

## **Final Agency Determination: FAD-303**

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**Subject:** A joint request dated April 23, 2021, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2019 crop year regarding the interpretation of the preamble and section 17(f)(10) of the Common Crop Insurance Policy Basic Provisions (Basic Provisions), published at 7 C.F.R. § 457.8. This request is pursuant to 7 C.F.R. § 400, subpart X.

### **Background:**

Referenced policy related to the request:

The Basic Provisions states, in relevant part:

#### 1. Definitions.

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**Irrigated practice** - A method of producing a crop by which water is artificially applied during the growing season by appropriate systems and at the proper times, with the intention of providing the quantity of water needed to produce at least the yield used to establish the irrigated production guarantee or amount of insurance on the irrigated acreage planted to the insured crop.

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**Prevented planting** - Failure to plant the insured crop by the final planting date designated in the Special Provisions for the insured crop in the county, or within any applicable late planting period, due to an insured cause of loss that is general to the surrounding area and that prevents other producers from planting acreage with similar characteristics. Failure to plant because of uninsured causes such as lack of proper equipment or labor to plant acreage, or use of a particular production method, is not considered prevented planting.

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#### 9. Insurable Acreage.

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(b) If insurance is provided for an irrigated practice, you must report as irrigated only that acreage for which you have adequate facilities and adequate water, or the reasonable expectation of receiving adequate water at the time coverage begins, to carry out a good irrigation practice. If you knew or had reason to know that your water may be reduced before coverage begins, no reasonable expectation exists.

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## 17. Prevented Planting

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(f) Regardless of the number of eligible acres determined in section 17(e), prevented planting coverage will not be provided for any acreage:

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(10) Based on an irrigated practice production guarantee or amount of insurance unless adequate irrigation facilities were in place to carry out an irrigated practice on the acreage prior to the insured cause of loss that prevented you from planting. Acreage with an irrigated practice production guarantee will be limited to the number of acres allowed for that practice under sections 17(e) and (f);

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FAD-289, published on RMA's website on September 16, 2019, states, in relevant part:

"The Federal Crop Insurance Corporation (FCIC) agrees with the first requestor that adequate irrigation facilities must be in place at the time coverage begins for the insured crop. FCIC agrees with the second requestor that the irrigation system is not required to be fully operational at the time coverage begins, as long as there is a reasonable expectation that it will be available and usable at the times needed in order to be considered a good irrigation practice. Section 9(b) of the Basic Provisions provides acreage can be reported under an irrigated practice when adequate facilities and adequate water exist, or the insured can demonstrate there is a reasonable expectation of receiving adequate water at the time coverage begins, to carry out a good irrigation practice.

Whether the irrigation facilities can be reasonably expected to be ready to deliver water to the crop at the appropriate time to allow production of a normal crop in accordance with the policy and procedures outlined above, must be determined by the Approved Insurance Provider (AIP) on a case-by-case basis. If the AIP determines that adequate irrigation facilities are available at the time coverage begins, but there is not a reasonable expectation of receiving adequate water at the time coverage begins to allow production of a normal crop, then there would be no reasonable expectation that a good irrigation practice could be followed during the growing season.

If the AIP determines the policyholder has adequate facilities that are not operational at the time coverage begins, but will be operational during the growing season at the time needed to carry out a good irrigation practice by applying water when it is needed to allow production of a normal crop and there was a reasonable expectation of receiving adequate water at the time coverage began, then the crop can be insurable under an irrigated practice.”

### **Interpretation Submitted**

The requestors questioned if it is necessary that the policyholder’s irrigation facilities and equipment be in place and operational prior to the insured cause of loss that prevented the policyholder from planting the acreage in order to obtain prevented planting coverage based on an irrigated practice production guarantee.

#### First requestor’s interpretation:

The first requestor’s answer to the question presented is: Yes. Section 17(f)(10) explicitly provides that prevented planting coverage will not be provided for any acreage based on an irrigated practice production guarantee, “unless adequate irrigation facilities were in place to carry out an irrigated practice on the acreage prior to the insured cause of loss that prevented you from planting.” The requirement that the policyholder have adequate irrigation facilities “in place” means that any irrigation equipment (such as pumps) must be functional and available for immediate use without further repairs or servicing. If the state of the irrigation equipment is such that it was not operational prior to the cause of loss, the acreage served by that equipment is not eligible for prevented planting coverage under an irrigated practice production guarantee. Moreover, even if it appears that the equipment could have been made operational through repairs and/or servicing,

if such repairs or servicing were not undertaken to make the equipment functional prior to the cause of loss, the acreage served by that equipment is not eligible for prevented planting coverage under an irrigated practice production guarantee.

In FAD-289, FCIC addressed a similar issue. However, that interpretation involved different policy language (section 9(b) of the Basic Provisions) and the very different concept reporting acres under an irrigated practice. Thus, FAD-289 provides no guidance on the issue of policy interpretation presented in this request.

The portion of section 9(b) interpreted in FAD-289 reads as follows: “If insurance is provided for an irrigated practice, you must report as irrigated only that acreage for which you have adequate facilities and adequate water, or the reasonable expectation of receiving adequate water at the time coverage begins, to carry out a good irrigation practice.” The issue presented was whether, to report acreage under an irrigated practice, it was essential that adequate irrigation facilities actually be in place and operational at the inception of coverage for the insured crop (as argued by the first requester) or if it was sufficient that adequate irrigation facilities be available and useable at the times needed to carry out a good irrigated practice (as argued by the second requester).

The portion of section 9(b) interpreted in FAD-289 allows for the reporting of acreage under an irrigated practice if there is a “reasonable expectation of receiving adequate water at the time coverage begins, to carry out a good irrigation practice.” (emphasis added) On the other hand, section 17(f)(10) states that “prevented planting coverage will not be provided for any acreage ...[b]ased on an irrigated practice production guarantee or amount of insurance unless adequate irrigation facilities were in place to carry out an irrigated practice on the acreage prior to the insured cause of loss that prevented you from planting.” (emphasis added)

Sections 9(b) and 17(f)(10) are concerned with completely different scenarios. Section 9(b) addresses irrigation facilities that must be in place by the inception of coverage in order to report acreage under an irrigated practice. On the other hand, section 17(f)(10) addresses the irrigation facilities that must be in place by the time of loss in order to qualify for prevented planting coverage based on an irrigated practice production guarantee. Perhaps more significantly, section 9(b) speaks in terms of the insured having a “reasonable expectation” of having adequate water. Section 17(f)(10) makes no similar reference to a “reasonable expectation.” Rather, section 17(f)(10) plainly states that adequate irrigation facilities must be “in

place” prior to the cause of loss that results in the inability to plant the crop. Thus, the only reasonable construction of section 17(f)(10) is that adequate irrigation facilities must be in place and operational prior to the cause of loss in order to obtain a prevented planting guarantee under an irrigated practice.

#### Second requestor’s interpretation:

The second requestor believes FAD-289 applies to this circumstance. It should make no difference that this is a prevented planting claim. The second requestor believes that the FAD-289 interpretation controls this issue. If irrigation facilities are in place, and there is a reasonable expectation of these facilities being functional and able to provide proper irrigation when and if needed, the acreage is available for prevented planting coverage.

#### **Final Agency Determination**

FCIC disagrees with both requestors. Adequate irrigation facilities must be in place at the time coverage begins for the insured crop; however, the irrigation system is not required to be fully operational at the time coverage begins. As long as there is a reasonable expectation that the irrigation system will be available for the crop year in order to carry-out a good irrigation practice, the irrigation system is not required to be fully operational prior to an insured cause of loss. The terminology “in place” is not synonymous with “available and usable.” Irrigation facilities must be in place at the time insurance attaches and prior to a cause of loss that prevents planting, but it is not required that the system be under power until the times needed to deliver water.

The requirement for having adequate irrigation facilities is the same for planted acreage as acreage prevented from planting. For planted acreage, irrigation facilities are considered adequate if it is determined that, at the time insurance attaches, they will be available and usable at the times needed and have the capacity to timely deliver water in sufficient quantities to carry out a good irrigation practice for the acreage insured under the irrigated practice. The difference for acreage prevented from planting, which is stated in section 17(f)(10), is the timing of which the facilities must be in place (prior to the insured cause of loss that prevented planting). “In place” is in reference to the capacity of the irrigation facilities as it directly relates to how many acres can be irrigated using a good farming practice, to qualify for an irrigated practice for insurance, and lastly, to determine the number of

irrigated eligible prevented planting acres.

The Approved Insurance Provider (AIP) must determine, on a case-by-case basis, whether the irrigation facilities will be ready to deliver water to the crop at the appropriate time(s) to allow production of a normal crop in accordance with the policy and procedure. If an AIP determines the irrigation facilities are in place prior to the insured cause of loss that prevented the policyholder from planting, and that those facilities would reasonably be expected to be available and usable at the times needed to deliver water to the crop at the appropriate times to carry out an irrigated practice on the acreage, then it meets this requirement for prevented planting coverage.

In accordance with 7 C.F.R. § 400.766(b)(2), this Final Agency Determination is binding on all participants in the Federal crop insurance program for the crop years the policy provisions are in effect. Any appeal of this decision must be in accordance with 7 C.F.R. § 400.766(b)(5).

***Date of Issue:*** July 19, 2021