiple counties and the total allocation is reduced, the number of irrigated acres eligible for prevented planting would be reduced in each county according to the amount of water prorated to each county.”
- RMA appears to view drought restrictions on available irrigation water as an automatic basis for the reduction of eligible acres for prevented planting coverage
 - Specifically choosing to ignore the fact that changes in management practices could ensure adequate water for irrigation

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LOCALIZED DROUGHT: THE PRODUCER BEARS THE BURDEN OF PROOF

- RMA relies on PRISM vs. Eyewitness Testimony
 - PRISM is a gathering of “climate observations”
- the RMA recommended that Great American void Plaintiff’s policy. The RMA wrote that “[a]n analysis by PRISM weather experts disclosed that drought conditions did not exist in Emanuel County, Georgia in 2009.”

Lane v. United States, 338 F. Supp. 3d 1324, 1328 (S.D. Ga. 2018)

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LANE V. UNITED STATES

- “Dr. Underwood also noted that according to data gathered by the National Climatic Data Center, June through August 2009 in Georgia was “the sixth driest June through August” in 115 years of record keeping.”
- However, The ALJ found that “the preponderance of the evidence supports the conclusion that [Plaintiff] did not suffer the loss that he reported”
- The District Court reversed *holding* “The ALJ fails to reference any substantive Government evidence . . . showing that Plaintiff’s crops were not ravaged by drought. Thus, the ALJ appears to have presumed the Government was correct and required that Plaintiff prove otherwise.”

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WATER CONSERVATION AND CHANGES IN MANAGEMENT

- More efficient irrigation strategies
 - row watered rice
 - poly pipe irrigation
 - tailwater recovery
 - subsurface drip irrigation
- Not always insurable!
- Potential Disincentive to Conservation

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CONCLUSION

- Thank you
- Questions?

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