LIVESTOCK FORAGE DISASTER PROGRAM

UNITED STATES DEPARTMENT of AGRICULTURE

CAUTION: This article is intended for educational purposes, only. It does not constitute legal advice. Nor is it a substitute for legal advice. Federal laws, regulations and rules may change with some frequency. It is important to consult with an attorney who is knowledgeable in this area of the law.

Here's a program to assist in times of drought and, more narrowly, in the case of fire. Who might benefit from this program? It is targeted at people who work with livestock. It is intended to compensate for grazing losses. So, for example, if you own cattle, and you own pasture or grazing land, and drought dries up your pasture, causes you to remove the cattle from that land early, perhaps forces you to purchase additional feed, or even to sell cattle for lack of feed, this program could assist you. What if you own livestock and rent the pasture or range that is affected by drought? This program might assist you. It depends in part on the terms and conditions of your lease arrangement for the land. What if you do not own livestock but take care of them for someone else – can this program compensate you for losses in time of drought? That depends. It depends on the terms and conditions of your responsibilities with respect to those livestock. What about livestock in feedlots? That answer is simple and it is no – no assistance under LFP for feedlot livestock. It is a program, after all, that compensates for *grazing* losses. Let's look at the details of this program and try to understand how it works, who might be eligible and what kind of risk management it potentially provides.

The Livestock Forage Disaster Program ("LFP") provides compensation to eligible livestock producers who have suffered grazing losses due to qualifying drought or fire. It pays compensation for grazing losses, that is losses to pasture, rangeland or certain non-irrigated crops planted for the purpose of livestock forage. Before compensation can be calculated, certain program requirements have to be met: the producer, the grazing losses, and the livestock must all be either eligible or covered under the program. And, of course, there must be a qualifying drought or fire.

LFP was reauthorized and made a permanent program under the Agriculture Act of 2014 (2014 Farm Bill). The regulations which govern this program are found in the Code of Federal Regulations at 7 C.F.R. Part 1416, Subparts A and C. LFP, after its reauthorization in 2014 (which was retroactive to October 2011), has paid considerable benefits to ranchers, as well as other livestock producers, who were affected by widespread droughts. For example, the amount of payments from 2012-2015 for Nebraska alone equaled $556,483,617, and payments for the same period nationwide equaled $5,727,318,463.

LFP is no doubt an important risk management tool for qualifying livestock producers, primarily for drought, and also to that smaller group of producers who graze federal lands that are affected by fire.[1] LFP is one of three agriculture disaster assistance programs directed at livestock producers who face losses brought about in general by adverse weather. The other two programs are the Livestock Indemnity Payments Program ("LIP") and the Emergency Assistance for Livestock, Honeybees and Farm-Raised Fish Program ("ELAP"). Each of these programs is discussed in a separate article. The programs are meant in part to complement one another.

LFP is administered by the Farm Service Agency (FSA). Additional information may be obtained from your local FSA office or through FSA's useful online resources.[2]

Subpart A of 7 C.F.R. Part 1416 contains the *general* eligibility requirements for participation in the three disaster programs. Subpart C contains the *specific* requirements for participation in LFP. It is important to note here that LFP is not necessarily a simple program to understand or to deal with. Most producers interested in utilizing this program will – and should – rely on FSA staff expertise to guide them through the application process. The purpose of this article is to give the reader a general overview of the program, its benefits and its requirements, with direction as to where additional detail might be obtained.

Let's start with the general eligibility provisions.

General Eligibility Requirements

The requirements that apply to most of the USDA programs, namely that a producer be a US citizen or resident (lawful) alien, or a partnership or other qualifying entity (e.g. limited liability company, corporation), also apply to LFP. The following general eligibility requirements also apply.

Eligible Producer

An eligible producer is a person who "assumes the production and market risks associated with the agricultural production of crops or livestock on a farm either as the owner of the farm, where there is no contract grower, or a contract grower of the livestock when there is a contract grower." (§1416.3) That's a tongue twister. The important part to take from this requirement for now (for LFP purposes) is the requirement that a producer to be eligible must bear risk in the livestock enterprise, either as owner of the livestock or as a contract grower. More to follow on that.

Payment eligibility

[1] This article focuses on drought and not on fire. Many of the requirements for eligibility are the same, the primary difference being the fact that LFP assistance for grazing losses caused by is limited to lands that are managed by a federal agency.

[2] Available at: http://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/index

To be eligible, the producer's average adjusted gross income for the applicable benefit year cannot exceed $900,000. This limit applies to individuals and legal entities. The applicable benefit year is the year for which benefits (or compensation for losses) are sought. The term "average adjusted gross income" refers to the average over the three taxable years that precede the most immediately preceding complete taxable year. For example, if a producer is applying for benefits for losses that occur in 2016, the three taxable years that count toward determination of average adjusted gross income are 2012-2014.

Payment Limits

The total amount of payments received through LFP, ELAP and LIP cannot exceed $125,000. This is a cap on combined payments received in any year under any of these three programs. There are a series of payment limitations imposed by the 2014 Farm Bill. As a general matter, spouses of eligible producers can receive a separate limitation amount, thereby, in effect, doubling the limitation amounts. There are more complex rules for determining payment limits where an entity, such as a limited liability company or corporation, is involved.[3]

Farm Operating Plan

Participants in the program (which means those people who have filed an application for benefits) must either already have on file, or provide to FSA, a farm operating plan.[4]
This form is used by FSA to assist in determining payment limitations and payment eligibility.

Insurance No Longer Required

To be eligible, a producer need *not* carry insurance either through Risk Management Agency or the Noninsured Crop Disaster Assistance Program (NAP). This is a change in requirements made by the 2014 Farm Bill.

Specific Requirements for Livestock Forage Disaster Program

There are three basic eligibility requirements for LFP, which pertain to definitions of eligible producers, covered livestock and eligible grazing losses. There is first, of course, the threshold question of whether or not there has been a qualifying drought designation.

Qualifying Drought

LFP is triggered by drought (and by fire on lands managed by a federal agency). There has to be a qualifying drought designation before the program kicks in. Drought ratings are made through resources of the U.S. Drought Monitor. This information, including regularly updated drought

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[3] For information on the entity rules, see 7 CFR §§ 1400.105 and 1400.106, as well as the following: http://www.fsa.usda.gov/programs-and-services/payment-eligibility/index

[4] There are two versions of this form, both a longer and a shorter form, both of which can be viewed at http://www.fsa.usda.gov/programs-and-services/payment-eligibility/actively_engaged/index. FSA does not typically expect a producer to fill out the farm operating plan on his or her own but rather in conjunction with the local FSA office staff. The farm operating plan is not the same thing as the acreage report.

maps, is available online.[5] These maps indicate the location and severity of drought throughout the United States, according to county. It is a county drought designation that triggers LFP. Land located in a designated county becomes eligible according to its rating in the Drought Monitor. The calculation of payments under LFP is also pegged in part to the Drought Monitor's various drought classifications (i.e. severe, extreme, exceptional) and the duration of those conditions.

Payments under LFP are made to producers as *monthly* payments, i.e. only as 1-month, 2-month, 4-month or 5-month payments. Here's how that works. A *severe* drought, as recorded in the Drought Monitor, that lasts for eight consecutive weeks during the normal grazing period, qualifies an eligible producer for a 1-month payment. An *extreme* drought rating that occurs at any time (no specified duration) during the normal grazing period warrants a 3-month payment. To receive a 4-month payment, there must have been an *extreme* drought rating for at least four weeks during the normal grazing period, or an *exceptional* drought rating at any time during the normal grazing period. To receive a 5-month payment, the drought must be exceptional for at least four weeks (not necessarily consecutive) during the normal grazing period. The 5-month payment is the maximum number of monthly payments that can be made in a single year. The "normal grazing period" is determined according to specific types of pasture or range.

The amount of a monthly payment is based on the monthly feed cost. How is this calculated? It is calculated based on either the number of head or on the carrying capacity of the grazing land. Both calculations are made, i.e. number of head and carrying capacity, and FSA will pay 60% of whichever is the lesser figure. FSA publishes the payment rate for specific types of covered livestock, which may be obtained online[6] or from the local FSA office. To learn the carrying capacity of the eligible land one should contact the local FSA office. With these figures in hand a person can estimate the payment. Alternatively, and officially, FSA will make the calculations.[7]

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[5] The US Drought Monitor is a partnership program of several organizations, including the USDA, the National Oceanic and Atmospheric Administration, and the National Drought Mitigation Center of the University of Nebraska, Lincoln. The US Drought Monitor maps, as regularly updated, are available at: http://droughtmonitor.unl.edu/Home.aspx . The USDA disaster designation webpage is located at: http://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/disaster-designation-information/index .

[6] Available at: http://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/livestock-forage/index .

[7] For those interested, here is a summary of how calculations are made. In order to make a calculation based on number of head, take the payment rate multiplied by the number of months of payment, multiplied by .6, multiplied by the number of eligible head, which will produce the payment amount. To make the calculation based on carrying capacity, once that animal per acre figure has been obtained, first divide the total number of eligible acres by the carrying capacity, which will produce an alternative number of head figure. The same calculation is then made as for number of head but using instead of actual numbers the alternate number of head. For a useful example of these calculations for cattle, see http://beef.unl.edu/livestock-forage-disaster-webinar .

Eligible Producer

Who is an eligible "livestock producer?" A person who, within the 60 days preceding a drought designation, owned, cash or share leased, or was a contract grower of, eligible livestock, and who provided pasture or grazing land for those animals, whether as owner of the land or cash-tenant. So, an eligible livestock producer is an owner of livestock, or a lessee[8] of livestock (for cash or on shares[9]), or a contract grower of livestock. In addition, for eligibility, the livestock producer must also provide pasture or grazing land for the livestock. The pasture or grazing land can be either owned or rented by the livestock producer. However, if the pasture or range is rented, it appears that it must be rented for cash. The land, of course, must be located in a county for which a qualifying drought designation has been made.

The program excludes from eligibility a livestock producer who rents pasture or grazing land from another person on a rate-of-gain basis. In other words, if the lease for the land that the livestock producer is providing determines the rental amount to be paid to the landowner based on how much gain the livestock put on during the grazing season, this arrangement disqualifies the livestock producer from eligibility. This is true whether or not the livestock producer is the owner of the livestock or a contract grower: if the land lease is based on rate of gain, there is no LFP eligibility.

If a contract grower is the eligible livestock producer under LFP, then the owner of the livestock is not eligible. What is a contract grower for LFP purposes? A producer whose income depends on the weight gain and survival of livestock, and which livestock are not in a feedlot. (Feedlot livestock, as mentioned, are excluded from LFP eligibility; see below under Eligible Livestock.)

What if a livestock owner rents pasture that is miles away, and agrees with the landowner that the latter will put out the mineral, check the cattle, make sure the tanks are full, etc. In other words, what about custom cattle care, sometimes known as agistment? It appears that for LFP purposes, an agistment contract may fall between the regulatory cracks. The livestock producer is not legally *providing* the pasture or grazing land, at least not as understood under LFP; the livestock producer rather than renting pasture is in a sense renting the services of someone to care for the grazing animals. In an agistment, which legally is a creature called a bailment, the owner of the livestock hires a person to care for the animals – the agister. The agister may be the owner or renter of grazing land, who, in some common parlance, is *taking in cattle* for the season. This is an arrangement that benefits a number of beginners, who can, while trying to

[8] A lessor and a lessee are the two parties to a lease. The lessor is the owner of the property, the one who grants the lease. The lessee is the person to whom the lease is made, i.e. the person who is leasing (or renting) the property from the owner.

[9] In share lease arrangements, the lessor and lessee typically each take a share of the calves; the lessor is paid rent in his or her share of the calves. In cash leases, the lessor is paid his or her share in cash and the lessee typically owns all of the calves. Right to cull proceeds and maintenance of herd sizes are other considerations that may vary according to lease.

grow their own herds, increase income through custom cattle care, often on pasture that the beginner does not own but rents. Unless the agister qualifies as a contract grower under LFP, he or she will likely not be eligible for LFP assistance. But neither may the livestock owner; it depends on the terms of the contract between the two parties.

The agistment agreement or contract typically defines what responsibilities either party has for the livestock in the arrangement. Often, the agister is paid for the number of months he or she takes care of the cattle, i.e. runs them on the grass. Some arrangements that are in fact agistments are written up as pasture leases. This can be a critical issue for livestock producers seeking payment for losses under LFP. FSA takes the position that for a livestock producer to meet the requirement of "providing pasture" he or she must have control of that pasture. It is not entirely clear where this requirement of control exactly comes from. The regulation itself does not expressly use the term control in the context of providing pasture. Control apparently is meant to capture the idea that the livestock producer be at risk in the pasture, that is suffer loss if the pasture dries up. Eligibility in these lease arrangements for the livestock owner depends essentially on what kind of responsibilities the livestock owner undertakes with respect to pasture maintenance. For example, if the livestock owner periodically checks on the livestock, is responsible for expenses such as fencing or windmill repair, such responsibilities and actions might suffice to preserve LFP eligibility for the livestock producer.

There can as well be important tax implications to these livestock arrangements. If lessor is involved with the livestock, in a way that would fit the eligibility requirements for LFP, he or she will likely also be deemed to be materially participating for tax purposes, i.e. not be receiving merely a passive rental income. This can have consequences on both social security retirement income and on taxation of the income from the cattle.

From FSA's perspective, it appears that most important to preserving LFP eligibility is the existence of a written lease that describes the responsibilities of the parties to the lease with respect to the pasture and the livestock.

Covered livestock

What livestock are covered under this program, and which are excluded? The covered livestock are first identified by kind.[10] They must be held for commercial purposes as part of the producer's farming operation.[11] Feedlot livestock, as mentioned, are excluded. This exclusion applies to animals that were in a feedlot or, as part of normal business operations of the producer, would have been in a feedlot on the beginning date of the qualifying fire or drought.

[10] Adult or non-adult beef cattle, beefalo, buffalo, and dairy cattle; alpacas, deer, elk, emus, equine, goats, llamas, poultry, reindeer, sheep, or swine.

[11] Excluded uses, i.e. non-commercial, include wild free roaming animals, recreational use such as pleasure, roping, hunting, pets or for show.

Also excluded are beef and dairy cattle, buffalo and beefalo that weighed less than 500 pounds on the beginning date of the drought.

The livestock must be such as would normally have been grazing the eligible pasture or range land during the normal grazing period in which the drought occurs. During the 60 days prior to the beginning date of the drought designation, the livestock producer had to have owned, leased, purchased, or entered into a contract to purchase the livestock, or the livestock producer had to have been a contract grower of the animals. The livestock producer may have sold or otherwise disposed of the animals due to the drought during the current production year or in one or both of the two production years immediately preceding the current production year.

<u>Eligible Grazing losses</u>

Grazing losses are eligible under LFP only if they occurred on land that is native or improved pasture (with permanent vegetative cover), or on land that has been planted to crops specifically for grazing, such as plantings of forage sorghum or small grains. Again, to qualify, the crop ground must have been planted specifically for grazing. Corn and sorghum stalks, for example, do not qualify. A producer's acreage report must reflect the fact that the crop was planted for grazing.

The land, of course, has to be located in a county for which a drought designation has been made during the normal grazing period.

Irrigated ground does not qualify under LFP, unless the land has in fact not been irrigated in the year for which assistance is being sought. In addition, the reason for not irrigating must have been a lack of water for reasons beyond the control of the applicant.

Conservation Reserve Program (CRP) land that is being hayed or grazed is not eligible under LFP.

<u>Application</u>

Applications for LFP are due within 30 calendar days after the end of the calendar year in which the grazing loss occurs. The application (CCC-853) must be complete by that deadline and include supporting documentation. What is that documentation? Before listing possible documentation, it is important to note two things. First, keep records. Second, work with your local FSA office to determine what precise documentation will suffice. Supporting documentation under the regulations must include: evidence of loss; current physical location of the livestock in the inventory; evidence of ownership or tenancy on the grazing land; an acreage report under 718; adequate proof that grazing loss was for covered livestock and occurred in the calendar year for which payments are being requested; and a farm operating plan (if not already on file with FSA). Other kinds of supporting documentation that FSA might request or rely on include verifiable purchase and sale records, grower contracts, veterinarian records, bank or loan papers, rendering truck receipts, FEMA records, National Guard records, written contracts, production records, private insurance documents, and sales records. Again, keep records and work with FSA.

<u>Payments</u>

The compensation that is paid for grazing losses under LFP comes with no strings attached. It does not have to be used for any particular purpose. It is taxable income.

Grazing losses that are not eligible for compensation under LFP may be eligible under the Emergency Assistance for Livestock, Honeybees and Farm-Raised Fish Program (ELAP). See article on ELAP for details.

Legal Aid of Nebraska

- *For additional information, contact your local FSA office.*
- *Information may also be available through the Nebraska Rural Response Hotline (1-800-464-0258).*
- *This is a document prepared by Legal Aid of Nebraska. It is not a USDA document.*