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Agricultural Disaster Resources

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Agricultural Disaster Resources

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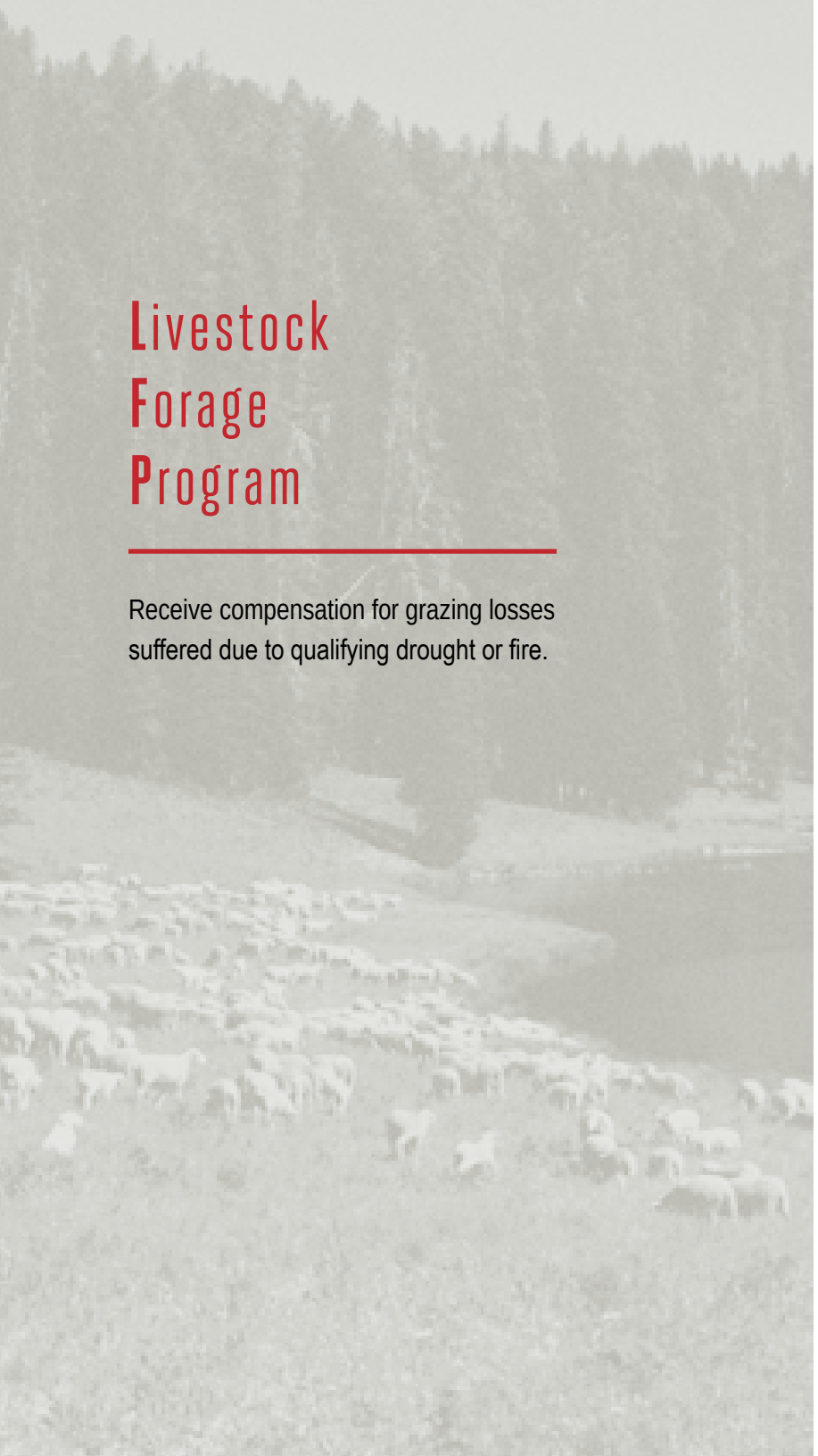
Content



Livestock Forage Program

Receive compensation for grazing losses suffered due to qualifying drought or fire.

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—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 Eligibility Requirements

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 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]

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 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.

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.

Eligible Grazing losses—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.

Application—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.

Payments—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 (p. 26).

Endnotes: Livestock Forage Program (LFP)

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*

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.

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*.

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.

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.

Livestock Indemnity Program

Receive assistance for livestock death losses caused by adverse weather.

The Livestock Indemnity Program ("LIP") provides assistance for livestock death losses (in excess of normal mortality) that are caused by adverse weather. (Under LIP, adverse weather does not include drought.[1]) LIP also covers losses for livestock killed by certain wild animals (including birds that kill), if those wild animals have either been reintroduced into the wild or are protected by federal law. Finally, LIP can cover death losses from blue-green algae bloom (cyanobacteria) and larkspur poisoning, which toxins are often triggered by weather events.

Normal mortality rates are established by the administrator of the program, Farm Service Agency, for each type of covered livestock, on a state-by-state basis. Payments are equal to 75% of the fair market value of the eligible animals, on the day before the death.

THE BASICS

Let's start with the basics. The details of coverage and eligibility for LIP, which can be intricate, are discussed in the next section of this article. You may wish simply to review the basics and then contact your local FSA office for more details and assistance, or to refer to FSA's useful online resources.[2]

What does LIP do? In general, it compensates for livestock death losses. It pays compensation at a rate of 75% of the fair market value of the lost animal. Death loss of livestock is not compensated unless the death losses for the year are greater than normal mortality rates.

When does LIP kick in? When livestock have died due to an eligible adverse weather event or eligible wild animal attack. The livestock had to have died no later than 60 days after the end of the adverse weather event or animal attack, as a direct result of the event or attack, and in the calendar year for which benefits are being requested. (Newborn livestock must have died within seven days of the event or attack.)

Where does it apply? In locations for which the USDA has determined that a qualifying adverse weather event has occurred. This is usually determined according to county. FSA determines if an adverse weather event has occurred. In general such adverse weather events include lightening, earthquake, tornado, winter storms (if accompanied by high winds, freezing rain or sleet, heavy snowfall and extreme cold), blizzards, floods, hurricanes, volcanoes, wildfires, extreme heat, extreme cold, tropical storms and typhoons. Drought is not included, because feed may be purchased in times of drought to prevent death. The only time drought is included is when anthrax, which can be exacerbated by drought, causes the death. Beginning in 2015, larkspur poisoning and cyanobacteria are included as eligible causes of death loss.

Who benefits from this disaster assistance? Livestock owners or contract growers, both of whom have to meet specific eligibility criteria. The general term for eligible persons under the program is *livestock producer.*

What kind of livestock are covered by LIP? For livestock owners: alpacas, beef cattle, dairy cattle, sheep, goats, swine, poultry, buffalo, beefalo, elk, emus, deer or reindeer. For contract growers only poultry and swine are covered. All animals had to have been kept for commercial purposes, and not have been wild, free roaming animals. Livestock that have died from disease are not covered, as mentioned, funless the disease was exacerbated by an adverse weather event and could not reasonably have been treated or prevented by vaccination or acceptable management practices.

What is the assistance? Money.

Does the money have any strings attached to it?
No, it can be used as seen fit. It is taxable.

How much is paid? 75% of the fair market value of the animal that died on the day before its death.[3] Only death losses in excess of normal mortality for the year are covered. Normal mortality rates are determined by FSA on a state-by-state basis.

How do I apply? Through your local Farm Service Agency. There are deadlines to meet and documents that are required, both application documents and records to support an application. These details are discussed below. The most important source of information for understanding deadlines and documents is your local FSA office. The deadline for filing a *notice of loss* is the earlier of 30 days after the loss becomes apparent or 30 calendar days after the calendar year in which the loss occurs. The deadline for an *application* is 30 calendar days after the calendar year in which the loss occurs. There are no provisions for allowance of late filled applications.

What records will I need? In addition to the appropriate application form, supporting documentation is required to show the quantity and kind of livestock that died and to prove that the deaths resulted from adverse weather or wild animal attack. The detailed kinds of records that may be used to verify and document losses are discussed below.

Where do I get additional information? For more detailed information, read on, contact your local FSA office, or review FSA's on-line resources.

DETAILS

LIP became a "standing" or permanent program under the Agriculture Act of 2014 (2014 Farm Bill), like the Livestock Forage Disaster Program ("LFP") and the Emergency Assistance for Livestock, Honeybees and Farm-Raised Fish Program ('ELAP"). As such, the source of funding for LIP shifted to the Commodity Credit Corporation, from the Agriculture Disaster relief Trust Fund.

The regulations which govern LIP are found in the Code of Federal Regulations at 7 C.F.R. Part 1416, Subparts A and D. LIP is administered by the Farm Service Agency (FSA). Subpart A of 7 C.F.R. Part 1416 contains the *general* eligibility requirements for participation in all three livestock disaster programs (LIP, ELAP and LFP). Subpart D contains the *specific* requirements for participation in LIP. It is useful to note that LIP is not necessarily a simple program to understand or to deal with. Most producers interested in utilizing this program will 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: Subpart A

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 LIP. The following are additional general eligibility requirements.

Eligible Producer—To be eligible, a producer must "assume 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 [as] a contract grower of the livestock when there is a contract grower." (§1416.3) That's a tongue twister. It also seems ambiguous in that it appears to limit eligibility to someone who either owns a farm or is a contract grower of livestock. However, under the specific requirements for the livestock disaster programs, an owner of livestock who rents land may also be eligible.

The important point to note for now (for LIP 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.

Payment eligibility—To be eligible, the producer's average adjusted gross income (AGI) 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 AGI 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 LIP, LFP and ELAP together cannot exceed $125,000. This is a cap on *combined* payments received in any year under any of these three programs. This is one of 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 for married couples. There are more complex rules for determining payment limits where an entity, such as a limited liability company or corporation, is involved.[4]

Farm Operating Plan—Participants in the program (which technically means those people who have simply filed an application for benefits) must either already have on file, or provide to FSA, a farm operating plan.[5] 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 Eligibility Requirements for LIP: Subpart D

There are basic eligibility requirements for LIP, which are: eligible adverse weather or wild animal attack, eligible livestock, and an eligible owner or contract grower.

Eligible Adverse Weather—The first thing to note is that eligible adverse weather events are determined by FSA. The event is defined by its "extreme or abnormal damaging nature." Such events may include lightening, earthquake, tornado, winter storms (if accompanied by high winds, freezing rain or sleet, heavy snowfall and extremely cold temperatures), blizzards, floods, hurricanes, volcanoes, vog[6], wildfires, extreme heat, extreme cold, tropical storms and typhoons. In addition, certain diseases which are triggered or exacerbated by adverse weather may be included as covered causes of death. For example, the FSA Handbook states that heavy rain followed by prolonged heat will not be considered an eligible adverse weather event except where such conditions trigger blue-green algae bloom, or cyanobacteria, which can cause livestock death. Simlarly, an unusual period of cold and wet conditions is not in itself an eligible adverse event except where it leads to death loss attributable to larkspur poisoning. A determination has been made that livestock death losses from these diseases, as triggered by the adverse weather, *may* not be susceptible to vaccination or good management practices and are therefore eligible under LIP for compensation. State FSA offices are responsible for specifying the exact eligibility criteria for either of these weather-related disease losses.

As mentioned, drought is not an eligible adverse weather event under LIP, except where the drought leads to death loss from anthrax poisoning.

Eligible Animal Attack—Eligible animals may include those animals reintroduced into the wild by the federal government or protected by federal law. The Handbook mentions by name wolves and avian predators, i.e. birds that kill. (Avian predators may include but are not limited to condors, bald eagles, osprey and black or turkey vultures.) The producer must provide adequate proof that the death was caused by such an attack. Documentation of such deaths preferably is obtained from the Animal and Plant Health Inspection Service Wildlife Services (APHIS) or from the Department of Natural Resources. In the absence of such documentation, the producer may provide records that can be independently verified, such as veterinarian records, or dated photographs, or third party certifications. See below for further information on documentation.

Eligible Livestock for Owners—The livestock need to have been owned by an eligible owner on the day of death. They have to have been kept for commercial purposes as part of a farming operation.[7] The death must have occurred no later than 60 days after the end of the adverse weather event or the attack by wild animal or avian predator, and as a direct result of such event or attack. (To be eligible losses, newborn livestock must have died within seven days of the adverse weather event or attack.) The deaths must have happened in the calendar year for which benefits are being requested.

Eligible livestock includes the following: beef cattle, dairy cattle, buffalo, beefalo, sheep, goats, swine, poultry, elk, alpaca, emus, equine, llamas, deer or reindeer. (In utero creatures are not included.) Payment rates for livestock can be found at: *http://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/livestock-indemnity/index*

Eligible Livestock for Contract Growers—The livestock must have been in the possession of the eligible contract grower at the time of death. The death must have occurred no later than 60 days after the end of the adverse weather event or the attack by wild animal or avian predator, and as a direct result of the event or attack. (Newborn livestock must have died within seven days of the adverse weather event or attack.) The deaths must have happened in the calendar year for which benefits are being requested. Eligible livestock includes only poultry (including kept for egg production) or swine.

Eligible Owner—In addition to the general eligibility requirements, the owner had to have owned the livestock on date of death. It must be the case that no contract grower is eligible for these same animals. In other words, if a contract grower is eligible, the owner of the animals is not. This reflects the definition of a contract grower as the one who is in possession of the animals and at risk for the death loss.

Eligible Contract Grower—To be eligible, a contract grower must meet the following: a) have a written agreement with the owner of the livestock which states the terms, conditions and obligations of the parties with respect to the livestock, b) be in control of the animals on the date of death, and c) be at risk for the loss of the animals. The grower must have suffered a loss of income in the death loss of the animal.

Normal Mortality—FSA determines normal mortality rates. Normal mortality is defined according to category of livestock and calendar year, i.e. what is normal death loss in a calendar year for various categories of livestock. Normal mortality is determined by state unless there are compelling reason to make a determination by regions within a state. Normal mortality rates for states are based on national mortality rates.[8]

DEADLINES AND DOCUMENTS

The following brief discussion of deadlines and documentation under LIP is general. It is critically important to contact your local FSA office for guidance on reporting losses and applying for assistance.

Deadlines

In seeking benefits under LIP, a producer submits both a *notice of loss* and an *application*. A notice of loss is a necessary part of a complete application. The deadline for submitting the notice of loss is the earlier of the following: a) within thirty days of the loss of livestock becoming apparent to the producer, or b) thirty days (January 30) after the end of the calendar year in which the loss occurred. The deadline for a complete application to be submitted is the same as (b), that is January 30 after the calendar year in which the loss occurred. Multiple notices of loss may be submitted for a single calendar, according to how and when the death losses occur, and these notice may be submitted by telephone, facsimile or email. An application, and not just a notice loss, may be filed for each occasion of death loss, without waiting until the end of the calendar year, and is encouraged. Bear in mind, however, that the last date to file an application for death losses is, as stated, within 30 days of year's end.

Contact your local FSA office to obtain the necessary forms and detailed information on submitting a notice of loss and application for benefits.

Documentation

It is important to maintain as complete a record as possible of losses in order to gain eligibility for the program. The applicant must show evidence of the loss. The following is a general listing of documentation that the Agency looks for in considering applications, eligibility and payment calculations. Under each loss category, note that FSA can accept either *verifiable* or *reliable* documentation. There is a difference between these two kinds of documentation. Verifiable documentation is such that can be verified by an independent source and is the strongest supporting documentation. Reliable documentation is such that may not be independently verifiable but which may nonetheless stand in FSA's estimate as sufficient. The 2014 Farm Bill made it possible for the Agency, in the absence of either verifiable or reliable documentation of losses, to consider *certification* of loss by the producer, provided, however, that similar producers suffered comparable losses. Thus, there are three levels of possible demonstration of loss to meet eligibility, in descending order of strength: verifiable documentation, reliable documentation and producer certification.

The producer must be able to document the death losses for which assistance is sought. The following documents may serve as verifiable documentation:

- rendering truck receipts or certificates
- FEMA records
- National Guard records
- veterinary records
- records assembled for tax purposes
- private insurance documents
- written contracts
- bank or other loan documents
- purchase records
- productions records
- property tax records.

In the absence of adequate verifiable proof of death, a producer may provide reliable records, together with verifiable beginning and ending inventory records. Reliable records may include:

- contemporaneous producer records in existence at the time of the event
- photographs (with dates)
- brand inspection records
- dairy herd improvement records *or*
- other similar reliable documents

Verifiable inventory records may include:

- veterinary records
- canceled check documentation
- balance sheets
- inventory records used for tax purposes
- loan records
- bank statements
- farm credit balance sheets
- property tax records
- brand inspection records
- sales and purchase receipts
- private insurance documents
- chattel inspections

There are also provisions in the rules for the producer to provide independent third party verifications, where needed, of the death losses.

Endnotes: Livestock Indemnity Program (LIP)

1 The only circumstance in which LIP might apply to death losses caused by drought is where there is an outbreak of anthrax.

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

3 Fair market value for categories of covered animals can be found as an attachment to the LIP Factsheet at: *https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/livestock-indemnity/index*

4 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*

5 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.*

6 Vog is a visible toxic air pollution, in aerosol form, that can occur in the context of a volcanic eruption.

7 In some livestock losses, a question may arise as to what constitutes a *farming operation*, which is generally defined as a "business enterprise engaged in producing agricultural products." It may be relevant, for example, to know whether or not the producer files taxes as a farming operation.

8 National mortality rates can be viewed in the appendices to the FSA Handbook for Livestock Disaster Assistance Programs for 2011 and Subsequent Years, 1-LDAP (Rev. 1), which can be downloaded at: *http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk*

Emergency Livestock Assistance Program

Receive financial assistance for livestock, honeybees, and farm-raised fish losses caused by disease, adverse weather, or other conditions.*

** This program provides assistance only for those losses that are not covered under the LFP and the LIP. It should be used only as a last resort.*

The Emergency Assistance for Livestock, Honeybees and Farm-Raised Fish Program ("ELAP") is in a sense the livestock disaster program of last resort. It provides assistance only for those losses that are not covered under the Livestock Forage Disaster Program (LFP) or the Livestock Indemnity Program (LIP). If you are seeking assistance for livestock related losses, you should first consider LFP or LIP.[1]

ELAP provides financial assistance to eligible producers of livestock, honeybees or farm-raised fish for losses caused by disease (including tick fever), adverse weather, such as blizzards, or other conditions, like wildfire.

This article focuses on livestock losses under ELAP and not on honeybee or farm-raised fish losses.[2]

THE BASICS

Let's start with the basics. The details of coverage and eligibility for ELAP can be intricate. Those details are discussed in the next section of this article. You may also simply review the basics and then contact your local FSA office for more details and assistance, or refer to FSA's useful online resources.[3]

What does ELAP do? In general, it compensates for livestock-related losses. What kind of livestock-related losses? Death loss, loss of feed, loss of pasture or grazing land, losses that arise out of the need to haul water to livestock in times of drought, and losses related to gathering in cattle to treat for tick fever.

When does ELAP kick in? In general, in times of blizzard, disease or wildfire. (The wildfire cannot have occurred on federally managed land; LFP applies in that circumstance.) However, ELAP affords the Agency flexibility to cover different kinds of disasters.

Where does it apply? In locations where the USDA has determined that qualifying adverse weather or a loss condition occurred. This is usually determined according to county.

Who benefits from this disaster assistance? Livestock owners or contract growers, who meet the eligibility criteria. The general term under the program is *livestock producer*. There are a number of criteria for eligibility as a producer under ELAP.

What kind of livestock are covered by ELAP? For livestock owners: beef cattle, dairy cattle, sheep, swine, poultry, buffalo and others. For contract growers: poultry and swine. Feedlot livestock are not covered.

What is the assistance? Money.

Does the money have any strings attached to it? No, it can be used as seen fit. It is taxable.

How much is paid? In general, a percentage of the loss, between 60% and 75%, sometimes higher.

How is the loss calculated? It varies, depending on the kind of loss for which assistance is requested. Those details are discussed below. Sometimes payment for losses is calculated on actual costs and sometimes on national averages.

How do I apply? There are deadlines and documents, both application documents and other records required to support an application. These details are discussed below. The most important source of information for understanding deadlines and documents is your local FSA office. In ELAP, which is a fiscal year (as opposed to a calendar year) program, the deadline for application is November 1st following the end of the program year for which benefits are being sought.

What records will I need? In addition to the appropriate application form, supporting documentation is generally required. Losses must be documented; keep records; make records. The kinds of records that may be used to verify and document losses are discussed below.

Where do I get additional information? For more detailed information, read on, contact your local FSA office or review FSA's on-line resources.

DETAILS

ELAP, like FLP and LIP, became a "standing" or permanent program under the Agriculture Act of 2014 (2014 Farm Bill). As such, the source of funding for the program shifted to the Commodity Credit Corporation, from the Agriculture Disaster relief Trust Fund. ELAP differs somewhat from FLP and LIP in its funding, in that the latter do not have specified annual funding limits. Annual emergency relief under ELAP, however, is capped at $20 million.

The regulations which govern ELAP are found in the Code of Federal Regulations at 7 C.F.R. Part 1416, Subparts A and B. Funding for ELAP occurs by *fiscal* and not *calendar* year, unlike LFP and LIP, which affects application deadlines. ELAP is administered by the Farm Service Agency (FSA). Subpart A of 7 C.F.R. Part 1416 contains the *general* eligibility requirements for participation in all three livestock disaster programs (ELAP, LFP and LIP). Subpart B contains the *specific* requirements for participation in ELAP. Again, it is useful to note here that ELAP is not necessarily a simple program to understand or to deal with. Most producers interested in utilizing this program will 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: Subpart A

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 ELAP. The following are additional general eligibility requirements.

Eligible Producer—To be eligible, a producer must "assume 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 [as] a contract grower of the livestock when there is a contract grower." (§1416.3) That's a tongue twister. It also seems ambiguous in that it appears to limit eligibility to someone who either owns a farm or is a contract grower of livestock. However, under the specific requirements for the livestock disaster programs, an owner of livestock who rents land may also be eligible. The important point to note for now (for ELAP 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—To be eligible, the producer's average adjusted gross income (AGI) 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 AGI 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 ELAP, LFP and LIP cannot exceed $125,000. This is a cap on combined payments received in any year under any of these three programs. The 2014 Farm Bill imposed a series of payment limitations. 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.[4]

Farm Operating Plan—Participants in the program (which technically means those people who have simply filed an application for benefits) must either already have on file, or provide to FSA, a farm operating plan.[5] 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 Eligibility Requirements for ELAP: Subpart B

First, as mentioned, if a loss is covered under LFP or LIP, it is not covered under ELAP. This typically means that if the loss is caused by drought to pasture or grazing land, it will likely be covered under LFP. If the loss is in the death of livestock caused by adverse weather conditions, those losses would likely be covered under LIP. Where neither LFP nor LIP can offer assistance, ELAP may offer help.

There are basic eligibility requirements for ELAP, which are:

- an eligible producer
- suffers an eligible loss, in the program year for which assistance is being requested
- losses are physically located in a county where eligible adverse weather or an eligible loss condition has occurred
- and timely files correct forms—CCC-851 for livestock losses, and FSA-578 for grazing losses

Notice the repeated term *eligibility*. As mentioned, the requirements of eligibility for each of these terms (producer, loss, adverse weather, loss condition) can differ somewhat depending on what kind of loss a person is seeking compensation for. There are four categories of loss:

- livestock death losses
- livestock feed and grazing losses
- losses related to the need to transport water
- specific losses related to cattle tick fever

For each of these categories of loss, there are eligibility criteria, sometimes similar and sometimes different. We will analyze the program according to the kind of loss for which payment is sought.

Note also that the phrase *adverse weather* is separate from the phrase *loss condition*. Adverse weather under ELAP means, initially, that it is not the kind of adverse weather condition covered under LFP and LIP. In general, *adverse weather* under ELAP includes (without limitation) blizzard, winter storms, and wildfires (the latter *not* on federally managed land). A *loss condition* means, first, as well, a condition not covered under other programs, and beyond that it tends to include diseases.[6]

THE FOUR LOSSES

Death Losses—First, livestock death losses caused by adverse weather (as opposed to a separate loss condition) are covered under LIP, not ELAP. For livestock death losses, ELAP assistance is limited to an eligible loss condition, which generally means a qualifying disease, as further discussed below.

To be eligible for compensation for death loss to livestock, the livestock had to have been owned by the applicant on the day of death. Alternatively, a contract grower, as opposed to the owner of the livestock, might be eligible if the contract grower a) had a written agreement with the owner, b) had control of the animals on the date of death, and c) was at risk for the losses.[7] The owner and the contract grower cannot both be eligible with respect to the same animals. In fact, the livestock owner will not be eligible if, on the day of death of the livestock, a contract grower could have been eligible with respect to those livestock.

Eligible animals for the *owner* of the animals include: alpacas, adult or non-adult dairy cattle, beef cattle, beefalo, buffalo, deer, elk, emus, equine, goats, llamas, poultry, reindeer, sheep or swine.[8] Animals eligible for *contract grower* losses include: poultry or swine.[9] In all cases the animals must have been maintained for commercial purposes as part of a farming operation on the date of death. The animals cannot before the date of death have been kept for noncommercial reasons, e.g. recreation, personal consumption, hunting, pleasure, roping, show or sport.

Payment is not made for in utero animals. Ineligible animals include wild free roaming animals, yaks and ostriches.

The animals had to have died in the county where the loss condition occurred, and the death loss had to have been in excess of normal mortality.[10] The deaths must have occurred a) as a direct result of the loss condition, b) on or after the beginning date of the loss condition and c) no later than 60 calendar days from the ending date of the loss condition. The Agency determines a beginning date for a loss condition. This determination can be made for national, state or county conditions.

FSA determines which adverse loss condition qualifies to trigger ELAP. Of course, it cannot be a loss condition covered under another program. Presently, FSA appears to have decided that for death losses caused by diseases to be eligible under ELAP the diseases need a) to be caused/transmitted by vectors,[11]

and b) not be susceptible to vaccination or acceptable management practices. Consequently, not all death losses caused by disease are eligible for assistance. FSA has named several diseases as *not* being covered loss conditions.[12]

How much is an eligible livestock owner paid under ELAP for death losses? Payment is based on a percentage of the *livestock payment rate* for each category of eligible livestock multiplied by the number of eligible dead livestock. The livestock payment rate is the fair market value for a category of livestock, as determined by the Agency, which is based on a national average. 75% of the livestock payment rate multiplied by the number of eligible dead livestock is paid to the producer. The percentage of the payment rate increases to 90% for beginning farmers, socially disadvantaged farmers and limited resource farmers. In a year where the full $20 million of available ELAP funding is not used, the 75% can be increased to 80%.

For example, the payment rate for an adult cow death loss for 2015 was $2016.19. So, 75% of that rate equals $1512.14. The producer, who has a herd of 100 cows, suffered 10 death losses. The normal mortality rate is 3%. 3% of 100 cows equals 3 cows. This normal mortality number is subtracted from the death losses: 10—3 = 7. The payment would be equal 7 x $1512.14 or $10,584.98.

Rates for payments to eligible contract growers are based on average income loss sustained.

Feed & Grazing Losses, Water Transport Losses & Tick Fever Losses—These are each separate kinds of loss under ELAP, which, however, share some eligibility criteria, namely for the livestock, the producer and the adverse weather or loss condition. We will discuss these common eligibility criteria first and then look at the separate requirements for feed and grazing, water transport and tick fever losses.

Eligible livestock are first identified by kind.[13] The livestock must be held for commercial purposes as part of the producer's farming operation.[14] Feedlot livestock 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 eligible adverse weather or loss condition.

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 for that kind of land in the county where the adverse weather or loss condition occurred. (This condition does not apply to eligibility for tick fever losses.)

The livestock producer, during the 60 days prior to the beginning date of the adverse weather or loss condition, must have owned, cash-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, whether as owner or contract grower, must have suffered one of the losses described below, i.e. loss of *purchased* feed or forage, loss of *harvested* feed or forage, or loss arising out of need to purchase additional feed, or to pay for the transport of water or additional feed to livestock, or to pay the costs associated with gathering livestock to treat for cattle tick fever.

Feed Losses—Feed losses (separate from grazing losses), to be eligible, must be loss of purchased feed or forage, or loss of mechanically harvested feed or forage. The feed and forage, whether purchased or harvested, must have been a) destroyed by eligible adverse weather or loss condition (harvested forage or feed must have been destroyed after harvest), b) intended for use as feed for eligible livestock, and c) physically located in a county where the adverse weather or loss condition occurred on the date of the beginning of that adverse weather or loss condition. Eligible adverse weather or loss condition includes, without limitation, blizzard, eligible winter storm, excessive wind, flood, hurricane, lightening, tidal surge, tornado, volcanic eruption or wildfire on land not federally managed.

There may be compensation for losses related to the need to purchase additional feed, above quantities normally purchased, as required to maintain the livestock until additional feed becomes available. The additional feed must be needed during eligible adverse weather or loss condition, which are the same as described in the preceding paragraph. The animals for whom the feed is purchased must be located in a county where the adverse weather or loss condition occurred. The purchase of additional feed can occur either during or after the eligible adverse weather or loss condition.

Payment is available for the cost of transporting additional feed to livestock. This loss is covered only in combination with one or more of the three other losses, i.e. purchased feed, harvested feed or additionally purchased feed.

This is apparently interpreted as an exceptional transport costs. For example, such compensation might include the costs of equipment rental fees for hay lifts or snow removal.

Payment for feed losses is based on actual costs. The payment is made in an amount of no less than 60% of that figure. For beginners, socially disadvantaged, or limited resource the percentage is raised to 90%.[15]

Grazing Losses—Recall, first, that a grazing loss is not eligible under ELAP if it is covered under LFP, which, primarily means that grazing and feed losses attributable to drought will not be covered under ELAP.

Grazing losses (separate from feed losses), to be eligible, a) must be incurred during the normal grazing period, b) on eligible land that is located in a qualifying county, c) and be due to an eligible adverse weather or loss condition, such as blizzard, eligible winter storm, flood, hail (hail damage is determined on a field by field basis), hurricane, lightening, tidal surge, tornado, volcanic eruption or wildfire on non-Federal land. The grazing loss must have been suffered on land that is native or improved pasture, with permanent vegetative cover, or land that is planted to a crop specifically for grazing purposes, such as plantings of forage sorghum or small grains. Corn and sorghum stalks, for example, do not qualify. Small grain forage crops (e.g. millet, rye, barley, oats, triticale) that are planted for harvesting are *not* eligible

The producer must be the person who provides the pasture or grazing lands and those lands have to be located in a county where the eligible adverse weather or loss condition occurred during the normal grazing period. Providing pasture or rangeland means either owning that land or renting it, the latter on either a cash or share basis. The rented ground can be owned privately, or by state or federal government.

The nature of the rental arrangement is important to eligibility. FSA takes the position that the land must be sufficiently under the control of the tenant to put that person at risk for the lost pasture. For example, where the lease arrangement is based on payment for actual number of days grazed, or according to the rate of gain, FSA takes the position that the tenant is not sufficiently at risk to qualify for grazing losses. The question does arise, however, as to what losses, if any, are compensable where the producer has to remove livestock from rented grazing land early in the grazing season (but without having to pay rent for the lost grazing time) and then purchase feed to make up for the lost pasture.

Payment for grazing losses is based on the number of lost grazing days. This is the number of days over which the producer had to remove livestock from the pasture or the number of days the producer had to provide additional feed above normal quantities. Payment is based on the lesser of either a) the daily feed cost for the number of lost grazing days, not to exceed 150, or b) the normal carrying capacity of the grazing land for the number of grazing days lost, again not to exceed 150. The payment is made in an amount of no less than 60% of that figure. For beginners, socially disadvantaged, or limited resource the percentage is raised to 90%.

Water Transport Losses—A producer who needs to transport water to livestock during times of drought may be able to recover some of those costs as a disaster loss under ELAP. The livestock which need the water must be located on land in a county that is suffering a qualifying drought. Such a drought is designated by the US Drought Monitor as having an extreme drought (D3) that directly affects the availability of water during the grazing period.[16] FSA makes this latter determination. The costs for which assistance is available do not include the cost of the water itself, but rather the costs associated with its transport, such as equipment rental fees, labor, and contracted transport fees. This assistance is not available for animals that are grazing CRP land. There had to have been adequate watering systems or facilities in place before the drought. It must also be true that the producer is not normally required to haul water. Costs may be compensated for no more than 150 days of transport

The land must be native or improved pasture (with permanent vegetative cover), or land that has been planted to crops specifically for grazing, such as plantings of forage sorghum or small grains. Corn and sorghum stalks, for example, do not qualify.

Apparently, transporting water to fill tanks or troughs is acceptable but not to fill earthen structures.
Payments are based on the lesser of either a) the total cost of transporting water to livestock for 150 days, based on the daily water requirement of the livestock, or b) the actual number of gallons transported for the program year. The Agency determines a national average price per gallon for water transport, which figures can also be varied by state or region. The payment is

made in an amount of no less than 60% of that figure. For beginners, socially disadvantaged, or limited resource the percentage is raised to 90%.

Tick Fever Losses—Compensation is available for the costs associated with gathering eligible livestock to treat them for tick fever by the Animal and Plant Health Inspection Service. Cattle tick fever is a severe and often fatal disease that destroys red blood cells of cattle.

Payment for tock fever losses is based on the actual number of cattle that receive treatment and the average cost of gathering in the cattle, the latter as determined by the Agency. The payment is made in an amount of no less than 60% of that figure. For beginners, socially disadvantaged, or limited resource the percentage is raised to 90%.

DEADLINES AND DOCUMENTS

The following brief discussion of deadlines and documentation under ELAP is general. It is critically important to contact your local FSA office for guidance on reporting losses and applying for assistance.

Deadlines

In seeking benefits under ELAP, a producer submits both a *notice of loss* and an *application*. A notice of loss is a necessary part of a complete application. The deadline for submitting the notice of loss is the earlier of a) within thirty days of the loss becoming apparent to the producer, or b) November 1 after the end of the program year for which benefits are being requested. The complete application itself must be submitted on or before November 1 after the end of the program year for which benefits are being requested. (Recall that ELAP is a fiscal year program. Therefore the program year for benefits runs from October 1 through September 30.)
Contact your local FSA office to obtain the necessary forms and information for submitting a notice of loss and application for benefits.

Documentation

It is important to maintain as complete a record as possible of losses in order to gain eligibility for the program. The following is a general listing of documentation that the Agency looks for in considering applications, eligibility and payment calculations. Under each loss category, note that FSA can accept either *verifiable* or *reliable* documentation. There is a difference between these two kinds of documentation. Verifiable documentation is such that can be verified by an independent source and is the strongest supporting documentation. Reliable documentation is such that may not be independently verifiable but which may nonetheless stand in FSA's estimate as sufficient. The 2014 Farm Bill made it possible for the Agency, in the absence of either verifiable or reliable documentation of losses, to consider *certification* of loss by the producer, provided, however, that similar producers suffered comparable losses. Thus, there are three levels of possible demonstration of loss to meet eligibility, in descending order of strength: verifiable documentation, reliable documentation and producer certification.

Livestock Death Losses—The producer must be able to document the death losses for which assistance is sought. The following documents may serve as verifiable documentation:

- rendering truck receipts or certificates
- FEMA records
- National Guard records
- veterinary records
- records assembled for tax purposes
- private insurance documents
- written contracts
- bank or other loan documents
- purchase records
- productions records
- property tax records

In the absence of adequate verifiable proof of death, a producer may provide reliable records, together with verifiable beginning and ending inventory records. Reliable records may include:

- contemporaneous producer records in existence at the time of the event
- photographs (with dates)
- brand inspection records
- dairy herd improvement records *or*
- other similar reliable documents

Verifiable inventory records may include:

- veterinary records
- canceled check documentation
- balance sheets
- inventory records used for tax purposes
- loan records
- bank statements
- farm credit balance sheets
- property tax records
- brand inspection records
- sales and purchase receipts
- private insurance documents
- chattel inspections.

There are also provisions in the rules for the producer to provide independent third party verifications, where needed, of the death losses.

Feed Losses—In the absence of verifiable or reliable records, FSA may accept a certification of losses by the producer, if similar producers have suffered comparable losses.

For purchased feed loses, the producer should provide receipts that show:

- date of feed purchase
- name, address, and telephone number of feed vendor
- type and quantity of feed purchased
- cost of feed purchased
- signature of feed vendor if the vendor does not have a license to conduct this type of transaction, e.g. a neighbor.

For raised feed losses, the producer needs to provide verifiable or reliable evidence of the following:

- the ability to produce the kind and amount of lost raised feed or forage, such as equipment, seed receipts, fertilizer purchase receipts, and FSA-578's
- payment for the production of the lost raised forage or feed, such as custom harvest costs
- any evidence that supports the amount of the lost raised forage or feed, such as but not limited to weight tickets, acres and yields, processing receipts.

For purchases of additional feed to make up for other feed or grazing losses, the producer must provide evidence of the additional purchased feed *and* evidence of normal quantities of feed. This means providing receipts or summary purchase receipts for feed or forage purchased from the beginning of eligible adverse weather or loss condition until additional feed became available, and provide the same documentation of reach of the preceding two years.

Grazing Losses—The producer must provide verifiable or reliable documentation to show either additional feed purchased above normal quantities or proof of removal of livestock from pasture. The producer must also provide the following:

- Written acreage lease and final bill or invoice
- BLM grazing permit or lease and final bill or invoice
- Forest Service grazing permt or lease and final bill or invoice
- State land lease and State land subleases

In the absence of a written lease (say for an oral lease arrangement) the lessor[17] must sign a CCC-855 to certify the lease arrangement.

Water Transport Losses—Documentation must include the method used to transport water (personal labor/equipment, hired labor/rented equipment, or contracted water transportation service), the number of gallons of water transported and the number of eligible livestock the water was transported to. Acceptable documentation will include verifiable or reliable documentation.

Verifiable records are those which can be vouched by an independent source, and may include:

- water bills/invoices
- hired labor receipts for transporting water
- contract receipts for transporting water
- Reliable records may also be considered and may include
- contemporaneous records
- producer diaries
- calendars

Tick Fever Losses—The producer must certify the losses due to gathering cattle for treatment of tick fever.

Endnotes: Emergency Livestock Assistance Program (ELAP)

1 So what losses do LFP and LIP cover? Broadly speaking, LFP provides compensation for *grazing losses* that are caused by *drought*, or, more narrowly, by fire on land managed by a Federal agency, and LIP provides compensation for livestock *death losses* that are caused by adverse weather, which adverse weather does *not* include drought. The only circumstance in which LIP might apply to death losses caused by drought is where there is an outbreak of anthrax. See separate articles on LFP (p. 4) and LIP (p. 14) for additional information.

2 For information on honeybee or farm-raised fish aspects of the program, see the relevant fact sheets at: http://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/emergency-assist-for-livestock-honey-bees-fish/index.

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

4 For information on honeybee or farm-raised fish aspects of the program, see the relevant fact sheets at: *http://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/emergency-assist-for-livestock-honey-bees-fish/index.*

5 Available at: *http://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/index*

6 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*

7 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*.

8 ELAP is not technically limited to blizzard, wildfire and disease, even if in practice these have been the areas of application. As mentioned, ELAP is a program under which the Agency has flexibility to respond to unforeseen disasters - disasters that are not covered by other programs. As such, the regulatory definitions of adverse weather and loss condition are general.

9 What is a contract grower? Under ELAP, producers, other than feedlots, whose income is dependent on actual weight gain and survival of the animals.

10 These types are further broken down into subtypes according to which payments for losses are calculated. For subtypes see: 7 CFR § 1416.104(d).

11 See sub-types under 7 CFR §1416.104(e).

12 Normal mortality rates are established by FSA under LIP by livestock category.

13 Vectors are living organisms, such as mosquitoes, that transmit disease. Other disease vectors include ticks, flies, sandflies, fleas, triatomine bugs and some freshwater aquatic snails.

14 Diseases excluded as loss conditions: Anaplasma Marginale, Mannheimia Haemolytica, Mycoplasma Bovis, Bovine Respiratory Disease, Malignant Catarrhal Fever, Bovine Leukosis Virus, Pregnancy Toxemia, Pneumonia, Infectious Bovine Rhinotracheitis, Parainfluenza.

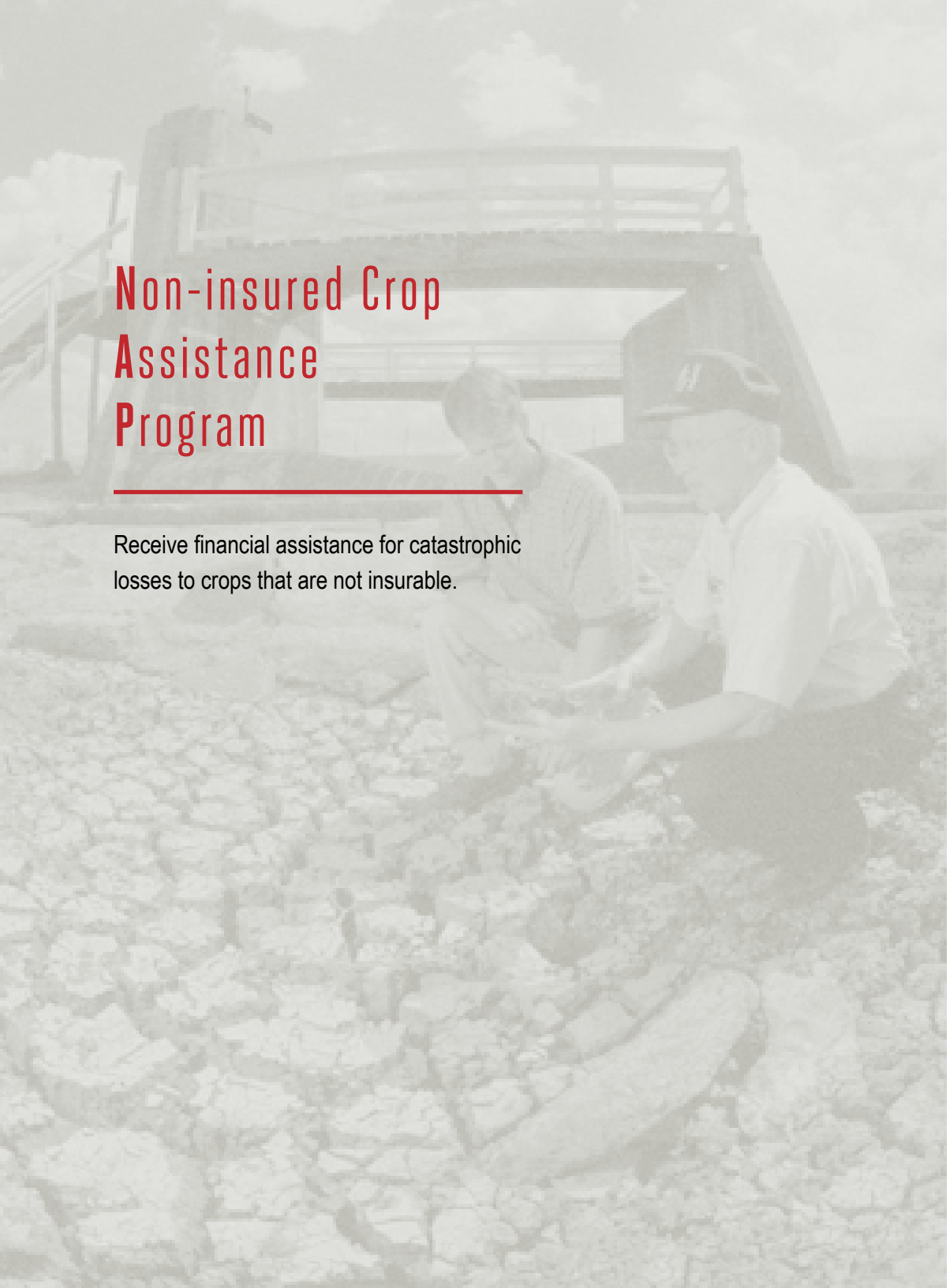
15 Adult or non-adult beef cattle, beefalo, buffalo, and dairy cattle; alpacas, deer, elk, emus, equine, goats, llamas, poultry, reindeer, sheep, or swine.

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

17 Beginner: a person who has not operated, or who has not operated for more than ten years, a farm or ranch, and who materially and substantially participates in the operation, which means substantial day-to-day labor and management. Socially Disadvantaged: a farmer or rancher who is a member of a group that has been subject to racial, ethnic or gender prejudice, including women, Hispanics, American Indians, Alaska Natives, Asians, Asian Americans, or Native Hawaiians. Limited Resource Farmer or Rancher: A person whose earnings and income are limited. The earnings threshold is adjusted for inflation and the income threshold is measured against national poverty guidelines. An online tool is available to determine one's eligibility as a limited resource farmer or rancher: *http://lrftool.sc.egov.usda.gov/DeterminationTool.aspx?fyYear=2016*.

18 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.*

19 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.



Non-insured Crop Assistance Program

Receive financial assistance for catastrophic losses to crops that are not insurable.

The Noninsured Crop Disaster Assistance Program ("NAP"), administered by the Farm Service Agency (FSA) of the United States Department of Agriculture (USDA) provides financial assistance for primarily catastrophic crop losses to crops that are not insurable. Not insurable means that the crops eligible for NAP are those crops for which crop insurance protection is not available under the Federal Crop Insurance Act.[1]

Losses covered under NAP include low yields, loss of inventory or prevented plantings. The losses must be caused by natural disaster. In general, assistance is available for losses that exceed 50% of the crop or for prevented plantings that exceed 35% of the intended crop acres. The amount paid is 55% of the market price. However, the Agricultural Act of 2014 (2014 Farm Bill) broadened coverage levels for certain crops, so that for a premium, a producer might increase coverage to as much as 65% of the crop (for losses that exceed 35% of the crop) at 100% of the market price. In addition, the 2014 Farm Bill provides for waivers of service fees and premium reductions for certain types of farmers, namely socially disadvantaged, limited resource and beginners.

The 2014 Farm Bill also made changes with respect to organic production and direct marketing to allow for separate pricing mechanisms for such production and marketing. In addition, the 2014 Bill a) introduced changes for crops grown on native sod (clarify the mandatory period of ineligibility for NAP coverage for such crops), b) clarified inclusion of certain feedstock crops for renewable biofuels, electricity or biobased products, c) added insufficient chill hours as a covered cause of loss for certain crops and conditions, and d) determined not to penalize producers in calculations of approved yields for failing to report their production in a year for which they did not have NAP coverage.

There are numerous eligibility and procedural criteria for receipt of NAP benefits, which in part are described below. It is important to contact your local FSA office in considering NAP coverage. NAP is not automatically available; it is something a producer must sign up for, i.e. an application for coverage, with payment of the service fee (see below), must be filed before any coverage can begin. In addition, NAP potentially covers a wide range of "crops" and it therefore requires considerable expertise to navigate the program, an expertise which your local FSA office may provide. The USDA website is a source of thorough information and tools for using NAP.[2]

Assistance for losses

- Loss of production
  - This is generally calculated in loss of yield.
- Loss of value
  - Pertains to what are called "value loss" crops, or crops for which calculating loss by yield is problematic, including aquaculture, floriculture, ornamental nursery, Christmas trees, mushrooms, ginseng, and turfgrass sod.[3]
- Prevented planting
  - Where a natural disaster prevents planting of a crop

Coverage available

- *Basic coverage*: must suffer more than a 50% crop loss or be prevented from planting more than 35% of intended crop acres
  - 50/55 NAP coverage: covers losses in excess of 50% of approved yield at 55% of average market price
  - Basically insures 50% of crop at 55% of market price
- *Buy-up coverage*: from 50 to 65 percent of production, in 5% increments, at 100% of market price
  - Can insure up to 65% of crop at 100% of market price
  - Not available for forage crops, i.e. crops or grasses intended for grazing
- Total payments received under NAP cannot exceed $125,000 per crop year per individual or entity.

Covered crops

- The crops must be a) commercially produced, b) ineligible for Catastrophic Risk Protection (CAT) through the Risk Management Agency of USDA, <u>and</u> c) any of the following:

- Crops grown for food
- Crops planted or grown for livestock consumption, such as grain or forage crops, including native forage
- Crops grown for fiber, such as cotton and flax (excludes trees grown for wood, paper or pulp products)
- Crops grown in a controlled environment, such as mushrooms and floriculture
- Specialty crops, such as honey and maple sap
- Sea oats and sea grass
- Industrial crops, such as feedstock for renewable biofuel, renewable electricity or biobased products
- Value loss crops, such as aquaculture, Christmas trees, ginseng, ornamental nursery and turf grass sod
- Seed crops, produced for sale as seed stock for other eligible NAP crops

- Note that livestock are excluded from coverage

Eligible Causes of Loss

- Damaging weather, such as drought, freeze, hail, excessive moisture, excessive wind, tornado, hurricane, insufficient chill hours (the latter available only for certain crops and locations as determined by FSA)
- Adverse natural occurrences, such as earthquake, flood or volcanic eruption
- Conditions relating to either of these, such as excessive heat, plant disease, insect infestation (these conditions must occur in the context of damaging weather or adverse natural occurrences; they are not stand-alone eligible causes of loss)

Cost

- Basic 50/55 coverage: Service Fee
  - $250 per crop per county with maximum per county of $750, and overall maximum fee of $1875 per producer (for farming in multiple counties)
- Buy-Up Coverage
  - The Basic Service Fee + a premium equal to 5.25% times level of coverage
  - Maximum premium per producer is $6562.50
  - Example of premium calculation, using apple orchard
    - 100% share in crop = 1
    - 20 acres of crop
    - 450 bushel yield per acre
    - $10 per bushel price
    - 65% coverage level
    - 1 x 20 x 450 x $10 x .65 x .0525 = $3071.25 premium
    - If there is a 100% loss, the payment would equal $58,500

- NAP is one of several USDA programs that targets benefits to beginning, socially disadvantaged or limited resource farmers and ranchers. In NAP, this benefit takes the form of a waiver of the basic service fee and a fifty percent reduction of premiums for the buy-up coverage.
  - Beginner: a person who has not operated, or who has not operated for more than ten years, a farm or ranch, and who materially and substantially participates in the operation, which means substantial day-to-day labor and management.
  - Socially Disadvantaged: a farmer or rancher who is a member of a group that has been subject to racial, ethnic or gender prejudice, including women, Hispanics, American Indians, Alaska Natives, Asians, Asian Americans, or Native Hawaiians.
  - Limited Resource Farmer or Rancher: A person whose earnings and income are limited. The earnings threshold is adjusted for inflation and the income threshold is measured against national poverty guidelines. An online tool is available to determine one's eligibility as a limited resource farmer or rancher.[4]
  - Entity: There are rules that apply to determine whether or not an entity, such as a limited liability company or corporation, qualifies under any of these categories. In general, all or a majority of the members must individually qualify and sometimes must be related by blood or marriage.

Coverage Periods—Coverage periods may vary according to the type of crop and kind of loss, e.g. annual crops, multiple planting crops, perennials and value loss crops. A producer's individual coverage, which must fall within the general coverage periods for the particular crop or loss, can in no event begin earlier than 30 days after an application for coverage is filed and the fee paid.

(There is an exception to the 30-days-from-application for the 2015 crop year.) For further details contact your local FSA office. FSA will also publicize application closing dates, in local media, at the USDA Service centers, and through newsletters.

Producer Eligibility—An eligible producer must have an ownership interest in the covered crop and share in the risk of producing the crop. The producer may be a landowner, operator, landlord, tenant or sharecropper. In order to verify that the producer has the requisite control over the land on which the crop is grown, FSA will require a copy of the lease, rental agreement, or other legal documentation, or a statement from the land owner or landlord attesting to the producer's control of the land.

The 2014 Farm Bill imposed new eligibility requirements based on total income. The producer's average adjusted gross income (AGI) 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 AGI 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.

Average Market Prices—NAP payments are calculated using average market prices. These prices are determined by FSA on a state-by-state basis for each crop. The price is also meant to reflect the intended use of the crop. The price is stated as a dollar value per applicable unit of measure for that crop, e.g. pounds, ounces, plants, flats, etc. To determine average price FSA takes the five years preceding the crop year at issue, drops the high and low years, and averages the remaining three. For those crops which lack five year market data, FSA has the ability to use the best available information. Separate prices may be established within a state for conventional and organic production. A payment factor is used to account for disposition of the crops, i.e. harvested, unharvested, prevented planting, and to account for attendant unincurred expenses.

Farmers who wish to choose organic pricing must do so in their application for coverage. They must report acreage as organic and provide a copy of their organic system plan. The farm must be organically certified, or, with respect to transitional acres, there must be written documentation from a certifying agency that the acres are under organic production. A separate APH (actual production history) database must also be established for organic production. NAP coverage for organic crops is available both at basic and buy-up levels.

FSA may establish an average market price that reflects prices received through direct marketing. To be eligible for this price a producer must elect the direct-market option on the application and must choose buy-up coverage for the crop. The producer must also submit actual marketing records for the previous one to three years.

Units—In NAP, everything is understood and calculated according to the *unit*. How many acres are in the unit? What production was in the unit? What losses were suffered in the unit? What is the payment for those unit losses? County FSA offices establish the units in a county. The unit is the foundation for determinations and calculations under NAP. This is true for all of the crops covered under NAP, from honeybees to cucumbers. A unit is a way of identifying a producer's interests in production of covered crops. There can be two kinds of interests—100% interests and less than 100% interests. All of a producer's 100% interests in a crop in a county will be part of a single unit. So, for example, a producer who is both owner and operator of land in the county makes up a single unit. If that same producer also rents land for cash from another land owner in the county, production on that rented land becomes part of the same single unit of the producer. Why? Because a cash lease is a 100% interest, similar to the interest of a person who owns and operates their own ground. If that producer also rents ground from separate landowners on a share basis, there will be a separate unit for each of those crop-share leases, because they are less than 100% interests and because each unit involves a different land owner.

Approved Yields—The approved yield is the expected crop production for the crop year for the unit. It is based on an average of a unit's actual production history (APH) for a minimum of four to a maximum of 10 crop years. APH is determined by dividing the total production by the crop acreage. The possible yields that may be used include actual yield, county expected yield, assigned yield or a zero-credited yield. (The latter is in effect a penalty for failure to report production for a year in which NAP coverage was in place but no loss was suffered; as distinguished from a by-pass year, a year in which no NAP coverage was obtained, in which case,

with the passage of the 2014 Farm Bill, the producer will no longer be given a zero-credited yield.) The keeping of production records is an important way to ensure that actual production history may be used to determine approved yields.

Calculating Payments—In general, payments are calculated per unit based on the crop acreage, approved yield, net production, coverage level (basic or buy-up), average market price for the commodity as established by FSA and a payment factor to account for the decrease in costs for crops that were not harvested or for which planting was prevented.

Calculations of payments can be very detailed efforts. FSA has provided a useful online tool to estimate payments.[5]

Procedure—How does it work?

- Apply for coverage by the relevant deadline
  - Form CCC-471: application for coverage.
    - File by the application closing date. Closing dates vary by crop. To obtain precise information on closing dates, contact your local FSA office.
  - Applying for coverage and paying the fee does not guarantee eligibility
- Determine and Understand the coverage period
  - It is important to know the coverage period for, among other things, meeting the deadlines for filing a Notice of Loss and Application for payment
- Remain eligible by providing necessary information
  - Acreage reporting: unit acreage certifications are filed on Form FSA-578. The information in general includes the name, type and variety of the crop, location and acreage (field, sub-field), share of the crop (and names of other interest-holders), type of practice used (i.e. irrigated, non-irrigated), date of planting and intended use of the crop. FSA encourages reporting crop acreages shortly after planting in order avoid missing deadlines and forfeiting coverage.
  - Production reporting: It is the producer's responsibility to provide the best available evidence of the quantity of harvested production and disposition of the crop. It is important to work with FSA to understand the deadlines for reporting such information and the kind of production records that FSA expects with respect to any particular crop. Records may include commercial receipts, settlement sheets, warehouse ledger sheets, pick records, or load summaries if the eligible crop was sold or otherwise disposed of through commercial channels; documentary evidence, such as contemporaneous measurements, truck scale tickets, pick records, and contemporaneous diaries, as necessary, to verify information provided by the producer if the eligible crop was stored, sold, fed to livestock, or otherwise disposed of other than through commercial channels.

Acreage and production reportings are used not only to verify the existence of a crop and record the number of covered acres, but to calculate approved yields, i.e. the expected production for a crop year.

- Notice of Loss and Application for payment—Form CCC-576
  - Filed within 60 days of last day of coverage
  - Provide acceptable appraisal information
  - Provide evidence of production
  - Note disposition of crop: marketable, unmarketable, salvaged, or used differently than intended

Endnotes: Non-insured Crop Assistance Program (NAP)

1. 7 U.S.C 1501 et seq. The Federal Crop Insurance Act is administered by the Risk Management Agency. More than 100 crops are insurable, the most common being corn, soybeans, rice, cotton. Eligibility for crop insurance can vary by state and within a state. You should consult FSA to find out which crops are not insurable in your area to determine whether NAP is available.
2. See: *https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/noninsured-crop-disaster-assistance/index* In addition, a useful tool exists to determine crop eligibility, premium payments and payments estimate for losses at: *http://fsa.usapas.com/NAP.aspx*
3. FSA has authority to determine which crops fall into this category.
4. See: *http://lrftool.sc.egov.usda.gov/DeterminationTool.aspx?fyYear=2016*
5. See: *http://fsa.usapas.com/NAP.aspx*

Chapter 12 Bankruptcy

Learn how to file. Chapter 12 allows "family farmers" and "family fisherman" to restructure their finances and avoid liquidation or foreclosure.

This article is written primarily for farmers and ranchers, in particular those farmers or ranchers who are facing financial distress. It is a summary of Chapter 12 bankruptcy. The intention is to distill the basics of Chapter 12 into useful, reliable, though necessarily general terms.[1]

It is worth noting a few things to start. The United States Constitution itself provides that there will be uniform bankruptcy laws. Chapter 12, the family farmer bankruptcy, was first brought into law in 1986, during the height of the farm crisis. It was not made a permanent part of the bankruptcy code until 2005. The purpose of this law, as often stated by the courts, is to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land.

PRELIMINARIES

Let's get a handle on a few basic bankruptcy terms.

Bankruptcy Petition—This is the filing in a bankruptcy court that begins a bankruptcy case. In bankruptcy, many things are defined according to whether they happened or arose before the petition was filed (pre-petition) or afterwards (post-petition). The power of a bankruptcy in many respects extends only over pre-petition matters.

Debtor—The person in bankruptcy, whether an individual or an entity, such as a corporation.

Bankruptcy estate—Property which the debtor owns or has an interest in as of the date the petition is filed. The estate also sometimes includes property that is acquired after the bankruptcy is filed.

Claims—A right to payment. We speak of creditors of the debtor as having claims. In general there are three types of claims in bankruptcy, a secured claim, an unsecured claim and a priority claim. A secured claim is one which is secured by a lien on property of the bankruptcy estate, whether real property or personal property. An unsecured claim is one that is not secured by a lien on property, that has no collateral underlying it, e.g. many medical debts, credit card debts, and open account purchases, etc. A priority claim is one that is given special status under the bankruptcy laws, such as certain claims for taxes, child support, alimony and the costs of the bankruptcy. In general, priority claims have to be paid in full. The treatment of a claim in bankruptcy, i.e. how much of the claim gets paid and under what terms, is often determined by which of these three types of claims it is.

1. Exemptions: Exemptions are property that the debtor gets to keep. Exemptions differ from state to state depending on whether or not a state has "opted out" of the federal bankruptcy exemptions. A majority of states have opted out and thus define for themselves what exemptions are available to a debtor in bankruptcy. Exemption planning is an important aspect of bankruptcy for debtors and often plays a role in determining what kind of bankruptcy a debtor files, i.e. a liquidation or a reorganization. Attached to this article is a listing of the Nebraska exemptions.[2]

2. Liquidation & reorganization: There are two basic types of bankruptcy: liquidation and reorganization. In a liquidation, also known as Chapter 7, the debtor seeks to wipe out debts in exchange for giving up non-exempt property. A trustee is appointed to collect and sell the debtor's assets and pay claims, according to status and priority. The debtor gets to keep exempt property. The goal a debtor seeks in Chapter 7 is the discharge, an order of the court freeing the debtor of personal liability for the pre-petition debts. Chapter 12 works differently; it is a reorganization bankruptcy. In a reorganization, the idea is that the debtor keeps possession of the property that he or she wants (or needs) to keep, and pays his or her debts under the terms and conditions of the bankruptcy. In a sense, you pay for what you keep, under bankruptcy terms, and surrender what you don't want to keep or cannot afford to keep. (A liquidation bankruptcy can sometimes be used as a reorganization, and a reorganization as a liquidation, but such bankruptcy strategies are beyond the scope of this article.)

3. Discharge: The goal of most bankruptcies is the discharge. This is the court order that makes legally binding many of the things that happened in a bankruptcy, e.g. the forgiveness of debts.

WHAT CHAPTER 12 DOES

It puts up a wall around your operation. This wall (the *automatic stay*) prevents creditors from taking action to collect debt, i.e. repossession of collateral, replevin, garnishments, foreclosure.

It stops lawsuits. It therefore gives the debtor a little breathing room, in which to comply with bankruptcy procedures and to propose a plan of reorganization.

Chapter 12 allows for some debts to be restructured. It allows for some debts to be written off, partially or entirely. It allows for the rejection of certain burdensome contracts and leases. It can erase liens on certain kinds of property. It can also assist in dealing with the tax debts that arise from the sale of farm assets, such as capital gain or recaptured depreciation.

The heart of Chapter 12 is the Chapter 12 Plan. Within the three months after a bankruptcy is filed, the farm debtor is required to file a plan of reorganization demonstrating how the farm or ranch intends feasibly to keep going. (This is a deadline that is sometimes extended.) What goes into this plan? The essence of the plan is the proposed treatment of creditors' claims. Let's take secured claims in a Chapter 12, for this is where one of the real strengths of Chapter 12 lies. Chapter 12 allows the debtor to restructure secured claims based on the nature and value of the collateral that secures the claim. A secured claim must be paid at least as much as the value of the collateral that secures the claim.[3] The value of collateral relative to the amount of the claim is thus an important determination in the bankruptcy. Once the amount of the secured claim is determined, the claim can be restructured. For example, a claim secured by land may be reamortized over 20-30 years and paid in installments that coincide with the availability of funds. A claim secured by machinery and equipment may be restructured over 3 to 7 years, sometimes longer, depending on the quality of the collateral. A claim secured by livestock may be restructured for payment over 5-10 years, maybe longer. In general, one of the goals for the debtor in Chapter 12 is to obtain as long a payout as possible, with no prepayment penalty, in order to lessen the burden on the cash flow. Another goal is to structure payments so that they come due when the debtor is most likely to have finds, often late winter for row crop farmers, but with livestock operations the timeframes differ. (Cash flows can differ by operation and the important thing is to understand the operation.) Claims are restructured (reamortized) using the bankruptcy rate of interest, which is Wall Street Journal Average National Prime + 2 points. That rate has rested at 5.25% for several years now.

Unsecured claims are treated according to something called the liquidation analysis, or best interests of creditors test. This is a hypothetical liquidation. The idea is this: if the debtor had filed under Chapter 7 instead of Chapter 12, what would the creditors likely have received on their claims: payment in full? fifty cents on the dollar? nothing? The liquidation analysis starts with the value of the property that the farm debtor owns. What is that value? (Value, as mentioned, is an important question in bankruptcy, and one which, in the absence of agreement among the parties, can sometimes require an appraisal.) Once a value is determined, certain things are subtracted (deducted) from that value: the amount of the secured claims, the debtor's exemptions, and the hypothetical costs of sale of the assets, including tax costs, which the debtor would incur in a liquidation of assets. Once these items are subtracted, any amount that remains in the value of the estate property, if anything, is the bankruptcy equity, or the amount available to be paid pro rata to unsecured creditors. The amount unsecured creditors must be paid can range from nothing to payment-in-full; it depends on the equity, which in turn depends on the value of the farm debtor's property.

Whatever the amount that has to be paid to unsecured creditors, it is typically paid over the term of the Chapter 12 Plan, usually three years, and usually with very little, if any, interest. If the unsecured creditors or the trustee object to treatment of the unsecured claims, then the debtor must devote disposable income for the three years of the plan to payment of those claims. However, there is often very little disposable income during the period of the plan, for disposable income is income net of the amounts necessary for support of the debtor and his or her dependents and for continuation of the farming business.

Priority claims are those claims that in general must be paid in full, regardless of the security position of the claim. Priority claims are typically paid within the term of the plan or, for child support and alimony, in accordance with court orders. Taxes are often priority claims, requiring payment over the term of the plan. Significant delinquent taxes can create a fatal cash flow burden to the

reorganization. Sometimes tax claims are not priority claims but general unsecured claims and are paid or not according to the best interests of creditors (liquidation analysis) test. For example, taxes that were first due and owing more than three years before the bankruptcy was filed, and for which the proper tax return was timely filed, can typically be treated as general and not priority unsecured claims. In Chapter 12, and Chapter 12 only, certain tax claims arising from the pre-petition sale of farm assets, such as land or breeding livestock or machinery & equipment, can be treated as general unsecured claims and discharged even where not paid in full. For example, if a farmer sells land or machinery and equipment in the year before the bankruptcy filing, perhaps under pressure from a creditor, and capital gain or other income tax is due as a result of that sale, there is a special Chapter 12 provision which gives the farm debtor the power to treat that tax claim as a general unsecured claim, and not as a priority claim, which means that the tax claim may not have to be paid in full, or, perhaps, at all, before it is finally legally discharged.

Executory contract: This is a term for a contractual obligation that has not been completed by the parties. For example, the farm debtor may have entered into a contract for the delivery of grain at a certain price, i.e. a forward contract. If this contract price is lower than the current market price, the farm debtor will generally want to reject this contract, in order to be able to sell grain for a higher price. Conversely, if the debtor has forward contracts at a good price relative to the current market, he or she will want to assume those contracts. Equipment leases and some FSA programs are other types of executory contracts, which may be assumed or rejected. In the current volatility of farm economics, the power to assume or reject contracts can be a significant consideration in a bankruptcy analysis.

One problematic area of executory contracts for Chapter 12 debtors lies in land leases, i.e. where the farm debtor is renting ground from a third-party landowner. In order to keep that lease, to continue to be able to farm the rented ground, the farmer must be current on rental payments and able in general to make rent payments as they come due. If the farm debtor is in arrears on the rent payments, he or she must be able to cure that arrearage, i.e. come up with the money to pay the overdue rent, promptly. There is, of course, no guarantee that a landowner will continue to rent to the farmer in bankruptcy in subsequent years. Consequently, farmers who rent much or all of their land can be more vulnerable in Chapter 12 than those farmers who own all or most of their ground.

Financing: How does one operate in a Chapter 12? Farmers typically borrow money every year in order to farm. Livestock operations also typically borrow money in order to keep operating, though this is perhaps less true of ranching operations. Such operating money is often structured as an annually payable operating line of credit. Generally (though not invariably) the farm debtor's lender will be reluctant to continue loaning money to a farm customer who has filed for (and is in) bankruptcy. Indeed, it may be pressure from that very farm lender that prompted the bankruptcy filing. So where does the necessary operating money come from? In general, one of two places: post-petition financing or use of cash collateral. Let's take these one at time.

Post-petition financing is a phrase that most commonly describes crop financing. If a farmer files bankruptcy before a crop is planted, the lien on that crop (if one existed, and it often does) is cut off. This means that the farmer has a new, prospective crop that can be pledged as collateral to a party that is willing to loan operating funds to the farm debtor. Such financing typically gives the new lender a super-priority lien on the crop, an assignment of crop insurance proceeds and an assignment of FSA program payments. It tends to be a fairly secure position. The question always is whether or not it is secure enough to overcome most lenders' reluctance to loan money "into a bankruptcy." Sometimes a friend or family member of the debtor, if able, will step in to provide bankruptcy financing under a court ordered super-priority position.

Livestock, as opposed to crop, financing is in general more difficult to obtain, in that pre-petition liens on livestock and their offspring are often not cut off by the bankruptcy filing. This brings us to the other possible source of post-petition operating money, the use of cash collateral, or operating under one's own steam. A farm debtor under certain circumstances may be able to sell grain, livestock, or other collateral assets and use the proceeds to operate on. This use of cash collateral (remember, when collateral is sold the lien usually attaches to the proceeds of the collateral as well) may be obtained either by agreement with the secured creditor or through order of the bankruptcy court.

Understanding and forecasting the need for—and source of - operating money is a critical part of pre-petition bankruptcy analysis. It can make all the difference to bankruptcy success or failure.

WHAT CHAPTER 12 REQUIRES: ELIGIBILITY

A person must be eligible to file for Chapter 12. This means in essence that a Chapter 12 debtor must qualify as a farmer under the Bankruptcy Code definition of family farmer. That definition is made up of two general parts: debt limits and income requirements. In addition to these two requirements, the debtor must be *engaged in* a farming or ranching business. The test for eligibility is meant to restrict use of Chapter 12 only to those persons who meet the definition of family farmer.

Engaged in a Farming Operation: This is a fairly straight forward requirement. Most activities that one would commonly think of as constituting farming or ranching qualify as engagement. Issues can arise where a farmer or rancher has discontinued an operation for financial reasons, e.g. rented out assets and taken an off-farm job. Issues can also arise in the use of certain entities.

Debt Test: A person to be eligible for Chapter 12 cannot have more than $4,031,575 of debt.[4] At least 50% of this debt had to have arisen as part of the farming operation, i.e. at least 50% of total debt must be farm debt. (There is a little flexibility in these figures, as the debt on a personal residence may be excluded from the test in certain circumstances. There have also been significant court decisions to provide guidance into what exactly qualifies as farm debt.)

Income Test: There are two ways to meet this test. More than half of a person's income must have come from farming in the taxable year preceding the year the bankruptcy is filed. If this test does not work for eligibility (some farm and ranch families may have taken on off-farm work and rented out their assets in order to keep going), the alternative test is that at least half of the income for the second and third years preceding the year of filing needs to have come from farming. So, for example, if a bankruptcy is filed in 2016, at least half of the income from 2015 needs to have come from farming. If it is less than half for 2015, one can then look at the prior years' income, that is 2014 and 2013, and if *in each of these years* the farm income exceeded the non-farm income, the income test is met.

What is meant by the term farm income? In general, it is the farm income reported on the top half of the Schedule F to the 1040, or gross farm income. Cash rents do not typically qualify as farm income. There have been numerous disputes over the years as to whether or not income from certain kinds of activities constitutes farm income. Discussion of this case law is beyond the scope of this article.

If the farmer under Chapter 12 is a corporation, LLC or partnership, the income and debt limit tests for eligibility are the same. Additionally, eligibility requires that one family (including relatives) owns more than half of the entity, that the family conduct the operation, and that more than 80% of the entity's assets be related to the farming operation.

HOW DOES CHAPTER 12 WORK

Most of the work of a Chapter 12 occurs in the months after the petition is filed. As mentioned, the petition commences a Chapter 12 bankruptcy case. The filing fee, paid with the petition or, if allowed, in installments, is $275. A complete list of creditors with addresses must be filed with the petition. In addition, the debtor is required to file, either with the petition or within two weeks of the petition, a set of bankruptcy schedules and statement of financial affairs. There is also a requirement to obtain a certificate of consumer credit counseling, even though a Chapter 12 is a business bankruptcy. This requirement can be quite simply fulfilled on line, by telephone or in person with nominal cost, i.e. $25-$40. In general, these documents paint a present picture of the financial situation of the debtor, including a description of assets, liabilities, exemptions, income, expenditures, executory contracts, and recent financial or property transactions.

Most Chapter 12 debtors will only attend in person one event related to their bankruptcy, which is the 341 Meeting of Creditors. At this meeting the debtor will answer questions related to the bankruptcy estate. Sometimes creditors attend the Meeting of Creditors, sometimes it is only the debtor, with counsel, and the Chapter 12 Trustee.

The main work of the Chapter 12, after preparing the Schedules and Statement of Financial Affairs, consists of negotiating with creditors and putting together a Chapter 12 Plan. Once a Plan is confirmed by the Bankruptcy Court, either with the agreement of the creditors or over their objections by order of the Court, the Chapter 12 Debtor must fulfill the Plan. This often essentially boils down to making the payments as required by the Plan (payments are often made through the Chapter 12 Trustee's office, though not always), and complying with

the Chapter 12 Trustee's requests for information. The plan typically runs for three years, after which, if all payments have been made, the discharge order is obtained and the bankruptcy ends. The claims that were restructured over a period of years beyond the three years of the plan (e.g. land, machinery or livestock debt) continue on as restructured.

SOME WARNINGS

Bankruptcy doesn't create money, though it can sometimes free up the use of funds that come from the sale of collateral. It costs money to file and stay in bankruptcy. In some bankruptcies the debtor has to pay not only his or her own lawyer's fees, but the lawyer fees incurred by secured creditors. There are typically trustee fees to be paid as well. A bankruptcy, once filed, will remain on a person's credit report for ten years. In certain agricultural enterprises, where reputation and relationships are critically important to maintaining customers or landlords, it can be problematic to hold on to those relationships, even though the bankruptcy filing may not harm them or put them at risk in any way.

FINAL NOTE

Chapter 12 can be a powerful tool. It is usually that last tool that a farmer or rancher in financial distress reaches for. If time and circumstances permit, it is always better to do a careful analysis of the bankruptcy option before a bankruptcy is filed. The best approach is to analyze with respect to the cash flow: what terms of debt repayment can a bankruptcy make possible, i.e. how can debt be restructured and/or written off, and can the farm or ranch meet those terms? The reorganization bankruptcy may be the last chance to keep going. Better to go into it with some sense of whether or not it can work for you.

Endnotes: Chapter 12 Bankruptcy

1 Chapter 12 is also available to family fisherman, as defined by the Bankruptcy Code, and though much of the material in this article is relevant to a bankruptcy analysis for such debtors, there are differences that are not discussed.

2 For information on exemptions in various states, see *http://www.nolo.com/legal-encyclopedia/bankruptcy-exemptions-state*.

3 If the collateral which secures a claim is worth less than the amount of the claim, the amount in excess of the value of the collateral becomes an unsecured claim, and is treated as such under the plan.

4 This figure is subject to change every three years.

Agricultural Access to Surface and Ground Water Under Nebraska Law: An Overview

Learn the laws governing access to surface and ground water for agricultural purposes in Nebraska.*

** For additional information about Nebraska water law, contact Joe Hawbaker, Hawbaker Law Office, Omaha, NE, a contracted attorney of Legal Aid of Nebraska.*

This is a summary section of a longer treatment of Nebraska water law from an agricultural perspective. That full discussion, like a half-mile center pivot system, covers a lot of ground. Accordingly, for convenience, this selection summarizes (1) Nebraska's regulatory system, and (2) the key features of Nebraska surface and ground water law. Both are reasonably susceptible to general description. Indeed, there are core features to both with which all producers should be familiar. The problem, though, is that the devil lurks in the details of Nebraska water law and its administration.

THE REGULATORY SYSTEM

The Nebraska Department of Natural Resources ("DNR") regulates and administers agricultural access to surface waters.[1] Meanwhile, a producer's development and use of ground water are subject to control at a more local level, by the state's twenty-three natural resource districts ("NRDs").[2] The DNR, though, plays an important role in the administration and regulation of ground water.[3] Similarly, the NRDs have a growing part in surface water administration, especially with respect to recreational uses and environmental objectives. As most irrigators are likely to know, the DNR and the NRDs are also engaged in a coordinated effort jointly to manage hydrologically connected surface and ground water supplies.[4]

From an agricultural perspective, the DNR's core tasks may be summarized as follows: (1) administer the surface water permit system in effect since 1895;[5] (2) oversee the registration, location and spacing of ground water irrigation wells;[6] (3) regulate the transfers of ground water to agricultural production units elsewhere in Nebraska[7] or in adjoining states;[8] and (4) coordinate and lead an ongoing joint effort with the NRDs to manage hydrologically connected surface and ground water, on a location-specific basis.[9]

The core tasks of the NRDs are as follows: (1) starting in 1975, coordinate with the DNR in designating and managing specific localities ("control areas");[10] limit irrigation well construction[11] as well as groundwater consumption in such control areas,[12] as well as develop rules and regulation to control surface runoff of groundwater used for irrigation, coupled with the power to issue cease-and-desist orders to halt violations;[13] (2) starting in 1982, develop ground water management plans, subject to DNR review and approval;[14] designate ground water management areas and impose controls as deemed necessary by the NRD to protect ground water supplies and avoid disputes between surface water appropriators and ground water users;[15] (3) starting in 2004, develop IMP's for hydrologically connected surface water and ground water, [16] where designated by the DNR as fully or over-appropriated;[17] and (4) starting in 2010, develop voluntary IMP's.[18]

The Law

1. **Surface Waters—** The law of surface waters in Nebraska may fairly be summarized as the common law of England, except as: (a) modified or abrogated by state statute or constitutional provision, and (b) modified or supplemented by the Nebraska Supreme Court. Although not entirely free from doubt, current Nebraska surface law may be generally described as follows:

   A. Diffused Surface Waters: Diffused surface waters are generally, but not exclusively, the water that immediately accumulates and drains across the land as a result of precipitation.[19] Diffused surface waters historically have been referred to as "surface waters."[20] Current law governing diffused surface water generally conforms to the common law of England,[21] meaning among other things that diffused surface water is the property of the landowner.[22] That said, the legislature declared "water" public property in 2003.[23] The effect of this declaration on private ownership of diffused surface water while it is present on a producer's property has yet to be addressed by the Nebraska Supreme Court.

   B. Confined Surface Waters: For regulatory purposes, confined surface waters are, in general, waters that flow perennially—or at least regularly for some part of the year—in the state's creeks, streams and rivers.[24] The term also encompasses natural lakes.[25]

   Unlike diffused surface water, confined surface waters have never been the property of landowners under Nebraska law (even though they likely own the land beneath such a watercourse as it crosses their ranch or farm; or to the center of the watercourse, referred to as the thread, should it form the border of their lands).[26] Instead, at common law, each landowner whose property touched such a body of water possesses the same and equal right to make reasonable use the water, as it flowed past or through his or her property,[27] and were each entitled to the free flow of water in its natural state, undiminished in quantity and unimpaired in quality by upstream landowners.[28] Such rights are known as riparian rights. They attach to and are limited to the riparian lands bordering the watercourse.[29]

Making a long story short, while limited irrigation is compatible with the riparian rights doctrine,[30] large-scale diversions and concomitant significant reductions in stream flow are not.[31] As the profusion of irrigation districts and canals in Nebraska indicate, there was a major change in the laws governing confined surface waters in Nebraska.

That seismic shift occurred April 4, 1895, with passage of Akers Law, a comprehensive irrigation code.[32] Akers Law established an application-and-permit system that allowed applicants—after obtaining the state's permission—to divert or otherwise appropriate confined surface waters for large-scale irrigation and other purposes,[33] for use on riparian as well as non-riparian lands.[34] Each such authorized allocation was subject to a beneficial use requirement[35] and closure based on seniority in time of shortage.[36] That seniority system was subject to a preferential use provision.[37] That statute also called for adjudication of preexisting diversions, to establish their seniority in times of shortage as well as their allotments of confined surface water.[38]

At the same time, Akers Law abolished riparian rights, prospectively.[39] Riparian rights that vested prior to April 4, 1895, however, survived.[40] Thus, unlike Nebraska's 1889 irrigation code,[41] as amended in 1893,[42] which abolished riparian rights in increasingly smaller streams, Akers Law survived constitutional challenge.[43] Vested riparian rights remain subject to enforcement today,[44] upon proof of vested rights status.[45] Further, in 1903, confined surface water appropriations in existence as of April 4, 1895 were adjudged vested common law rights by the Nebraska Supreme Court.[46] These preexisting appropriations—unlike those obtained pursuant to statutory permit—are not subject to the quantitative restrictions under Akers Law or later statutes or regulations.[47]

The core elements of Akers Law were elevated to constitutional status in 1920.[48] The permit system established by Akers Law remains the backbone of modern surface water regulation in Nebraska.[49] These permits generally run with the land serviced.[50] However, according to the DNR, they are not recorded with land deeds and do not transfer upon conveyance of the property. Instead, it is the obligation of the landowner(s) to inform the DNR of ownership changes.[51] While DNR has jurisdiction over the statutory permit system, riparian rights—unless previously adjudicated—are handled by the courts.[52] In other words, the DNR cannot issue closure notices to permittees based upon another user's riparian rights, unless the user's riparian rights have been adjudicated superior to the appropriator's permit rights.

C. Transported Waters: Irrigation districts and other providers generally obtain confined surface waters that their members or customers use pursuant to the 1895 permit system.[53] While the provider holds the permit, water rights generally attach to the land being serviced.[54] Subject to certain core statutory obligations and conditions,[55] producer water rights are generally governed by the provider's rules and regulations.

2. **Ground Water—**The law of ground water in Nebraska has grown increasingly complex. Our understanding of the law is as follows: the common law of England controls, except as modified by the Nebraska Supreme Court and the legislature. Thus, it appears that there is a common law right to extract ground water that runs with the land, but the exercise of that right must be in conformance with certain statutory requirements administered by the DNR, affecting the registration, location and spacing of irrigation wells. Further, that right is subject to more stringent controls and restrictions at the hands of the NRDs. The extent to which NRD restrictions and controls amount to the impairment or confiscation of vested common law property rights remains open, despite what appears to be judicial deference to heightened regulation of ground water. Indeed, after nearly 120 years of judicial and legislative attention, the law governing "ownership" of ground water appears turbid, in both senses of the word: muddled and muddy. As discussed below, there are landowner property rights in ground water, recognized both by statute and case law. But their parameters are in flux.

A. The Common Law Rule: The common law separated ground water into two categories: underground streams and percolating water.[56] All ground water was presumed to be percolating water.[57] If the underground water was flowing in a proven underground stream, it was subject to riparian rights doctrine.[58] Obviously, if proof of an underground stream failed, then the ground water was percolating

water. As such, it was deemed part of the property, in the same fashion as diffused surface water.[59] In short, unless a known underground stream was involved, at English common law the landowner was entitled to access and use the water beneath his or her property without restriction.[60] At the same time, a landowner had no claim against an adjacent owner whose ground water pumping operations were depleting the ground water beneath surrounding properties—the resulting depletion was known as *damnum absque injuria.*[61] In 1894, the Nebraska Supreme Court declared the English "absolute dominion" rule as too well established for dispute.[62]

In other words—and as repeatedly acknowledged by the Nebraska Supreme Court—at English common law a landowner was entitled to extract groundwater at his or her discretion without limitation, without regard to purpose, and without regard to the diminution or extinction of neighboring groundwater supplies. [63] It was not until 1933—long after most of the public domain was patented in private owners—that the Nebraska Supreme Court in dicta adopted the American rule of reasonable use, coupled with application of the correlative rights doctrine in time of groundwater scarcity.[64] As explained below, the overlying landowner not only retains his or her proprietary interest in the water with these modifications, but in fact receives additional protection of his or her property right.

B. Judicial Modification of the Common Law Rule: In *Olson v. City of Wahoo,* in the midst of an extraordinary drought that persisted for much of the 1930's,[65] the Nebraska Supreme Court unilaterally placed potential limits on a landowner's right to appropriate ground water.[66] First, it imposed a reasonable use and beneficial use requirement.[67] Although the Nebraska Supreme Court has repeatedly declared the reasonable use rule to be in effect in Nebraska,[68] the "rule" has yet to be applied to resolve a well interference dispute. In any event, the reasonable use rule, in a nutshell, enables an adjacent landowner whose ground water supply is adversely impacted by a neighbor's pumping to seek relief in court, to the extent the offending owner is applying water wastefully, or transporting it beyond the overlying lands.[69]

At the same time it proclaimed adherence to the reasonable use rule, the Nebraska Supreme Court adopted the correlative rights doctrine.[70] This doctrine, in essence, protects an overlying owner's right of appropriation when the underground source was insufficient to meet the needs of the overlying owners.[71] Under such circumstances, an owner is entitled to ask a court to regulate pumping activities so that his or her ground water is not exhausted or rendered inaccessible by another landowner's pumping operations.[72] In a word, the correlative rights doctrine addresses the chief criticism of English common law rule, by recognizing a legally protectable property interest in ground water so as to enable a landowner to prevent his or her supply from being drained by adjacent pumping operations.[73]

Like the reasonable use rule, the correlative rights doctrine has been repeatedly endorsed in principle by the Nebraska Supreme Court,[74] but not actually applied as a rule of decision. In a word, the Court's reasonable use rule and correlative rights doctrine, regardless of repetition, amounted to judicial dictum, but not law. That said the legislature adopted the reasonable use rule and correlative rights doctrine in 1982—but without defining either.[75] Like the legislature's claim of public ownership of ground water in 2003, the meaning and effect of the reasonable use rule and correlative rights doctrine in their statutory form have yet to be construed and applied by the Nebraska Supreme Court.

C. Statutory Considerations: In addition to the limitations on irrigation wells represented in theory by the reasonable use rule and correlative rights doctrine, the legislature in the late 1950s and early 1960s imposed registration, recording, location and spacing requirements, all administered by the DNR.[76] In 1975, a landowner's access to ground water became generally subject to administration by the local natural resource district, in accordance with the terms of the Ground Water Management Act ("GWMA"). [77]

The GWMA was amended and renamed the Ground Water Management and Protection Act ("GWMPA") in 1981, to reflect the inclusion of anti-pollution provisions.[78] It has since undergone repeated amendment, seemingly on an annual basis over the past two decades. The more important changes involve the expansion of NRD responsibilities and powers in controlling access and use of ground water, based upon DNR findings that river basins or portions thereof are fully or even over-appropriated.

Under current law, spacing and location requirements can be rendered more stringent by the local NRD. Further, NRDs are authorized to place quantitative restrictions on the amount of water extracted by an irrigation well, as well as limit the opportunity to access ground water to certain lands, banning new or replacement wells if lands were not irrigated within a certain time frame. Although such exercises of power by the NRDs have been challenged on constitutional grounds in two cases,[79] the cases fall short of squarely and decisively addressing the vested rights doctrine, as previously applied by the Nebraska Supreme Court in the context of surface water.

In analyzing property rights in ground water, consideration should be given to the Nebraska Supreme Court's treatment of riparian rights[80] and surface water appropriations[81] that pre-date Akers Law, namely, the moment when the legislature declared all "unappropriated waters" in Nebraska's natural streams to be public property,[82] or *publici juris.*[83]

Like statutory appropriations authorized pursuant to Akers Law,[84] these pre-existing riparian rights[85] and surface water appropriations[86] are vested common law property rights; as such, they are not only subject to enforcement, but constitutionally shielded from governmental impairment or confiscation without due process of law, including compensation.[87] Further, pre-Akers Law surface water appropriations—due to their status as vested common law property rights—are not subject to the quantitative limitations on water appropriations[88] set out in the 1895 Act[89] or subsequent legislation.[90]

At first glance, the implications as to ground-water irrigation wells and related acreages in operation before ground water was first declared "public property" in 2003 by the legislature appear significant. The vested rights analysis immunizing pre-Akers Law surface appropriations from subsequent quantitative restrictions applies with equal if not greater force to irrigation wells and related acres in service prior to the statutory authorization, if not NRD imposition, of quantitative restrictions on ground water pumping.[91] This is so because the right to appropriate ground water has been recognized and treated as a private property right of the surface owner, both before and after passage of the GWMPA.[92]

In fact, the correlative rights doctrine is premised upon each overlying landowner possessing a legally enforceable property interest in the underlying ground water.[93] Further, it must also be noted that the Unicameral, when it enacted the 1963 Municipal and Rural Domestic Ground Water Transfers Permit Act[94] authorizing public authorities to drill, extract and transport pump ground water from private lands to remote locations in violation of common law[95]—also expressly recognized the common law "…right of an owner of an estate or interest in land to recover damage for any injury done to his or her land or to any water rights appurtenant thereto." *See* 46 Neb. Rev. Stat. § 46-547 (Reissue 2010).

Accordingly, producers and their counsel may wish to monitor key dates and events involving local ground water controls, including expiration of the local NRDs current ground water allocations, if any, as well as the expiration of the local moratorium on well drilling, if any, plus any and all hearings to renew, extend or modify such restrictions, together with hearings on the local watershed's appropriated status. *Parties inclined to test their rights and/or challenge onerous rules and regulations, determinations, and/or orders must give cautious and careful attention to the forums, procedures and time frames for seeking relief.*

D. The Ownership Issue: The case law in Nebraska and elsewhere applying the vested rights doctrine tends to suggest that landowners have a vested right to access ground water, based on the law in effect at the time their lands were first patented.[96] By analogy and necessary implication, the English common law right vested upon severance of the land from the public domain, in the same fashion as riparian rights. On this issue, it is vital to recognize that none of the patents originally issued in Nebraska were subject to the Desert land Act of 1877,[97] which severed surface and ground water from the land itself for future conveyancing purposes. Similarly, wells in operation prior to passage to the Ground Water Management Act in 1975, if not under later amendments, arguably are vested rights not subject to quantity of water restrictions imposed after they were first put in use.[98] In short, while the issue is not free from doubt, such restrictions

may constitute government action for which just and adequate compensation may be owed, pursuant to the Nebraska and federal constitutions.

Patent analysis calls for sophisticated factual and legal research and analysis, as the correct legal result requires (thorough) historical investigation, from a factual as well as federal statutory standpoint; it also requires (acute) familiarity with the case law governing construction of patents, not to mention U.S. Supreme Court precedents addressing the role of state law in determining water rights.

FINAL COMMENT

As stated, this summary is part of a longer discussion and analysis of Nebraska water law. The longer treatment includes dewtailed discussions of the bifurcated regulatory system, the sources of agricultural water, and further in depth discussion of surface and groundwater rights in Nebraska, including recent legislative efforts and the Spencer Dam saga. There appears to be little, if anything, simple when it comes to determining and enforcing an agricultural producer's property rights with respect to surface or ground water for irrigation purposes. We finish where we began—there is no substitute for a consultation with experienced counsel in evaluating the existence, scope and obstacles to enforcement of such rights.

Endnotes: Agricultural Access to Surface and Ground Water Under Nebraska Law: An Overview

1 *See* Neb. Rev. Stat. § 61-206(1) (Reissue 2009). The DNR assumed the RESponsibilities and functions formerly exercised by the Department of Water Resources and the Nebraska Natural Resources Commission. *See* Neb. Rev. Stat. § 61 -205 (Reissue 2009). The task of administering Nebraska's surface water resources was first performed by the State Irrigation Board created in 1895. From 1911 to 1919, the permit system was administered by the State Board of Irrigation, Water Power and Drainage. In 1919, the agency's name was changed to Department of Public Works; and again in 1933, to Department of Roads and Irrigation. In 1957, the legislature transferred the powers and functions exercised by the Department of Roads and Irrigation to the newly created Department of Water Resources. In 2000, the statutory responsibilities of the Department of Water Resources were transferred to the DNR. *See Nebraska Blue Book, 2014-2015,* pp. 558-56; *See also* ***http://www.nebraskahistory.org/libarch/research/public/state_finding_aids/water_resources_dept.pdf***.

2 Neb. Rev. Stat. § 46-702 (2010) ("The Legislature also finds that natural resources districts have the legal authority to regulate certain activities and, except as otherwise specifically provided by statute, as local entities are the preferred regulators of activities which may contribute to ground water depletion"); *see also* Neb. Rev. Stat. § 2-3229 (Reissue 2012) (twelve purposes of NRD's include "the development, management, utilization, and conservation of ground water and surface water"). Take note, though, that such provisions do not confer automatic standing upon the NRD's to represent the interests of constituents in litigation. *Metropolitan Utilities Dist. v. Twin Platte Natural Resources Dist.,* 250 Neb. 442, 550 N.W.2d 907 (1996) (Twin Platte NRD lacked standing to object to MUD's proposed appropriation of Platte river water to recharge its ground water wells).

3 For a general discussion of the DNR's role as to Nebraska ground water, *Management of Hydrologically Connected Surface Water an Ground Water: The Problem of Sustainable Use,* 54 RMMLF-INST 14-1 (2008), footnotes 90-107 and corresponding text (electronic version; pages unnumbered).

4 For further discussion, *see* C. Hoffman and S. Zellmer, *Assessing Institutional Ability to Support Adaptive, Integrated Water Resources Management,* 91 Neb. L. Rev. 805, 815-821 (2013); *and* M. Kelly, *Nebraska's Evolving Water law: Overview of Challenges and Opportunities,* Platte Institute Policy Study (September 2010); *see also* S.D. Mossman, *"Whiskey is for Drinkin' but Water is for Fightin' About: A First-Hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L.B. 108,* 30 Creighton L. Rev. 67 (1996).
The Unicameral's efforts at regulating hydrologically- connected water resources are also addressed in J. D. Aiken, *The Western Common Law of Tributary Water: Implications for Nebraska,* 83 Neb. L. Rev. 541 (2004) and J.D. Aiken, *Hydrologically-Connected Ground Water, Section 858 and the Spear T Decision,* 84 Neb. L. Rev. 962 (2006); and D. Blankenau, T. Wilmoth & J. Broom, *Spear T. Ranch v. Knaub: The Reincarnation of Riparianism in Nebraska Law,* 38 Creighton L. Rev. 1203 (2005).

5 *See* in general Neb. Rev. Stat. §§ 46-201 to 46-207 (Reissue 2010) (core principles of prior appropriation permit system); Sections 46-226 to 46-231 (adjudications of water rights, including termination procedures); *and* Sections 46-233 to 46-243 (appropriation application process); *see also* Sections 46-244 to 46-273 (rules governing

transported water); and 46-2,120 to 46-2,130 (transfers of appropriations by irrigation districts and canal companies). The DNR other surface water regulatory responsibilities include oversight of inter-basin and intra-basin transfers of surface water, the use of surface water for underground storage, and instream appropriations. *See* Sections 46-288 to 46-294.05; Sections 46-295 to 46-2,106; and 46-2,107 to 46-2,119, respectively.

6 Neb. Rev. Stat. §§ 46-601 through 46-611 (2010).

7 Neb. Rev. Stat. § 46-691 (Reissue 2010).

8 Neb. Rev. Stat. § 46-613.01 (Reissue 2010).

9 Neb. Rev. Stat. §§ 46-713 to 46-718; and § 46-720 (Reissue 2010). A dispute between the DNR and a NRD is heard by an Interrelated Water Review Board specially empaneled to resolve the disagreement by the Governor. Neb. Rev. Stat. §§ 46-719 (Reissue 2010).

10 Laws 1975, LB 577, §§ 2(9) and 3.

11 Laws 1975, LB 577, §§ 4-7.

12 Laws 1975, LB 577, §§ 10-14.

13 LB 577, § 9, now codified as amended at Neb. Rev. Stat. § 46-708 (Reissue 2010).

14 Laws 1982, LB 375, §§ 3 and 4, now codified at Neb. Rev. Stat. §§ 46-709 and 46-710 (Reissue 2010); *see also* Section 46-711 (DNR review requirements).

15 Neb. Rev. Stat. § 46-712 (reissue 2010).

16 Laws 2004, LB 962, §54, now codified at Neb. Rev. Stat. § 46-714 (Reissue 2010).

17 Laws 2004, LB 962, § 53, now codified at Neb. Rev. Stat. § 46-713 (Reissue 2010). Such a designation triggers, in effect, a prohibition on further development of surface and ground water resources in the affected area. *See* Neb. Rev. Stat. § 46-714 (Reissue 2010).

18 Laws 2010, LB 764, § 1, now codified at Neb. Rev. Stat.§ 46-715(1)(b) (Reissue 2010).

19 *See* Restatement (Second) of Torts, § 846, comment (b) (1979).

20 *See for example, Nichol v. Yocum,* 173 Neb. 298, 303, 113 N.W.2d 195, 198-199 (1962) (seminal case in Nebraska Supreme Court; reviews and applies common law rules governing "surface waters" to "diffused surface waters").

21 The doctrine of the common law in regard to surface water is in force and prevails in this state as a general rule." *Town v. Missouri Pac. Ry. Co.,* 50 Neb. 768, 774, 70 N.W. 402, 404 (1897); *accord, Nichol v. Yocum, supra,* 173 Neb. at 303, 113 N.W.2d at 198.

22 *Town v. Missouri Pac. Ry. Co., supra,* 50 Neb. at 774, 70 N. W. at 404; *Nichol v. Yocum, supra,* Neb. at 307, 113 N.W.2d at 201; *see also Jameson v. Nelson,* 211 Neb. 259, 264, 318 N.W.2d 259, 263 (1982).

23 Laws 2003, LB 619, § 10, p. 1117, now codified at Neb. Rev. Stat. § 46-702 (Reissue 2010).

24 *Harnsberger & Thorson,* pp. 10-11.

25 *Id*.

26 River beds in Nebraska are as effectually the subject of private ownership as other property, except that, in case of navigable streams, there is an easement for public navigation. *Theis v. Platte Valley Public Power & Irr. Dist.,* 137 Neb. 344, 346, 289 N.W. 386, 387-388 (1939), *citing Kinkead v. Turgeon,*74 Neb. 573, 109 N.W. 744, 748 (1906) (applying common law of England rule, per adoption statute, in holding that riparian lands along Missouri River extended to the river's thread, subject to a public easement of navigation). The rule in Nebraska is as follows:

> Under Nebraska law, title to riparian land, that is, land with water flowing over it or along its border, runs to the thread, or center, of the contiguous stream. *See Cofer v. Kuhlman,* 214 Neb. 341, 333 N.W.2d 905 (1983). *See, also, Saunders County v. Metropolitan Utilities Dist.-A,* 11 Neb. App. 138, 645 N.W.2d 805 (2002). The thread of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow. *Anderson v. Cumaston,* 258 Neb. 891, 606 N.W.2d 817 (2000). The thread of the stream is that portion of a waterway which would be the last to dry up. *Id.* Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel. *Zeimba v. Zeller,* 165 Neb. 419, 86 N.W.2d 190 (1957).

Madson v. TBT Ltd. Liability Co., 12 Neb. App. 773, 784-785, 686 N.W.2d 85, 95 (2004).

27 The common law right of reasonable use runs with the land itself. *See Crawford Co. v. Hathaway,* 67 Neb. 325, 342, 93 N.W. 781, 787 (1903) ("'At common law every riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of running streams through his land, undiminished in quantity and unimpaired in quality, although all have the right to the reasonable use thereof for the ordinary purposes of life...and any unlawful diversion thereof is an actionable wrong'").

28 The Nebraska Supreme Court originally embraced the "natural flow" English common law doctrine of riparian rights *in its purest form*: "Every owner of land through which a stream flows is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion or pollution. The right extends to quality as well as quantity of the water." *Barton v. Union Cattle Co.,* 28 Neb. 350, 356, 44 N.W. 454, 455 (1889) (downstream riparian proprietor on Sarpy Creek entitled to abatement of pollution caused by upstream cattle operation); *accord, Plattsmouth Water Co. v. Smith,* 57 Neb. 579, 584, 78 N.W. 275, 277 (1899) water company operating at mouth of Platte River "entitled to the usual, natural, regular quantity of the water in said stream flow uninterruptedly, and without material diminution or alteration, through the channel to or past its property;" injunction to prevent upstream riparian from altering flow granted); and *In re Metropolitan Utilities District of Omaha,* 179 Neb. 783, 797, 140 N.W.2d 626, 635 (1966) ("At common law a riparian landowner is entitled to have the stream flow through or by his land, essentially undiminished in quantity and unimpaired in quality, and he may make whatever domestic use of the water he desires and he does not forfeit those rights by nonuser").

29 *Osterman v. Central Nebraska Public Power & Irr. Dist.,* 131 Neb. 356, 366, 268 N.W. 334, 339 (1936).

30 *Meng v. Coffee,* 67 Neb. 500, 503, 93 N.W. 713, 714 (1903), *appeal after remand, Brewster v. Meng,* 76 Neb. 560, 107 N.W. 752 (1906).

31 *Id*.

32 *See* Laws 1895, ch. 93a—*Water Rights and Irrigation; see also* 7 Neb. Comp. Stat. (1895), §§ 5440-5526, pp. 1101-1133 (hereinafter "Akers Law" or "1895 Act").

Akers Law *inter alia* established a "state board of irrigation" to prioritize pre-existing surface water appropriations, beginning with "the streams most used for irrigation." *See* Ch. 93a, §§ 1 -28; *see in particular* §§ 5 and 16. The statute further declared "the water of every natural stream not heretofore appropriated" to be "property of the public," "subject to appropriation," and that "the right to divert unappropriated waters for a beneficial use shall never be denied." *See* Ch. 93a, §§ 42-43. All *future* appropriations were subject to prior review and approval by the board. Ch. 93a, § 28. The board was authorized to award applicants less water than requested, but obliged to approve statutorily-compliant applications, subject to two conditions: (1) unappropriated water remains available in the applicant's proposed source of supply; and (2) the proposed "appropriation is not otherwise

detrimental to the public welfare." *Id.* The legislation is named after it chief sponsor, R.C. Akers, an irrigator himself, who later served on the board. *See* A.G. Glees and P.G. Longo, *An Overview of Nebraska Water Law, appearing in* A.G. Gless, ed., *The History of Nebraska Law* (Ohio State Press 2008), p. 91.

The constitutionality of the state irrigation board's quasi-judicial role and powers were affirmed by the Nebraska Supreme Court in 1903. *See Crawford Co. v. Hathaway,* 67 Neb. 325, 93 N.W. 781 (1903), *overruled in part on other grounds, Wasserburger v. Coffee,* 180 Neb. 149, 141 N.W.2d 738 (1966). The constitutionality of the appropriation permit system was upheld in *Farmers' Irr. Dist. v. Frank,* 72 Neb. 136, 100 N.W. 286 (1904).

33 Laws 1895, ch. 93a, § 28, pp. 252-254. The application process is now codified as amended at Neb. Rev. Stat. § 46-235 (Reissue 2010).

34 *In re Application A-16642,* 236 Neb. 671, 683-684, 463 N.W.2d 591, 601 (1990).

35 Laws 1895, ch. 93a, § 16, p. 248 ("All appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases"). The beneficial use requirement is now codified as amended at Neb. Rev. Stat. § 46-229 (Reissue 2010).

36 Laws 1895, ch. 93a, §§ 20, 35 and 43, pp. 248, 255-256 and 260, respectively.

37 Laws 1895, ch. 93a, § 43, p. 260. The preferential use provision is now codified as amended at Neb. Rev. Stat. § 46-204 (Reissue 2010). The proposition that a senior appropriator's appropriation was subject to condemnation by a junior appropriator as a precondition to enforcement of a superior preference was not set out in Akers Law. It was apparently first introduced by the Nebraska Supreme Court in *In re Kearney Water & Electric Powers Co.,* 97 Neb. 139, 146-147, 149 N.W. 363, 366-367 (1914) (power appropriation undertaken pursuant to 1877 irrigation act was protectable vested right). However, the condemnation precondition was specified in the 1920 amendments elevating the surface prior appropriation scheme under Akers Law to constitutional status. *See* Neb. Const., Art. XV, §§ 4-7; *see in particular* Section 6 ("Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user"); *see also* Neb. Rev. Stat. §§ 70-668 and 70-669 (Reissue 2009), as amended by Laws 2016, LB 1038, §§ 13 and 14, effective July 21, 2016.

38 Laws 1895, Ch. 93a, §§ 1-28; *see in particular* §§ 5 and 16.

39 *Crawford Co. v. Hathaway,* 67 Neb. 325, 342, 93 N.W. 781, 786-787 (1903), *overruled on other grounds*, *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966) (effective date of Akers Law rather than 1889 St. Raynor Act established cut-off date for further vesting of riparian rights).

40 *Id*.

41 Laws 1889, c. 28, Art. 1, § 1, p. 503.

42 Laws 1893, c. 40, § 1, pp. 377-378.

43 *See Clark v. Cambridge & A. Irr. & Imp. Co.,* 45 Neb. 798, 807, 64 N.W. 239, 241 (1895) ("The provision of Act March 27, 1889, as amended by Act 1893, abolishing riparian rights in all streams over 20 feet in width, without making compensation to the riparian owners, is invalid"); *see also Crawford Co. v. Hathaway, supra,* 67 Neb. at 342, 93 N.W. at 786 (favorable discussion of *Clark* ruling).

44 In addition to the *Clark* and *Crawford Co.* decisions, parties interested in vested rights doctrine in general and riparian rights in particular may find the following decisions helpful: *Slattery v. Harley,* 58 Neb. 575, 79 N.W. 151, 152 (1899); *Meng v. Coffee,* 67 Neb. 500, 503, 93 N.W. 713, 714 (1903), *appeal after remand, Brewster v. Meng,* 76 Neb. 560, 107 N.W. 752 (1906*); McCook Irrigation & Water Power Co. v. Crews*, 70 Neb. 109, 96 N.W. 996 (1903), *reversed on rehearing,* 70 Neb. 115, 102 Neb. 249 (1905); *Cline v. Stock*, 71 Neb. 70, 98 N.W. 454 (1904), *prior opinion vacated and judgment affirmed,* 71 Neb. 79, 102 N.W. 265 (1905); *In re Platte River Public Power & irrigation Dist.,* 132 Neb. 292, 271 N.W. 864 (1937), *on rehearing,* 133 Neb. 420, 275 N.W. 593 (1937); *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966); *see also Brummond v. Vogel,* 184 Neb. 415, 168 N.W.2d 24 (1969) (court enforced riparian stream rights without proof of pre-Akers Law riparian status); and *Koch v. Aupperle,* 274 Neb. 52, 737 N.W.2d 869 (2007) *overruling Brummond v. Vogel,* 184 Neb. 415, 168 N.W.2d 24 (1969) (proof of pre-Akers Law riparian status required to assert such rights).

45 *Wasserburger v. Coffee*, *supra,* 180 Neb. at 158, 141 N.W.2d at 745:

> In such cases land has a riparian status only if two requirements are met. First, by common law standards the land was riparian immediately prior to the effective date of the irrigation act of 1895. Second, the land subsequently has not lost its riparian status by severance; consequently it ordinarily is a part of the smallest tract held in one chain of title leading from the owner on April 4, 1895, to the present owner. If a tract was riparian on April 3, 1895, its status was unaffected by the statutes. However, if the tract, or part of it, later lost its riparian status as a result of severance, the nonriparian land cannot regain the riparian status.
>
> All parcels patented prior to April 4, 1895, and located in the five tracts satisfy the test of present unitary possession, but the history of the titles is incomplete. Little has been established beyond patent and present ownership. In view of the unsettled law the cause should be remanded in order that the parties may adduce additional evidence.

46 *Crawford Co. v. Hathaway, supra,* 67 Neb. at 363-364, 93 N.W. at 793-794. For further treatment of pre-Akers Law surface water appropriations as vested common law rights, *see In re Water Appropriations D-887 and A-768,* 240 Neb. 337, 341-342, 482 N.W.2d 11, 15 (1992); *City of Scottsbluff v. Winters Creek Canal Co.,* 155 Neb. 723, 730, 53 N.W.2d 543, 548 (1952); *Plunkett v. Parsons,* 143 Neb. 535, 539-541, 10 N.W.2d 469, 471-472 (1943); *State ex rel Cochran v. Cary,* 138 Neb. 163, 167, 292 N.W. 229, 243 (1940)*; Enterprise Irr. Dist. v. Willis,* 135 Neb. 827, 831-836, 284 N.W. 326, 329-331 (1939); *City of Fairbury v. Fairbury Mill & Elevator Co.,* 123 Neb. 588, 591, 593, 243 N.W. 774, 776, 777-778 (1932); *Nine Mile Irrigation Co. v. State,* 118 Neb. 522, 528, 532, 225 N.W. 679, 681 -681, (1929); *In re Southern Nebraska Power Co.,* 109 Neb. 683, 685 -688, 192 N.W. 317, 318-320 (1923); and *Kearney Water & Electric Power Co. v. Alfalfa Irr. Dist.,* 97 Neb. 139, 146, 149 N.W. 363, 366 (1914).

47 *See In re Water Appropriations D-887 and A-768, supra,* 240 Neb. at 341-342, 482 N.W.2d at 15; *Enterprise Irr. Dist. v. Willis, supra,* 135 Neb. at 827, 284 N.W. at 327; and *Winters Creek Canal Co. Willis,* 135 Neb. 825, 826, 284 Neb. 332, 332 (1939).

48 *See Northport Irr. Dist. v. Jess,* 215 Neb. 152, 157, 337 N.W.2d 733, 737-738 (1983):

> The right of Nebraska citizens to use the waters flowing in the State is protected by Neb. Const. art. XV, §§ 4, 5, 6, and 7, which state as follows: "Section 4. The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want. (Adopted, 1920)."
>
> "Section 5. The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the

state for beneficial purposes, subject to the provisions of the following section. (Adopted, 1920)."

"Section 6. The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user. (Adopted, 1920)."

"Section 7. The use of the waters of the state for power purposes shall be deemed a public use and shall never be alienated, but may be leased or otherwise developed as by law prescribed. (Adopted, 1920.)"

49 "Extant water law in Nebraska remains fundamentally the same as that enacted in 1895." *Harnsberger & Thornson*, 73. "The appropriation statutes were revised in 1911, but no major changes were made." *Id., citing* J.A. Doyle, *Water Rights in Nebraska*, 29 Neb. L. Rev. 385, 389 (1950); *see* footnote 254 for citation to 1911 amendment adding annual three acre-feet restriction.

50 "By act of the Nebraska legislature, all appropriations for irrigation purposes made since 1895 are inseparably appurtenant to specific land, and so follow the land to which the water was intended to be and has been applied." *United States v. Tilley,* 124 F.2d 850, 857-858 (8th Cir. 1941), citing Neb. Comp. St. 1929, Sec. 46-109, the pertinent provisions of which are now codified at Neb. Rev. Stat. § 46-122(1) (Reissue 2010). "Appropriative rights acquired prior to 1895, however, were not necessarily required to be attached to specific land, and so could, generally speaking, be transferred or assigned for use on other property. [Citations omitted]." *Id.; see also, State ex rel. Blome v. Bridgeport Irr. Dist.*, 205 Neb. 97, 105, 286 N.W.2d 426, 432 (1979) and *Kearney Water & Electric Co.*, 97 Neb. 140, 147-147, 149 N.W.2d 363, 366-367 (1914).

51 *http://www.dnr.nebraska.gov/swr/wells-and-water*:

People who use Nebraska's surface water resources are required in most instances to obtain a surface water right/permit from the Nebraska Department of Natural Resources. The permit(s)/water right(s) are approved for a specific location, amount of water and purpose. Surface water rights are administered by NDNR, and are NOT recorded with the deed when land is bought, sold, or transferred. Many permits/rights were originally granted to previous landowners may be one, two or sometimes three generations back. Permits/rights do not transfer with land titles. Often subsequent generations of owners are not familiar or aware of the surface water permit/right for their land. This can be especially true if the land is now irrigated using a groundwater well. While not always the case, it is not uncommon to find landowners with surface water permits/rights who have no idea that a permit/right exists for their land.

State statutes require all landowners to file a written notice with NDNR of any changes in ownership, and/or address for surface water rights and registered groundwater wells. The forms required to update this information are available on NDNR's website...Forms for both surface water rights and well registrations are also available from NDNR upon request.

52 Neb. Rev. Stat. § 46-226 (Reissue 2010).

53 Formation of irrigation districts was authorized shortly before passage of Akers Law. *See* Laws 1895, Ch. 70, §§ 1-64, pp. 269-304, effective March 26, 1895. The laws currently governing irrigation district formation, operation, discontinuance and merger are codified at Neb. Rev. Stat. Ch. 46, Art. 1 (Reissue 2010). Additional obligations applicable to irrigation canals are codified at Neb. Rev. Stat. §§ 46-244 to 46-273 (Reissue 2010).

54 Neb. Rev. Stat. § 46-2,121 (Reissue 2010); *see also Central Nebraska Public and Irr. Dist. v. North Platte Natural Resource Dist.,* 280 Neb. 533, 543, 788 N.W.2d 252, 261 (2010) ("While an irrigation district may hold a surface water appropriation in its own name, it holds that appropriation for the benefit of the owners of land to which the appropriation is attached. In other words, generally speaking, [an irrigation district] is an agent for the purposes of diverting, storing, transporting, and delivering water;" consequently, irrigation and power district lacked standing to object to local NRD's ground water allocations as insufficient to protect local stream flows in Pumpkin Creek basin that feed into the North Platte River, which in turn provided water to Lake McConaughy).

55 *See in particular* Neb. Rev. Stat. § 46-120 (Reissue 2010) ("The board shall have the power and it shall be its duty to manage and conduct the business affairs of the district, make and execute all necessary contracts, employ such agents, officers, and employees as may be required and prescribe their duties, establish equitable bylaws, rules and regulations for the distribution and use of water among the owners of such lands, and generally to perform all such acts as shall be necessary to fully carry out the purposes of sections *46-101 to 46-1,111*").

This obligation has been treated as on ongoing duty to construct and maintain laterals required to deliver water in usable quantities to all irrigable lands in the district. *See State ex rel. Clark v. Gerring Irr. Dist.,* 109 Neb. 642, 192 N.W.2d 212 (1923) (duty remained enforceable despite twenty years of nonperformance). Note, however, that efforts to enforce the same statutory duty were deemed time-barred in *DaLaet v. Blue Creek Irr. Dist.,* 23 Neb. App. 106, 868 N.W.2d 483 (2015), with no mention of the *Gerring* case.

Other important provisions include Section 46-122 (Reissue 2010) (irrigation district has no power to cancel or terminate the water rights, nor can it suspend delivery of water except for nonpayment of taxes and assessments as provided by statute and the by-laws of the district; also identifies lawful actions district may take in times of shortage); Section 41-160 (statutory liability for failure to deliver water); and Section 46-157 (authorizes and obligates "water commissioners," meaning the chairmen of the board of directors of each affected district, to apportion natural stream flow in times of shortage, by rotating access among the various districts).

56 "The only classification of subterranean waters made by the common law is based on the method of transmission through the ground, and is that they belong to one of only two classes, namely: (1) Underground currents of water flowing in known and defined channels or watercourses; (2) water passing through the ground beneath the surface in channels which are undefined and unknown." *Nourse v. Andrews,* 200 Ky. 467, 255 S.W. 84, 86 (1923); *see also Olson v. City of Wahoo,* 124 Neb. 802, 810, 248 N.W. 304, 307-308 (1933) ("There is a distinction made between underground waters flowing in known and well-defined channels, such as the water flowing in the gravel bed in Todd Valley, and also underground waters, the channels of which are undefined and unknown, and it is held that the principles of law governing the former are not applicable to the latter. [Citation

omitted]"). *For additional authorities, see Subterranean and percolating waters; springs and wells,* 55 ALR 1385, 1386-1387 (1928), *supplemented,* 109 ALR 395, 397 (1937).

57 "It is well settled that unless it is shown that the underground water flows in a defined and known channel it will be presumed to be percolating water." *Clinchfield Coal Corp. v. Compton*, 148 Va. 437, 448, 139 S.E. 308, 312 (1927); *accord, Ball v. United States*, 1 Cl. Ct. 180, 184 (1982); *For additional authorities, see Subterranean and percolating waters; springs and wells, supra,* 55 ALR at 1387-1388, *supplemented,* 109 ALR at 397.

58 "Waters flowing in defined and known subterranean stream or channel are generally governed by the same rules applicable to natural watercourses or surface waters and owner of land beneath which such waters flow has the same rights respecting those waters as a riparian owner with respect to a surface stream across his property." *Ball v. United States*, *supra,* 1 Cl. Ct. at 184; *for additional authorities, Subterranean and percolating waters; springs and wells, supra,* 55 ALR at 1487-1498, *supplemented,* 109 ALR at 415-416.

59 The Nebraska Supreme Court acknowledged this point of law in *In re Metropolitan Utilities District of Omaha*, 179 Neb. 783, 800-801, 140 N.W.2d 626, 631 (1966) (emphasis added):

> The common law rights of riparian owners have been modified in this state by what is known as the American doctrine. This doctrine has been defined as follows: 'The American, as distinguished from the English rule, is that, *while the owner of the land is entitled to appropriate subterranean or other waters accumulating on his land, which thereby becomes a part of the realty,* he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land he owns, unconnected with the beneficial use of the land, especially if the exercise of such use in excess of the reasonable and beneficial use is injurious to others, who have *substantial rights to the water*.' [Citation omitted].

60 "The common law regarded the fee simple owner of the land as the owner of everything above and below the surface from the sky to the center of the earth, expressed in the maxim, *Cujus est solum, ejus est usque ad coelom et ad inferos*, and this doctrine is adhered to in England. *Acton v. Blundell*, 12 Mees & W. 324, 13 L.J. Exch. 28; *Chasemore v. Richards*, 7 H.L.Cas. 349. Under this doctrine, the owner of the land may make any use he pleases of underlying percolating waters, and may even cut them off maliciously without liability to his neighbor." *Clinchfield Coal Corp. v. Compton*, 148 Va. 437, 451-452, 139 S.E. 308, 311-312 (1927). *For further discussion of the English Rule, see Subterranean and percolating waters; springs and wells,* 55 ALR 1385, 397-399 (1928), *supplemented* 109 ALR 397, 397-398 (1937); *see also* Dellapenna, J.W., *A Primer on Groundwater Law,* 49 Idaho L. Rev. 265, 271-276 (2013) (discussing evolution of the "absolute dominion" rule, which confers ownership over waters beneath real property as well as the land itself; and the "rule of capture" theory, conferring an ownership interest in groundwater upon extraction).

61 *Williams v. Ladue*, 161 Pa. 283, 287-288 (1897); *see also Mosier v. Caldwell,* 7 Nev. 363 (1872) and *Dehil v. Youmans,* 50 Barb. 316 (N.Y.1867).

62 *Beatrice Gas Co. v. Thomas,* 41 Neb. 662, 59 N.W.2d 925, 927-928 (1894) (Court implicitly if not expressly recognizes ownership interest in ground water by extending common law real property nuisance principles to subsurface water contamination issue).

63 "Under the English rule of water law—also referred to as the absolute ownership rule—a landowner had absolute ownership of the waters under his or her land. Therefore, the owner could withdraw any quantity of water for any purpose without liability, even though the result was to drain water from beneath surrounding lands." *Spear T Ranch, Inc. v. Knaub, supra,* 269 Neb. at 186, 691 N.W.2d at 126, *citing Prather v. Eisenmann,* 200 Neb. 1, 261 N.W.2d 766 (1978) and *Cline v. American Aggregates,* Ohio St.3d 384, 474 N.E.2d 324 (1984); *see also* Metropolitan *Utilities District of Omaha v. Merritt Beach Co.,* 179 Neb. 783, 797, 140 N.W.2d 626, 635 (1966); *Olson v. City of Wahoo,* 124 Neb. 802, 248 N.W. 304, 307-308 (1933); *and Beatrice Gas Co. v. Thomas,* 41 Neb. 662, 59 N.W.2d 925, 927-928 (1894), *quoting Kinnaird v. Standard Oil Co. Oil Co.*, 89 Ky. 468, 12 S.W. 937, 938-939 (1890).

64 *Olson v. City of Wahoo,* 124 Neb. 802, 248 N.W. 304, 307-308 (1933).

65 "From 1931 to 1940 Nebraska suffered from the most severe drought of record. Only once, in 1938, was the amount of precipitation during the ten year period above the mean, and total rainfall deficiency was 45.2 inches. This, together with a nation-wide depression, was ruinous." R.S. Harnsberger, J.C. Oeltjen, and R.J. Fischer, *Groundwater: From Windmills to Comprehensive Public Management,* 52 Neb. L. Rev. 179, 190 (1973), *citing* M. Lawson, A. Reiss, R. Phillips, and K. Livingston, *Nebraska Droughts: A Study of Their Last Chronological and Spatial Extent with Implications for the Future* 6-7, 74 (Dept. of Geography Occasional paper No. 1, U. of Neb. 1971). The University of Nebraska—Lincoln's National Drought Mitigation Center—which opened in 1995—breaks down the 1930's drought into four discrete episodes: "Although the 1930s drought is often referred to as if it were one episode, there were at least 4 distinct drought events: 1930–31, 1934, 1936, and 1939–40 (Riebsame et al., 1991)." *See* ***http://drought.unl.edu/droughtbasics/dustbowl/droughtinthedustbowlyears.aspx***.

66 *Olson v. City of Wahoo,* 124 Neb. 802, 811, 248 N.W. 304, 308 (1933) ("The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is in our opinion, supported by the better reasoning").

67 *Id*.

68 *See, e.g., Spear T Ranch, Inc. v. Knaub,* 269 Neb. 177, 192-193, 691 N.W.2d 116, 131 (2005); *Prather v. Eisenmann,*200 Neb. 1, 6, 261 Neb. 766, 769 (1978); M*etropolitan Utilities District of Omaha v. Merritt Beach Co.,* 179 Neb. 783, 800-801, 140 N.W.2d 626, 637 (1966); *Luchsinger v. Loup River Public Power District* 140 Neb. 179, 182, 299 N.W. 549, 550-551 (1941); and *Osterman v. Central Nebraska Public Power & Irr. District,* 131 Neb. 356, 365, 268 N.W. 334, 338 (1936); *for further discussion*, *see Harnsberger & Thorson,* pp. 210-226.

69 A. Dan Turlock, *Law of Water Rights and Resources* § 4.8 (July 2016 Update).

70 *Olson v. City of Wahoo, supra,* 124 Neb. at 811, 248 N.W. at 308.

71 A. Dan Turlock, *Law of Water Rights and Resources* § 4.14 (July 2016 Update).

72 *See for example Katz v. Walkinshaw*, 141 Cal. 116, 74 P. 766 (1903), the seminal case first announcing the correlative rights doctrine. In addition to recognizing a landowner's proprietary interest in ground water, the California Supreme Court rejected the notion that correlative rights would be too difficult for a court to administer:

> The objection that this rule of correlative rights will throw upon the court a duty impossible of performance—that of apportioning an insufficient supply of water among a large number of users—is largely

conjectural. No doubt cases can be imagined where the task would be extremely difficult, but, if the rule is the only just one—as we think has been shown—the difficulty in its application in extreme cases is not a sufficient reason for abandoning it and leaving property without any protection from the law.

141 Cal. at 136-137, 74 P. at 772.

73 In *Katz v. Walkinshaw*, large, later-in-time pumpers argued in favor of the absolute dominion rule, which would leave smaller, preexisting agricultural pumpers without a remedy for the depletion of their underlying ground water supplies. The California Court, after extended analysis, preferred to recognize an enforceable property interest in ground water, belonging to each overlying landowner. In doing so, it offered the following criticism of the absolute dominion rule:

> We do not see how the doctrine contended for by defendant [absolute dominion] could ever become a rule of property to any value. Its distinctive feature is the proposition that no property rights exist in such waters except while they remain in the soil of the landowner; that he has no right either to have them continue to pass into his land as they would under natural conditions, or to prevent them from being drawn out of his land by an interference with natural conditions on neighboring land. Such right as he has is therefore one which he cannot protect or enforce by resort to legal means, and one which he cannot depend on to continue permanently or for any definite period.

141 Cal. at 133, 74 P. at 771; *see also Maerz v. U.S. Steel Corp.*, 116 Mich. App. 710, 714-715, 323 N.W.2d 524, 527 (1982) ("The English rule was, however, not universally popular in American courts. One problem with the rule was that it immunized a landowner who removed the percolating water for purely malicious reasons. [Citation omitted]. Additionally, although neighboring landowners theoretically had a property right in the percolating waters lying beneath their lands, the overlying owner with the biggest pump and deepest well could control the water otherwise available to both").

74 *Spear T Ranch, Inc. v. Knaub, supra,* 269 Neb. at 192-193, 691 N.W.2d at 131; *Osterman, supra,* 200 Neb. at 6, 261 Neb. at 769; and *Luchsinger v. Loup River Public Power District, supra,* 140 Neb. at 182, 299 N.W. at 550-551; *for further discussion*, *see Harnsberger & Thorson,* pp. 210-226.

75 Laws 1982, LB 375, § 1, p. 305 ("Every landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his or her land subject to the provisions of Chapter 46, article 6, and the correlative rights of other landowners when the ground water supply is insufficient to meet the reasonable needs of all users"). Without mincing words, the legislature recognized the common law ownership interest in groundwater and the concomitant right of landowners to extract such waters at their discretion, subject to: (a) the privately enforceable rights of other landowners under the American reasonable use rule and the correlative rights doctrine; and (b) the registration, spacing and location provisions then set out in Article 6. The legislature did not declare that groundwater ownership and pumping rights were further subject to the GWPMA until 1996: "Every landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his or her land subject to the provisions of Chapter 46, article 6, *and the Nebraska Ground Water Management and Protection Act* and the correlative rights of other landowners when the ground water supply is insufficient to meet the reasonable needs of all users." *See* Laws 1996, LB 108, § 8 (emphasis added). The LB 108 version is presently codified at Neb. Rev. Stat. § 46-702 (Reissue 2010).

The effective date of LB 108 may well play a key role in vested rights analysis, as applied to irrigation wells.

76 For general discussion of preliminary irrigation well legislation, *see In re Central Nebraska Public Power and Irr. Dist.,* 270 Neb. 108, 113-114, 699 N.W.2d 372, 376 (2005) and *Metropolitan Utilities Dist. v. Merritt Beach Co.,* 179 Neb. 783, 140 N.W.2d 626 (1966). These early legislative conditions on irrigation wells are now codified as amended at Neb. Rev. Stat. §§ 46-601 to 46-613.02 (Reissue 2010) (registration and spacing requirements); Sections 46-635 to 46-637 (location restrictions to avoid interference with surface stream flows); and Sections 46-651 to 46-655.01 (additional potential spacing requirements).

77 *See* Laws, 1975, LB 577, §§ 1-24, pp. 1145-1158, originally codified at Neb. Rev. Stat. 46-656 to 674 (1943) (1975 Supplement). In addition to Sections 46-656 to 46-674, the GWMA also included Sections 2-3225, 46-602, 46-603, 46-629, and 46-630. *See Neb. Rev. Stat. (1943)* (1975 Supplement), p. 457 (note by Revisor of Statutes) The GWMA, as amended and now known as GWMPA is presently codified at Neb. Rev. Stat. §§ 46-701 to 46-756 (Reissue 2010 & Cum. Supp. 2014); *see also* Carl A.P. Fricke & Darryll T. Pederson, *Ground-Water Resource Management in Nebraska*, 17 Ground Water 544 (1979) (brief overview of development of ground water irrigation in Nebraska and GWMA's original provisions).

78 Laws 1981, LB 146, §§ 4-16, pp. 419-428.

79 *See Ligenfelter v. Lower Elkhorn Natural Resources District,* 294 Neb. 46, 881 N.W.2d 892 (2016); and *Bamford v. Upper Republican Natural Resources District,* 245 Neb. 299, 512 N.W.2d 642 (1994), *cert. denied,* 513 U.S. 874 (1994).

80 *See Clark v. Cambridge & A. Irr. & Imp. Co.,*45 Neb. 798, 807, 64 N.W. 239, 241 (1895) ("The provision of Act March 27, 1889, as amended by Act 1893, abolishing riparian rights in all streams over 20 feet in width, without making compensation to the riparian owners, is invalid"); *see also Slattery v. Harley,* 58 Neb. 575, 79 N.W. 151, 152 (1899); *Crawford Co. v. Hathaway,* 67 Neb. 325, 93 N.W. 781 (1903), *overruled in part by Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966); *Meng v. Coffee,* 67 Neb. 500, 503, 93 N.W. 713, 714 (1903), *appeal after remand, Brewster v. Meng,* 76 Neb. 560, 107 N.W. 752 (1906*); McCook Irrigation & Water Power Co. v. Crews*, 70 Neb. 109, 96 N.W. 996 (1903), *reversed on rehearing,* 70 Neb. 115, 102 Neb. 249 (1905); *Cline v. Stock*, 71 Neb. 70, 98 N.W. 454 (1904) *rev'd,* 71 Neb. 79, 102 N.W. 265 (1905); *In re Platte River Public Power & Irrigation Dist.,* 132 Neb. 292, 271 N.W. 864 (1937), *on rehearing,* 133 Neb. 420, 275 N.W. 593 (1937); *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966); *see also Brummond v. Vogel,* 184 Neb. 415, 168 N.W.2d 24 (1969) (court enforced riparian stream rights without proof of pre-Akers Law riparian status); and *Koch v. Aupperle,* 274 Neb. 52, 737 N.W.2d 869 (2007) *overruling Brummond v. Vogel,* 184 Neb. 415, 168 N.W.2d 24 (1969) (proof of pre-Akers Law riparian status required to assert such rights).

81 *See In re Water Appropriations D-887 and A-768,* 240 Neb. 337, 341-342, 482 N.W.2d 11, 15 (1992); *City of Scottsbluff v. Winters Creek Canal Co.,* 155 Neb. 723, 730, 53 N.W.2d 543, 548 (1952); *Plunkett v. Parsons,* 143 Neb. 535, 539-541, 10 N.W.2d 469, 471-472 (1943); *State ex rel Cochran v. Cary,* 138 Neb. 163, 167, 292 N.W. 229, 243 (1940) *; Enterprise Irr. Dist. v. Willis,* 135 Neb. 827, 831-836, 284 N.W. 326, 329 -331 (1939); *City of Fairbury v. Fairbury Mill & Elevator Co.,* 123 Neb. 588, 591, 593, 243 N.W. 774, 776, 777-778 (1932); *Nine Mile Irrigation Co. v. State,* 118 Neb. 522, 528, 532, 225 N.W. 679, 681-681, (1929); *In re Southern Nebraska Power Co.,* 109 Neb. 683, 685 -688, 192 N.W. 317, 318-320 (1923); *Kearney Water & Electric Power Co. v. Alfalfa Irr. Dist.,* 97 Neb. 139, 146, 149 N.W. 363, 366 (1914); and

Crawford Co. v. Hathaway, 67 Neb. 325, 356-357, 364, 93 N.W. 781, 791-792, 794 (1903).

82 *See* Neb. Laws (1895) Ch. 93a, § 42; 7 Neb. Comp. Stat. (1895) §5485, p. 1109 ("The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of this state, subject to appropriation as hereinbefore provided").

83 *See Kirk v. State Board of Irrigation,* 90 Neb. 627, 631, 134 N.W. 167, 169-170 (1912) ("In this state, the water of running streams is *publici juris*; its beneficial use belongs to the public and is controlled by the state in its sovereign capacity").

84 *See Loup River Public Power Dist. v. North Loup River Public Power & Irrigation Dist.,* 142 Neb. 141, 152-153, 5 N.W.2d 240, 247-248 (1942).

85 *See for example, Clark v. Cambridge & A. Irr. & Imp. Co., supra,* 45 Neb. at 807, 64 N.W. at 241 ("at common law, every riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of running streams through his lands, undiminished in quantity and unimpaired in quality, although all have the right to the reasonable use thereof for the ordinary purposes of life...and any unlawful diversion thereof is an actionable wrong;" assuming the 1889 Irrigation Act was intended to abolish vested riparian rights without compensation, "it is a clear invasion of private rights, and within the prohibition of the constitution. The right of a riparian proprietor, as such, is property, and, when vested, can be destroyed or impaired only in the interest of the general public, upon full compensation, and in accordance with established law").

86 *See for example Crawford Co. v. Hathaway, supra,* 67 Neb. at 356-357, 364, 93 N.W. at 791-792, ("The court will take judicial notice of the fact that since the early settlements of the western portions of the state, where irrigation has been found essential to successful agriculture, a custom or practice has existed of appropriating and diverting waters from the natural channels thereof into irrigation canals, and the application of such waters to the soil for agricultural purposes. Whether vested rights have been acquired thereby must depend on the facts and circumstances as disclosed in any particular case...the appropriator acquires title by appropriation and application to some beneficial use, and of which he cannot be deprived except in some of the modes prescribed by law").

87 *See, e.g., State ex rel. Cochran v. Cary, supra,* 138 Neb. at 167, 292 N.W. at 243; *Enterprise Irr. Dist. v. Willis, supra,* 135 Neb. at 836, 284 N.W. at 329-331; *In re Southern Nebraska Power Co., supra,* Neb. at 683, 192 N.W. at 317; *Nine Mile Irrigation Co .v. State, supra,* 118 Neb. at 528, 225 N.W. at 681-682.

88 "The first irrigation laws...adopted in 1877 and 1889...placed no limitations upon the quantity of water that could be appropriated, save and except that it must be for a useful purpose and within the capacity of the diversion works. Laws 1877, p. 168; Laws 1889, c. 68, p. 503." *In re Metropolitan Utilities District of Omaha*, 179 Neb. 783, 798, 140 N.W.2d 626, 635 (1966); *accord, Enterprise Irr. Dist. v. Willis, supra,* 135 Neb. at 829, 284 N.W. at 328.

89 *See* Neb. Laws 1895, ch.93a, § 20; 7 Neb. Compiled Statutes, § 5447, p. 1102.

90 *See In re Water Appropriations D-887 and A-768, supra,* 240 Neb. at 341-342, 482 N.W.2d at 15; *Enterprise Irr. Dist. v. Willis, supra,* 135 Neb. at 827, 284 N.W. at 327; and *Winters Creek Canal Co. Willis,* 135 Neb. 825, 826, 284 Neb. 332, 332 (1939).

91 *Compare with Baeth v. Hoisveen,* 157 N.W.2d 728 (N.D. 1968) (a landowner of premises overlying ground water, be it percolating or in a more or less well-defined stream, acquires a vested right following withdrawal and application of said ground water to a beneficial use) and *Undlin v. City of Surrey,* N.W.2d 742 (N.D. 1978); *see also Volkman v. City of Crosby,* 80 S.D. 517, 127 N.W.2d 708 (1963) (where landowner has applied percolating subterranean waters to reasonable beneficial use on his overlying land and thereby acquired vested right to such use, state may not by subsequent legislation authorize impairment or destruction of such use without compensation); and *McNamara v. City of Rittman,* 107 Ohio St.3d 243, 835 N.E.2d 640 (2005) (landowners have a property interest in the groundwater underlying their land and that governmental interference with that right can constitute an unconstitutional taking).

92 "The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is in our opinion, supported by the better reasoning." *Spear T Ranch, Inc. v. Knaub,* 269 Neb. 177, 192 -193, 691 N.W.2d 116, 131 (2005), quoting *Olson v. City of Wahoo,* 124 Neb. 802, 811, 248 N.W. 304, 308 (1933). "Nebraska, in *Olson*, adopted the rule of reasonable use with the addition of the California doctrine of apportionment in time of shortage." *Prather v. Osterman,* 200 Neb. 1, 6, 261 Neb. 766, 769 (1978). The *Olson* rule amounts to a "modified reasonable use rule." *Id.* "Without embarkation on an ontological or metaphysical investigation, it is clear that the right to use ground water is an attribute of owning fee simple title to land overlying a source of ground water and is inseparable from the land to which it applies. We conclude that the right of an owner of overlying land to use ground water is an appurtenance constituting property protected by Neb. Const. art. I, § 21: 'The property of no person shall be taken or damaged for public use without just compensation therefor.'" *Sorensen v. Lower Niobrara Natural Resources Dist.*, 221 Neb. 180, 191-192, 376 N.W.2d 539, 549 (1985). We note here that a water right "inseparable" from the land is a real property right. *See Crawford Co. v. Hathaway,* 67 Neb. 325, 326, 93 N.W. 781, 781 (1903) (Syllabus: "A riparian's right to the use of the flow of the stream passing through or by his land is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land; such right being a property right, and entitled to protection as such, the same as private property rights generally"), *partially overruled on other grounds, Wasserburger v. Coffee,* 180 Neb. 149, 141 N.W.2d 738 (1966). Pre-GWMPA cases make clear that landowners retained a proprietary interest in ground water under the *Olson* rule. *See Osterman v. Central Nebraska Public Power and Irrigation District,* 131 Neb. 356, 364-365, 268 N.W. 334, 338 (1936) (subterranean irrigation is a "valuable right" of surface landowners recognized and protected by *Olson* rule; therefore, surface owners have standing to object to inter-basin transfer of Platte River waters that would lower water table beneath their properties); *and Luchsinger v. Loup River Public Power Dist.,* 140 Neb. 179, 182, 299 N.W. 549, 550-551 (1941) (sub-irrigation is a valuable property right, the destruction by an irrigation and power district constitutes a compensable taking under the Nebraska constitution; *Olson* rule "answers for itself as a sound proposition of law essential to the protection of property rights of private individuals and is consistent with the Constitution and with morality and justice"); *see also In re Metropolitan Utilities District of Omaha,* 179 Neb. 783, 800-801, 140 N.W.2d 626, 631 (1966) ("The common law rights of riparian owners have been modified in this state by what is known as the American doctrine. This doctrine has been defined as follows: 'The American, as distinguished from the English rule, is that, while the owner of the land is entitled to appropriate

subterranean or other waters accumulating on his land, which thereby becomes a part of the realty, he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land he owns, unconnected with the beneficial use of the land, especially if the exercise of such use in excess of the reasonable and beneficial use is injurious to others, who have *substantial rights to the water*.'[Citation omitted]").

Post-GWMPA cases also treat the extraction of ground water as a property right. *See Prather v. Osterman,* 200 Neb. 1, 11, 261 Neb. 766, 769 (1978) (extraction of ground water for domestic purposes is "a valuable property right"); *In re Application U-2,* 226 Neb. 594, 604-605, 413 N.W.2d 290, 298 (1987) ("an overlying property owner has a protected right in the use of ground water, as defined in § 46-657"); *Hagan v. Upper Republican Natural resource District,* 261 Neb. 312, 318, 622 N.W.2d 627, 631 (2001) (depletion of underlying aquifer conferred standing on landowners—previously denied irrigation variances—to challenge variances granted to others to conduct hog confinement operations); *and Sorensen v. Lower Niobrara Natural Resources Dist.*, *supra*.

93 *See in general Katz v. Walkinshaw*, 141 Cal. 116, 74 P. 766 (1903), the seminal case first announcing the correlative rights doctrine. For modern analysis of the ownership interest in ground water, *see McNamara v. City of Rittman,* 107 Ohio St.3d 243, 835 N.E.2d 640 (2005), discussing the meaning and effect of *Cline v. American Aggregates,* 15 Ohio St.3d 384, 474 N.E.2d 324 (1984). *Cline*, of course, played a dispositive role in persuading the Nebraska Supreme Court's to adopt Restatement (Second) of Torts § 858 as the law governing potential liability for ground water pumping operations in Nebraska. *See Spear T Ranch, Inc. v. Knaub,* 269 Neb. 177, 186, 189-190, and 193-194, 691 N.W.2d 116, 127, 129, and 132 (2005).

94 Neb. Rev. Stat. §§ 46-638 to 46-650 (Reissue 2010).

95 *See Sorensen v. Lower Niobrara Natural Resources District,* 221 Neb. 180, 189, 376 N.W.2d 539, (1985) (rejecting Lower Niobrara NRD's post-GWMPA argument that since landowners cannot own ground water, they are not entitled to recover damages for impairment of their right to use water in an eminent domain proceeding).

96 "A 'patent' is the conveyance by which the [federal government] passes its title to portions of the public domain." *Shumway v. United States*, 199 F.3d 1093, 1096 (9th Cir. 1999), quoting *Smelting Co. v. Kemp*, 104 U.S. 636, 640 (1881)."A patent does not merely pass title, like a deed, but operates as an official declaration of title which is, with limited exceptions, unassailable and not rebuttable." *Id., citing Smelting Co. v. Kemp*, *supra,* 104 U.S. at 600-641. Federal land patents, among other things, must be construed and enforced in accordance with and according to the laws and regulations in effect at the time of their issue. *See Crow Tribe of Indians v. Peters,* 835 F. Supp.2d 985, 990 (D. Mont. 2011)(citing multiplicity of supporting U.S. Supreme Court opinions); *see also Hash v. United States,* 403 F.3d 1308, 1315-1316 (Fed. Cir. 2005); *Capreal, Inc. v. United States*, 99 Fed. Cl. 133, 141 (Ct. Fed. Cl. 2011); and *Thompson v. United States,* 101 Fed. Cl. 416, 433-434 (Ct. Fed. Cl. 2011); *see also Marvin M. Brandt Revocable Trust v. United States* , __ U.S.__, 134 U.S. 1257 (2014) (construing railroad rights of way under General Railroad Right-of-Way Act of 1875 in accordance with basic common law principles).

97 Act March 3, 1877, c. 107, s 1, 19 Stat. 377, now codified at 43 U.S.C.A. 321.

98 *Compare with Baeth v. Hoisveen,* 157 N.W.2d 728 (N.D. 1968); *Undlin v. City of Surrey,* 262 N.W.2d 742 (N.D. 1978); and *Volkman v. City of Crosby,* 80 S.D. 517, 127 N.W.2d 708 (1963); *see also McNamara v. City of Rittman,* 107 Ohio St.3d 243, 835 N.E.2d 640 (2005).

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Photos: USDA Agricultural Research Service

Funding provided by Legal Services Corporation