# Final Agency Determination: FAD-259

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**Subject:** This issuance replaces FAD-259 published on RMA's website on April 4, 2016. The revised issuance is needed to provide clarity regarding the impossibility as a defense for non-compliance with policy provisions under the Federal crop insurance program. The original request was dated February 4, 2016, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2013 crop year regarding the interpretation of section 13(a) and section 20 of the Common Crop Insurance Basic Provisions (Basic Provisions), published at 7 C.F.R. § 457.8. This request is pursuant to 7 C.F.R. part 400, subpart X.

**Background:**

Referenced policy related to the request:

The preamble of the Basic Provisions states, in relevant part:

> This insurance policy is reinsured by the Federal Crop Insurance Corporation (FCIC) under the provisions of the Federal Crop Insurance Act (Act) (7 U.S.C. 1501 et seq.). All provisions of the policy and rights and responsibilities of the parties are specifically subject to the Act. The provisions of the policy may not be waived or varied in any way by us, our insurance agent or any other contractor or employee of ours or any employee of USDA unless the policy specifically authorizes a waiver or modification by written agreement.
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Section 1 of the Basic Provisions states, in relevant part:

> **1. Definitions**
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*Consent.* Approval in writing by us allowing you to take a specific action.

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Section 13 of the Basic Provisions states, in relevant part:

**13. Replanting Payment**

(a) If allowed by the Crop Provisions, a replanting payment may be made on an insured crop replanted after we have given consent and the acreage replanted is at least the lesser of 20 acres or 20 percent of the insured planted acreage for the unit (as determined on the final planting date or within the late planting period if a late planting period is applicable). If the crops to be replanted are in a whole-farm unit, the 20 acres or 20 percent requirement is to be applied separately to each crop to be replanted in the whole-farm unit.

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Section 20 of the Basic Provisions states, in relevant part:

**20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review**

(a) If you and we fail to agree on any determination made by us except those specified in section 20(d) or (e), the disagreement may be resolved through mediation in accordance with section 20(g). If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in sections 20(c) and (f), and unless rules are established by FCIC for this purpose. Any mediator or arbitrator with a familial, financial or other business relationship to you or us, or our agent or loss adjuster, is disqualified from hearing the dispute.

(1) All disputes involving determinations made by us, except those specified in section 20(d) or (e), are subject to mediation or arbitration. However, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure,

either you or we must obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC.

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(ii) Failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award.

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(b) Regardless of whether mediation is elected:

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(4) In any suit, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, an interpretation must be obtained from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC. Such interpretation will be binding.

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(f) In any mediation, arbitration, appeal, administrative review, reconsideration or judicial process, the terms of this policy, the Act, and the regulations published at 7 CFR chapter IV, including the provisions of 7 CFR part 400, subpart P, are binding. Conflicts between this policy and any state or local laws will be resolved in accordance with section 31. If there are conflicts between any rules of the AAA and the provisions of your policy, the provisions of your policy will control.

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(h) Except as provided in section 20(i), no award or settlement in mediation, arbitration, appeal, administrative review or reconsideration process or judicial review can exceed the amount of liability established or which should have been established under the policy, except for interest awarded in accordance with section 26.

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**Interpretation Submitted**

Section 13(a) of the Basic Provisions clearly states that replanting payments “may be made on an insured crop replanted after we have given consent. …” The prior consent that is required must be in writing as defined in section 1 of the Basic Provisions. Federal Crop Insurance Corporation (FCIC) has previously interpreted this consent requirement to be very specific and that any failure to obtain the consent, regardless of the reasons, renders the policyholder ineligible for a replanting payment. See FAD-191 published on RMA’s website on August 26, 2013. FCIC has also interpreted the written consent requirement to be absolute and determined that verbal consent or silence will not satisfy the consent requirement based on the definition of consent contained in section 1 of the Basic Provisions. See FAD-129 published on RMA’s website on November 18, 2010. Based on the above, it is clear that FCIC has interpreted section 13(a) to mean that the failure to obtain written consent prior to replanting, regardless of the reasons for such failure, absolutely precludes a policyholder from receiving a replanting payment.

The requestor interprets section 20 of the Basic Provisions to preclude an arbitrator from applying state and common law principles and defenses to avoid application of specific requirements under the policy, including the requirement for written consent in connection with a replanting payment. As set forth in the preamble to the Basic Provisions, no person may waive the terms of the policy. The requestor interprets the anti-waiver provision of the policy to apply to an arbitrator and to prevent an arbitrator from ordering an approved insurance provider (AIP) to pay a replanting payment that is not otherwise payable under the terms of the policy. Specifically, section 20(f) of the Basic Provisions provides that the Act, crop insurance regulations, and the policy terms are binding in any arbitration and supersede any conflicting state laws (including state common law based defenses such as impossibility). Further, section 20(h) of the Basic Provisions limits any award in arbitration to the liability established or which should have been established under the policy, and any applicable interest. FCIC has specifically interpreted these provisions to prevent the application of state common law “equitable estoppel” principles to support an arbitration award contrary to the express provisions of the policy. See FAD-211 published on RMA’s website on March 24, 2014. In similar fashion, FCIC has also made the determination that FCIC’s policies and procedures take precedence over “industry standard” or “industry practice.” See FAD-249

published on RMA’s website on December 2, 2015. The requestor interprets the anti-waiver provision of the Basic Provisions and section 20 to preclude an arbitrator from rendering an award for a replanting payment where consent was not obtained based upon the common law defense of “impossibility” or any other equitable principles. The requestor believes that this interpretation is consistent with FCIC’s previous determinations regarding section 20 of the Basic Provisions, including FAD-211 published on RMA’s website on March 24, 2014 which determined that state and local laws are preempted to the extent that they are in conflict with the Act, regulations or contracts of FCIC.

The requestor further interprets section 20 to limit an arbitrator or court’s power or authority as it relates to policy or procedure interpretation. Section 20(b)(4) requires that when a dispute “in any way involves a policy or procedure interpretation,” an interpretation of the policy or procedure “must” be obtained from FCIC. The requestor interprets this section to mean that any issue or dispute relating to the interpretation or applicability of a policy provision must be submitted to FCIC and is not subject to arbitrator or judicial review or interpretation. The requestor further interprets section 20(a)(l)(ii) to require automatic nullification of an award when an arbitrator makes a determination that a state or common law defense is applicable to an express requirement under the terms of the policy, as such a determination would be deciding “whether a specific policy provision or procedure is applicable to a situation, how it is applicable, or the meaning of any policy provision or procedure.” To allow an arbitrator to determine when, and under what circumstances common law defenses could be applicable to void specific requirements under the policy would violate the anti-waiver provisions, the limitations on an arbitrator's authority to interpret policy provisions and lead to inconsistent implementation of the federally reinsured policies.

**Final Agency Determination**

The Federal Crop Insurance Corporation (FCIC) agrees with the requestor’s interpretation. FCIC agrees the policyholder must obtain written consent from the AIP prior to replanting.

FCIC also agrees that under the preamble to the Basic Provisions no person may waive the terms of the policy. As stated in FAD 191, the policy only provides authority for a replanting payment when a specific sequence of events occurs: first, damage must occur; second, the AIP must be timely notified by the policyholder;

third, the AIP must provide consent for replanting the damaged crop; and four, the replanting must occur. Provided, all four of the events occurred these provisions preclude an arbitrator from rendering an award for a replanting payment where consent was not obtained prior to replanting.

FCIC agrees that under section 506(l) of the Federal Crop Insurance Act and section 31 of the Basic Provisions, any state or local law in conflict with any provision of the policy is preempted. FCIC agrees section 20 means that any issue or dispute relating to the interpretation or applicability of a policy provision must be submitted to FCIC, and the determination is binding on all participants in the crop insurance program and the arbitrator must abide by the determination. Failure to adhere to this requirement can result in nullification of an arbitrator's award.

However, FCIC does not agree that preemption is as complete as the requestor suggests. The Supreme Court has held that all parties are bound by the terms of the contract codified in regulation. See FCIC v. Merrill, 332 U.S. 380 (1947). This is consistent with FAD-211. However, the courts have also held that Federal law does not preempt all state law causes of action in cases where the agent or AIP has failed to follow FCIC approved policy and procedure. See Rio Grande Underwriters, Inc. v. Pitts Farms, Inc., 276 F.3d 683 (5th Cir. 2001); Meyer v. Conlon, et al., 162 F.3d 1264 (10th Cir. 1998). Therefore, FCIC's interpretation of the binding effect of the policy provisions and its interpretations of statute and regulations and its preemption of state and local laws must be consistent with the law, and that includes judicial precedence.

Further, FCIC does not agree that the defense of impossibility is preempted by statute or regulation, or any interpretation rendered by FCIC. FCIC has historically recognized impossibility as a defense to performance under the policy. While FCIC does not have the authority to waive or alter any provision of the policy, it is recognized that impossibility may be a defense to non-performance of a provision of the contract in very limited and far-reaching situations. It is the policyholder's burden in such situations to prove that it was impossible to comply with the specific terms on the policy. See BULLETIN NO.: MGR-09-009; (Inability to complete harvest due to adverse weather before the date claims must be submitted excuses performance): MGR-05-017 (Inability to provide a notice of loss within 72 hours excuses performance because a hurricane has destroyed the means of communication); BULLETIN NO.: MGR-03-012 (Lack of sufficient production information by the sales closing date excuses the requirement to elect to substitute

yields by the sales closing dates). In each of these cases, FCIC has only recognized the physical impossibility of performance due to circumstances beyond the policyholder’s control. FCIC does not recognized other state or common law defenses of impossibility.

In accordance with 7 C.F.R. § 400.765(c), 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. § 400.768(g).

**Date of Issue:** August 17, 2016